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MINUTES OF MEETING

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on 20 March 2007

Chairman: Mr. Bruce Gosper (Australia)

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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.52)

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(d) United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Status report by the United States (WT/DS294/20/Add.1)

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.52)

2. The Chairman drew attention to document WT/DS176/11/Add.52, 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 March 2007, in accordance with Article 21.6 of the DSU. As noted in the status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US administration continued to work with the Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that the introduction of bills to implement the DSB's ruling in Section 211 dispute was welcome news. Thirty five representatives were already supporting bills to repeal Section 211. The EC hoped that the present Congress would not sit on those bills as the previous Congress and would finally bring an end to this dispute to the benefit of all. Ignoring the TRIPS obligations, as the United States had done for more than five years now, affected the interests of the whole industry by undermining the authority of the TRIPS Agreement and the credibility of actions to promote worldwide a rules-based protection of intellectual property rights. The EC, therefore, urged the United States to comply with its obligations under the TRIPS Agreement.

5. The representative of Cuba said that, for over five years, the DSB Members had been awaiting the US action to implement the rulings and recommendations in the Section 211 dispute. During that period of time, month after month the US delegation had continued to reiterate that: "The US administration is working with the Congress with respect to appropriate statutory measures that would resolve this matter". The same statement had just been repeated again at the present meeting. The United States had little or no interest in complying with the DSB's rulings, and more specifically with its obligations under the TRIPS Agreement, despite the fact that it considered itself to be a strong advocate of intellectual property rights. This had been confirmed by the fact that, in 2006, the US Patent and Trademark Office had denied a licence to renew the registration of the Havana Club

trademark, for foreign policy reasons. In doing so, the United States had pre-empted the conclusion of the lawsuit currently under way in US courts where the question of ownership of the trademark had to be determined without political interference. The United States was also not concerned about the possibility that other Members could follow the US bad example and ignore the disciplines of the TRIPS Agreement, which could result in more chaos in the area of protection of intellectual property rights. The US attitude, the only WTO Member that had systematically failed to comply with its obligations under the WTO Agreements such as the TRIPS Agreement undermined the credibility and the balance of the multilateral trading system at this important juncture of the WTO.

6. Furthermore, the status of the Section 211 dispute was not clear. Article 21 of the DSU provided that: "....prompt compliance with the recommendations and rulings of the DSB is essential to ensure the effective resolution of disputes to the benefit of all Members and that, if it is impracticable to comply immediately, the Member concerned shall have a reasonable period of time in which to do so." However, in the Section 211 dispute, the last reasonable period of time agreed between the US and the EC had expired on 30 June 2005. That meant that it was not clear when the Member concerned had to implement the DSB's recommendations and rulings. Cuba was aware that the only draft law that had been introduced in the current session of the US Congress was bill H.R. 1306 which had its own version in the Senate S.749. Both had been introduced by Florida lawmakers. This Bill was intended to modify Section 211 by making cosmetic changes that would leave it virtually intact, thereby usurping Cuban trademarks of recognized international prestige. He noted that Cuba had acquired that information from the Internet and that such information had not been provided by the United States to the DSB. Once again, Cuba renewed its call on the United States to take prompt and immediate action to implement the DSB's recommendations and rulings and insisted that the only possible solution to this dispute was to repeal Section 211.

7. The representative of Brazil said that his country thanked the United States for its status report and the statement made at the present meeting. However, Brazil regretted the lack of any positive development regarding the implementation of the DSB's recommendations in this dispute, after more than five years since the adoption of the Panel and the Appellate Body reports. Compliance with the DSB's recommendations, together with the number of 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. By contrast, the complete absence of meaningful actions toward compliance severely impaired the functioning of the system, and altered the balance of rights and obligations, which the whole Membership had negotiated. Brazil recognized that all Members bore the responsibility for implementation, but the major players' behaviour 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.

8. The representative of India said that his country thanked the United States for its situation report and the statement. However, as had been noted several times previously, 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, as more than five years had now elapsed since the adoption of the recommendations and rulings of the DSB in this case. India again urged the parties to this dispute to inform the DSB as to how they intended to fulfill the objective of prompt settlement.

9. The representative of the Bolivarian Republic of Venezuela said that his country wished to thank Cuba for its statement, which it fully endorsed, and considered Cuba's complaint to be legitimate. His delegation must, once again, draw attention to the continued inaction of the United States in this dispute. As Cuba had mentioned, the United States had repeated every month, for over

four years, that the US administration was working with the US Congress to implement the Panel's rulings and recommendations on this matter. However, his delegation wished to learn more about these efforts and to see concrete results in line with the Panel's recommendations. Unfortunately, it would seem that the current situation was far from that point. Therefore, as far as his delegation was concerned, the fact remained that this persistent disregard for the core obligations under the TRIPS Agreement undermined the authority of that instrument, and hence the credibility of the WTO.

10. The US administration's decision to refuse, on foreign policy grounds, to grant the specific licence needed to renew the registration of the Havana Club trademark had also sent an inappropriate and disturbing message. Renewal of this licence would not have given away or granted any rights. It would merely have preserved the status quo and would have allowed the US courts to decide, in pending proceedings, who was the legitimate owner of that trademark. Ownership of intellectual property rights should be decided in courts on the basis of the rule of law, free from the interference of political considerations. If the example set by this decision were to be followed by other countries, this would seriously undermine efforts to promote rules-based protection of intellectual property rights worldwide. His country, therefore, invited the United States to reconsider its position in light of its severely damaging effects, and in particular its negative impact on a developing country, such as Cuba. Finally, his country urged the United States, the only WTO Member that systematically failed to comply with panels' recommendations under the TRIPS Agreement, to bring itself into compliance with that Agreement.

11. The representative of China said that, once again, his country wished to express its systemic concerns with the protracted implementation process in the Section 211 dispute. First, China thanked the United States for its status report and the statement. China also thanked the EC and Cuba for their statements, which it fully supported. China appreciated the efforts made by United States during the past five years aimed at implementing the DSB's rulings. However, unfortunately there was no indication when the matter would be resolved to the satisfaction of the parties to the dispute and other Members. As China had stated at previous DSB meetings, the prompt and full implementation of the DSB's rulings and recommendations was one of the major cornerstones of the WTO dispute settlement system. In the meantime, the prompt implementation in this dispute would not only be beneficial to other Members, but also to the United States, who was an active advocate of intellectual property rights in all fora. Therefore, China again urged the United States to fully implement the decision of the DSB as soon as possible.

12. The representative of Argentina said that his country thanked the United States for its status report regarding this dispute. However, Argentina stressed the seriousness, from a systemic point of view, of the failure of Members to comply with the DSB's recommendations, and urged the United States to take the necessary steps to remedy the situation as quickly as possible.

13. The representative of Nicaragua said that her country thanked the United States for submitting its status report. Like previous speakers, Nicaragua wished to express concern at the delay in implementing the DSB's recommendations and rulings in this case. In Nicaragua's view, such non-compliance placed in jeopardy two fundamental components of the multilateral trading system: (i) the balance of rights and obligations among all WTO Membersr; and (ii) an effective application of the principles of most-favoured-nation and national treatment. Furthermore, from the systemic point of view, the failure to settle this dispute promptly cast doubt on the legitimacy and efficiency of the dispute settlement process and the protection of intellectual property rights. Finally, as the EC had stated in previous statements, intellectual property rights must be awarded solely on the basis of legal considerations. Nicaragua hoped that the US Congress would adopt the necessary legislative measures in the near future.

14. The representative of the United States said that his country regretted that certain Members – including some whose record of protecting intellectual property rights appeared less than robust –

continued to criticize the US commitment to intellectual property rights. These criticisms were completely unfounded. It was of course true that the United States remained a strong advocate of substantial protections for intellectual property internationally. However, the United States was also second to no one in providing strong intellectual property protection within its own territory. And, in response to some suggestions at the present meeting 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 in the vast majority of its disputes. As for the remaining few, the United States was actively working towards compliance.

15. The representative of Cuba said that his delegation wished to express disagreement with the US statement. If five years was not a long period of time, Cuba did not know how much longer Members would have to wait for compliance with the DSB's decisions in this dispute, and in particular those relating to the TRIPS Agreement. One simply needed to look at the DSB agenda to realize how many rulings and recommendations had not yet been implemented by the United States.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.52)

17. The Chairman drew your attention to document WT/DS184/15/Add.52, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 8 March 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.

19. The representative of Japan said that his country noted the statement made by the United States along with its most recent status report that the US administration was working with the new US Congress to pass specific legislative amendments that would implement the DSB's recommendations and rulings. However, it was regrettable to note that it had been more than five and half years since the DSB had adopted the recommendation and rulings regarding this case in August 2001, but the United States was still reporting to the DSB on the status of its implementation. As Japan had repeatedly stressed before the DSB, a full and prompt implementation of the recommendations and rulings was essential for maintaining the credibility of the WTO dispute settlement system. Japan reiterated that it strongly hoped that the United States would accelerate its efforts to complete its work on full compliance at the earliest possible date.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.27)

21. The Chairman drew attention to document WT/DS160/24/Add.27, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

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

23. The representative of the European Communities said that the EC's position on this dispute was well known, the EC wished to see the law made conform to the WTO obligations of the United States. The EC understood that the new US Congress might be more receptive to this defence of TRIPS-derived rights. 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.

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

(d) United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Status report by the United States (WT/DS294/20/Add.1)

25. The Chairman drew attention to document WT/DS294/20/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

26. The representative of the United States said that his country had provided a status report in this dispute on 8 March 2007, in accordance with Article 21.6 of the DSU. As noted in the report, on 6 March 2006, the US Department of Commerce had published a notice requesting comments on its intention to no longer perform average-to-average comparisons in anti-dumping investigations without offsets. On 26 January 2007, the Department had published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. Accordingly, as of 22 February 2007, the United States was no longer performing average-to-average comparisons in anti-dumping investigations without offsets. The United States continued to work to implement the DSB's recommendations in this dispute. In that connection, on 26 February 2007, the Department of Commerce had issued to the parties to the anti-dumping proceedings in question several preliminary results for comments.

27. The representative of Japan said that his country wished to express its appreciation for the work and efforts made by the United States to implement the DSB's recommendations and ruling pertaining to this case. As a result, the United States had abandoned its zeroing methodology in the weighted-average-to-weighted-average price comparison in the original anti-dumping investigations on 22 February 2007, as scheduled. This demonstrated that the zeroing methodology was the "measure" that could be withdrawn by the US authority without any legislative action on the part of the US Congress. Japan also understood that the United States was working hard to implement the other part of the recommendations and ruling of the DSB. However, Japan recalled that the end of the reasonable period of time agreed upon between the EC and the United States was approaching. Japan would closely observe, with much interest, whether and how the United States would achieve full compliance with the DSB's recommendations in this dispute by bringing all the "as applied" cases found to be WTO-inconsistent into conformity with the WTO Agreement.

28. The representative of the European Communities said that the EC welcomed the entry into force of the new methodology, which had brought an end to the practice of zeroing in original investigations when calculating the dumping margin on a weighted-average-to-weighted-average basis. The EC also welcomed the preliminary results in the proceedings aimed at implementing the DSB's ruling for the 15 original measures found WTO-incompatible, although it objected strongly to the massive increase in the "all others" rate in several cases, due to the inclusion of "adverse facts available" duty rates in the calculation. The EC hoped that the United States would complete these proceedings by the 9 April deadline and would give full effect to the implementing measures by stopping to apply the zeroed duty rate after 9 April, including when collecting duties on unliquidated entries. The EC also trusted that the United States would abandon the unjustified increases in the all others rates and would leave these rates unchanged. With regard to the 16 "as applied" periodic reviews, to the EC knowledge, the United States had not yet taken any action to bring them into compliance with its WTO obligations. This raised serious concerns as to the US ability to fully implement the DSB's rulings and recommendations within the three weeks that were now left before the expiry of the implementation period in this dispute. The EC wished to know why the United States had not yet started implementing the DSB's ruling on the periodic reviews; if the United States intended to bring them into compliance by 9 April, and if the United States could communicate a detailed time-table of its proposed implementation. Failing such confirmation, the EC would have to prepare for the next step foreseen in the DSU; i.e. protecting its retaliation rights.

29. The representative of the United States said that the EC's question would be passed on to capital. As the EC was aware, there was a substantial amount of work involved in responding to the DSB's recommendations and rulings. The United States was working hard to try to conclude the work by 9 April 2007.

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

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

(a) Implementation of the recommendations of the DSB

31. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 20 February 2007, the DSB had adopted the Panel Report pertaining to the dispute: "United States – Anti-Dumping Measure on Shrimp from Ecuador". He invited the United States to inform the DSB of its intentions in respect of implementation of the recommendations.

32. The representative of the United States said that his country intended to implement the recommendations and rulings of the DSB in a manner that respected the US WTO obligations. The United States would need a reasonable period of time in which to implement. The United States and Ecuador had reached agreement on a reasonable period of time of six months from the date of adoption of the Panel Report.

33. The representative of Ecuador thanked the United States for its statement concerning the time-frame within which it had stated that it hoped to be able to implement the DSB's recommendations. Pursuant to the Panel's recommendations and the parties' agreement on procedures, Ecuador reiterated its request to the United States that the Department of Commerce complete its new calculations, preferably by 20 August 2007. Ecuador was confident that that would mean that the

anti-dumping order could be revoked and that Ecuador could export without additional duties. Ecuador had learned that a preliminary calculation by the Department of Commerce indicated a reduction in the additional tariff. Ecuador was, therefore, optimistic that the final calculation would establish that no dumping was taking place.

34. The representative of Japan said that his country welcomed the statement by the Untied States in which it had stated its intention to implement the recommendations and rulings of the DSB in this dispute. Japan believed that the US statement together with the procedural agreement reached between the United States and Ecuador demonstrated the willingness on the part of the United States to resolve the "zeroing" disputes in an "efficient" manner "with a minimum burden on the resources of the parties and the dispute settlement system"[1]. Japan would closely observe, with much interest, how the United States would achieve compliance with the DSB's recommendations and rulings in this dispute.

35. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

3. 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

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

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

38. The representative of the European Communities said that the repeal of the Byrd Amendment one year ago had been a significant step in the right direction. But, it was still insufficient to bring the United States into full conformity with its WTO obligations. As long as the transition period produced its effect, the US administration would continue distributing the anti-dumping and anti-subsidy duties to its industry in breach of Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement. The EC, therefore, asked again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

39. The representative of Japan said that his country continued to claim that by enacting the Deficit Reduction Act of 2005, it had taken all necessary actions to implement the DSB's recommendations and rulings. Japan recognized that the Act which had formally repealed the CDSOA was a significant step forward in the right direction. However, the fact remained that, under the transitional clause, the illegal distribution still continued. The transitional clause provided that the duties collected on imports that would enter prior to 1 October 2007 must be disbursed. Under the US system, this meant that the disbursement under the CDSOA would continue for years to come. The

[1] See the statement made by the United States at the 20 February 2007 DSB meeting (Item 6).

United States must immediately stop the illegal disbursements and fully implement the DSB's recommendations and rulings. Japan also reiterated that the United States was under obligations to provide the DSB with a status report pursuant to Article 21.6 of the DSU. Japan wished to reserve all its rights under the DSU until the United States came into full compliance with its obligations.

40. The representative of Brazil said that he would repeat – word by word – the statement made by his delegation at the 17 March 2006 DSB meeting – the first meeting when this item had been included on the agenda, more than one year ago. Unfortunately, those words continued to be at the present meeting as relevant as they had been for the past year. He then stated the following: "Brazil thanks Canada, the EC and Japan for raising this issue at the DSB. This is the appropriate forum to debate about a matter – compliance or non-compliance – that concerns the whole Membership. We share the view of those three Members that the 'issue' is not resolved in this dispute within the meaning of Article 21.6 of the DSU. Significant and welcome as the repeal of the Byrd Amendment is, the conditions under which such repeal will operate do not support the assertion that the United States has implemented the DSB's relevant recommendations. Brazil reiterates that there will be no full compliance on the part of the United States until and unless all disbursements under the Byrd Amendment cease. As a consequence, the co-complainants cannot be deprived of any right conferred by the DSU with respect to this situation of non-compliance by the mere passing into law of the Deficit Reduction Omnibus Reconciliation Act."

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

42. The representative of India said that his country thanked Canada, the EC and Japan for raising this issue at the DSB yet again. India failed to understand how the United States could claim to be in compliance with the recommendations in this dispute while continuing to disburse collected anti-dumping and countervailing duties to its industry, almost fours years after they should have stopped. Data available in the CDSOA Annual Report from the US own Customs and Border Protection for the fiscal year 2006 only proved India's argument in this regard. 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.

43. The representative of Thailand said that his country thanked Canada, the EC and Japan for once again bringing this item before the DSB. Thailand remained disappointed at the United States' continued illegal disbursement of funds under the CDSOA. Likewise, Thailand remained disappointed at the Unites States' continued refusal to submit any status report on its outstanding implementation in this dispute. Therefore, Thailand repeated its call for the United States to cease these WTO-inconsistent disbursements, to repeal the Byrd Amendment with immediate practical effect, and to resume providing status reports until such actions were taken and this matter had been fully resolved.

44. The representative of Chile said that his delegation wished to make a statement since many delegations at the present meeting had referred to disputes in which compliance or full compliance with the rulings and recommendations of panels had been questioned. His delegation had a systemic

concern regarding this matter. The role of the WTO was to assist the parties in finding a solution to a dispute. Thus, Chile was concerned that persistent and repeated doubts with regard to compliance could undermine the WTO because if Members did not comply with panels' recommendations, they would all have to bear consequences.

45. The representative of the United States said that as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. With respect to comments regarding further status reports in this matter, as his delegation had already explained, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. Those Members who had inscribed this item on the agenda of the present meeting were, of course, free to do so, but the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings. Finally, the United States continued to be surprised by the assertions that the United States would not have implemented the DSB's rulings and recommendations until the last CDSOA distribution was made. Of course, such questions were for panels to decide.

46. The DSB took note of the statements.

4. European Communities – Regime for the importation, sale and distribution of bananas

(a) Recourse to Article 21.5 of the DSU by Ecuador: Request for the establishment of a panel (WT/DS27/80)

47. The Chairman recalled that the DSB had considered this matter at its meeting on 8 March 2007 and had agreed to revert to it. He drew attention to the communication from Ecuador contained in document WT/DS27/80, and invited the representative of Ecuador to speak.

48. The representative of Ecuador said that this item was on the DSB's agenda for the second time. At the present meeting, his delegation would not reiterate the background of the case or Ecuador's legal arguments, which were set out in Ecuador's request for the establishment of a panel under Article 21.5 of the DSU. Ecuador wished to reaffirm its statement made at the DSB meeting on 8 March 2007, when full details had been provided of the reasons why Ecuador had been compelled to request the establishment of a panel. Therefore, in the light of the foregoing, and in accordance with Article 6 of the DSU, the DSB must establish a panel at the present meeting.

49. The representative of the European Communities reiterated that the EC had always expressed its firm commitment to pursue a negotiated solution in 2007 for the benefit of all WTO Members concerned. Most of the statements made at the special DSB meeting held on 8 March, including that of Ecuador, had pointed in that direction. Since then the EC had had numerous high level meetings seeking to find a solution to this dispute. Without prejudice to Ecuador's rights under the DSU, Ecuador's request for the establishment of a panel seemed to contradict this overall spirit, hopes and expectations. Ecuador had opted for bringing a case mostly focused on the preferential treatment offered to some of the most weak and vulnerable WTO Members, which, in addition, had received multilateral consent. Furthermore, the EC was obliged to reiterate the EC's objection to the invocation of Article 21.5 of the DSU as a basis for this request. The EC reiterated its position that the current EC banana import regime was not a "measure to comply" with the recommendations and rulings of the DSB in the Bananas III dispute, which had been adopted almost a decade ago. Those recommendations and rulings had already been implemented back in 2001. The EC would, therefore, use all its rights to contest Ecuador's recourse to Article 21.5 of DSU.

50. The representative of Nicaragua said that her country supported Ecuador's request for the establishment of a panel. This dispute on non-compliance had gone on long enough without a settlement. Failure to find a solution had not only affected access by Nicaraguan producers to the EC market, it also caused substantial losses in sales to the US market due to the volume displaced from the EC market. This dispute must be settled in a way that would preserve trade interests of MFN developing countries, such as Nicaragua, which suffered a great amount of damage. Consequently, Nicaragua requested that Ecuador's Article 21.5 request be approved, reserved the right to participate as a third party in the Article 21.5 proceedings to defend its substantial trade interest, and hoped that, in accordance with the developing country provisions of Article 21, this matter would be reviewed promptly and expeditiously.

51. The representative of Panama said that, as had clearly been stated at the 8 March 2007 DSB meeting, Panama endorsed Ecuador's request for the establishment of a panel and intended to participate in the proceedings as actively as possible in order to defend its trade interests. Panama, like Ecuador, was of the opinion that the banana measures taken by the EC to comply with the "EC – Bananas III" recommendations and other related proceedings had failed to meet the EC's compliance obligations. The EC was applying: (i) an ACP tariff quota, which violated Article XIII of the GATT 1994 and was not covered by a waiver; (ii) a huge ACP tariff preference which violated Article I of the GATT 1994, and was not covered by a waiver; (iii) an "autonomous" customs duty which was in violation of Panama's most basic rights in this area. Given that these non-compliant measures threatened Panama's most important agricultural industry and its 8,000 workers, Panama continued to believe that short-term relief must be granted. Nevertheless, Panama regretted to note that more than a year had passed with no assurances whatsoever that access would be improved in the short term. Panama, therefore, must take the necessary steps to protects its interests in these proceedings.

52. The representative of Honduras said that, as a developing country that employed thousands of workers in its banana sector, Honduras maintained a strong interest in obtaining full and fair access to the EC market. Honduras continued to believe that the current EC arrangement unfairly restricted access to the EC market for Honduras' important banana sector. In 2006, the banana industry in Honduras had suffered a 5 per cent decline in its volume of exports to the EC, a 16 per cent decline in its share of the EC market, and a 37 per cent decline in the value of its exports to the EC. Honduras, therefore, considered that short-term improvements in access were essential. In order to safeguard this vital sector of its economy, Honduras wished – as it had already done in 2002 – to make its position very clear, namely, that it reserved all substantive and procedural rights to address the EC's continuing non-compliance in this dispute.

53. The representative of St. Kitts & Nevis, speaking also on behalf of the Windward Island banana producers: St. Lucia, St. Vincent & the Grenadines and Dominica, said that the countries under consideration attached the highest priority to Ecuador's request for the establishment of a panel. For most developing countries the challenges that confronted development were the same; i.e. securing the livelihoods of peoples through sustainable employment was a sacrosanct principle to which the countries under consideration subscribed. For them, sustainable employment was the greatest bulwark against poverty. It was critical that all developing countries be granted an opportunity to sustain the livelihoods of their peoples. This should not be pursued in a manner that sought compromise or negated the ability of other developing countries to provide economic security and the prospect of development for their people. It was for that reason that his delegation was concerned that there was no sufficient level of sensitivity, even amongst developing countries, of the developmental concerns and aspirations of other developing countries. It was for the above reasons that Dominica, St. Lucia, and St. Vincent and the Grenadines' producers expressed deep regret that Ecuador had decided to pursue this matter in the DSB.

54. While his delegation recognized the importance of the DSB for its role in adjudicating disputes, it believed that the DSB did not offer the best forum for a lasting solution to this matter.

Beyond the clear and immediate concerns regarding Ecuador's request, it was rather unfortunate that Ecuador had now decided to pursue litigation instead of negotiations despite conciliatory exchanges between the interested parties during the consultations in December 2006 and Ecuador's pledge to seek a negotiated settlement. Finally, the countries under consideration reaffirmed their support for negotiations rather than litigation in order to resolve this dispute, and pledged commitment to work in a constructive manner with all parties involved. He also wished to formally request that should a panel be established, Dominica, St. Lucia, St. Vincent and the Grenadines, due to the importance of this issue for their economies, would request third-party status in the panel's proceedings.

55. The representative of the United States said that, as his delegation had previously stated many times, the United States had looked forward to this dispute finally being resolved at the beginning of 2006; i.e. the United States had looked forward to the EC shifting to a tariff-only regime as it had committed to do in 2001. Ecuador's request, at the present DSB meeting, underscored the concerns of Members with the current EC regime and only affirmed the need for the EC to work with interested Members to reach a resolution. The United States supported Ecuador's efforts to try to obtain a resolution to this dispute.

56. The representative of Cameroon said that his country strongly objected to Ecuador's request which, as the EC had clearly stated, was targeting the ACP preferences. Cameroon found this unfortunate. Cameroon considered that negotiations were in the interest of all WTO Members. However, it seemed that Membership of the WTO was limited to some. He underlined that the interests of all Members should be maintained. Targeting the preferences of the ACP countries and requesting a panel was a confrontational approach, which should be denounced. Cameroon supported the statements made by the EC and St. Kitts & Nevis.

57. The representative of Côte d'Ivoire said that, as previously stated, his country was surprised that the consultations held among all the banana producers, including Ecuador, had arrived at this point. However, his country noted that it was Ecuador's right to request a panel and that such a panel would have to be established. Côte d'Ivoire would request to be granted third-party rights to participate in the proceedings, once a panel was established.

58. 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 Ecuador in document WT/DS27/80. The Panel would have standard terms of reference.

59. The representatives of Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, St. Lucia, St. Vincent & the Grenadines and the United States reserved their third-party rights to participate in the Panel's proceedings.

60. The representative of Jamaica said that her delegation wished to make a statement regarding third-party participation in the Panel's proceedings. Jamaica wished to indicate that in keeping with the practice of previous banana panels, it would be requesting enhanced third-party participation in the Panel's proceedings and that a communication to this effect would be submitted to the WTO Secretariat.

61. The DSB took note of the statement.

5. Chile – Provisional safeguard measure on certain milk products/Chile – Definitive safeguard measure on certain milk products

(a) Request for the establishment of a panel by Argentina (WT/DS351/2 – WT/DS356/2)

62. The Chairman drew attention to the communication from Argentina contained in document WT/DS351/2 – WT/DS356/2, and invited the representative of Argentina to speak.

63. The representative of Argentina said that in the period between September and December 2006, Chile had imposed two safeguard measures (provisional and definitive) on liquid milk, powdered milk and Gouda cheese from Argentina. These safeguard measures had been imposed as a result of the investigation initiated by the Chilean authority in August 2006, and consisted of a tariff surcharge of 23 per cent applicable for a period of 200 days in the case of the provisional measure, and for a period of one year in the case of the definitive measure. Argentina considered that these measures violated the provisions of the GATT 1994 and the Agreement on Safeguards, nullifying and impairing benefits accruing to Argentina. Argentina believed that these two measures, imposed with no evidence of the circumstances that would justify them, infringed – in being applied to imports of milk products from Argentina and no other country – a fundamental principle of the legal system governing international trade: most-favoured-nation treatment. There were also clear irregularities in the investigation procedure, which, in Argentina's view, would make the investigation carried out by the Chilean authority, along with the measures subsequently imposed, inconsistent with various provisions of the Agreement on Safeguards and the GATT 1994. In order to avoid a dispute, Argentina had requested two consultations with Chile under the DSU provisions. Unfortunately, a mutually satisfactory settlement of the matter had not been reached. Therefore, Argentina now requested the establishment of a panel as it was its right to do so. Argentina emphasized that, during the consultations, it had made enormous efforts and had provided ample evidence of its good faith and willingness to reach a satisfactory settlement, formulating two questionnaires in order to ascertain the technical reasons why the safeguards had been imposed. On both occasions, the Chilean authorities had merely referred to the need to protect the sector producing the raw material for the goods at issue, imports of which were declining because the price paid by processing plants was constantly being reduced. Given that it had proved impossible to reach an agreement, and for all the reasons explained above, Argentina requested the establishment of a panel with standard terms of reference.

64. The representative of Chile said that his country regretted Argentina's decision to request the establishment of a panel regarding the provisional and definitive safeguard measures on certain milk products, a decision taken despite the explanations and legal basis, which had been submitted during the consultations. Without prejudice to the foregoing, Chile was particularly concerned over the manner in which Argentina had acted, and objected to the request, *inter alia*, for several reasons: Argentina used a single request for the establishment of a panel to cover two requests for consultations regarding different measures. Chile was not aware of any legal precedents or basis that would justify Chile's approach. If accepted, that approach would have negative systemic implications for the procedural rights enshrined in the DSU, and in particular, though not exclusively, in Article 6.2 of the DSU. Chile noted that Argentina had made many mistakes since its first request for consultations regarding the provisional measure. Among other things, it had not clearly indicated the measure being challenged, and had cited the wrong substantive rules. Some of those errors had been the subject of corrigenda including the one circulated recently, more than two months after the request for consultations had been made. Chile had never made an issue of those deficiencies mainly because they had came as part of a negotiation process designed precisely to clarify aspects of the measures being challenged, as well as their legal basis.

65. Chile was not accustomed to use procedural loopholes to delay the progress of proceedings, but believed that to attempt to consolidate two requests for consultations regarding different measures

into a single request for the establishment of a panel could seriously jeopardize Chile's procedural rights. Argentina seemed to be keen to correct its past mistakes, but in so doing, it was raising doubts about what it was challenging. In its request for the establishment of a panel, it referred to "measures" in the plural, without making clear whether the reference was to the provisional or the definitive measure; it included legal provisions that were not amongst those cited during the consultations; and it relied on legal rules that were not applicable to both measures, such as Article 7.1 of the Agreement on Safeguards, which could not be applied to provisional measures. It was Chile's understanding that in the light of the procedural confusion that could result from Argentina's single panel request, the Secretariat had suggested that Argentina discuss this matter with Chile. Yet it was Chile that had put forward a practical solution to avoid confusion. Chile had proposed to Argentina to withdraw its panel request and to submit two separate panel requests covering each of the different measures, as it had been done with Argentina's requests for consultations. Chile would have no objection to the first request or to a single panel examining the complaints raised in both requests, in line with the spirit of Article 9 of the DSU. In that way, such a panel could focus on the substance rather than on procedural issues. Regrettably, Argentina had not accepted that proposal. In addition, Argentina's request had inherent flaws that further warranted its dismissal. For example, it identified as a measure at issue the minutes of a meeting of Chile's Commission on Distortions that had not been the subject of either of the two consultations and could not, therefore, become part of the panel's terms of reference. At the present meeting, his delegation had not addressed the substance of Argentina's claim because it believed that before doing so one must clearly establish what Argentina was alleging to and on what legal basis. If Argentina insisted on the establishment of a panel, Chile would defend its measures.

66. The representative of Argentina said that, in accordance with the DSU provisions, Chile had the right at this stage to oppose Argentina's request for the establishment of a panel. Chile had referred to substantive and procedural aspects. With regard to the substance, Argentina did not wish to make any comments because it did not believe that it was relevant to enter into any discussion at this stage. However, with regard to the procedural issues referred to by Chile, his delegation wished to point out that nothing in practice or under the DSU provisions prevented a Member from making a request in an unified way as Argentina had done in this case. Argentina did not violate the rules, but simply had tried to follow a practical approach. Argentina believed that bringing together both matters was relevant since the provisional and definitive measures had been imposed as a result of a single investigating procedure by the Chilean authority. Thus, Argentina's panel request was perfectly in line with Article 6.2 of the DSU.

67. The representative of the United States said that with respect to the statements made by the parties to the dispute, the United States wished to make a comment on one issue. The United States saw nothing in the DSU that prevented a Member from requesting that the DSB establish a panel to examine a matter involving measures that had, in fact, been consulted on.

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

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/343)

69. The Chairman drew attention to document WT/DSB/W/343, which contained additional names 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 wished to propose that the DSB approve the names contained in document WT/DSB/W/343.

70. The DSB so agreed.

71. The Chairman said that it was his intention to make a statement at the next regular DSB meeting regarding the need to update the indicative list of governmental and non-governmental panelists. This was, of course, in accordance with the proposals for the administration of the indicative list of panelists approved by the DSB on 31 May 1995 and contained in an Annex to document WT/DSB/33. He said that an item concerning this matter would be placed on the agenda of the next regular DSB meeting to be held in April.

72. The DSB took note of the statement.