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on 1 September 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.45)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.45)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.20)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the three 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.45)

2. The Chairman drew attention to document WT/DS176/11/Add.45, 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 22 August 2006, in accordance with Article 21.6 of the DSU. As noted in the status report, several legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, both in the US Senate and the US House of Representatives. The US administration continued to work with the US Congress to implement the DSB's recommendations and rulings. In this connection, the United States regretted very much that some Members – including some whose record of protecting intellectual property rights appeared less than robust – had unjustly criticized the US commitment to intellectual property rights and the WTO. The United States said that it was a strong advocate of substantial protections for intellectual property internationally, and that it was second to none in providing strong intellectual property protection in the United States. His delegation wished to comment on other criticisms that it had heard. The United States had heard some criticisms from those asserting a "systemic" interest in prompt implementation, who had noted that four and a half years had passed since the adoption of the recommendations and rulings in this dispute. The United States trusted that those asserting such an interest had now realized that Item 2 of the agenda of the present meeting involved a dispute that had left several Members waiting for full compliance nearly a decade following the adoption of the DSB's recommendations and rulings. Therefore, the United States looked forward to the interventions of these delegations concerning their systemic interest under Item 2. Second, some Members had asserted that the US administration had not provided details of how it was working with the US Congress to implement the DSB's recommendations and rulings, and had concluded incorrectly that nothing was being done. In this connection, the United States would note that it was not always

possible or appropriate to recount internal governmental efforts to pass legislation. The United States noted that it had heard similar criticisms about the level of detail of US status reports in other disputes in which the US Congress had ultimately passed legislation. Finally, a number of Members had referred to a matter – the renewal of a particular trademark – that had nothing to do with the recommendations and rulings of the DSB, which concerned only the text of Section 211. This agenda item concerned US implementation of the recommendations and rulings of the DSB; matters which did not relate to implementation were not relevant to this discussion.

4. The representative of the European Communities said that, once again, the United States could not report on any progress in the implementation of the DSB's rulings and recommendations in respect of Section 211. And, Members would again be presented with the same repetitive empty report under Item 3 of the agenda of the present meeting concerning the dispute on Section 110 of the US Copyright Act. Both disputes concerned the TRIPS Agreement that the United States had strongly and rightly promoted. This Agreement was a keystone for achieving effective and non-discriminatory protection of intellectual property rights worldwide and an indispensable complement to the rules on trade in goods in the development of world trade. By its persisting ignorance of other Members' rights under the TRIPS Agreement, the United States undermined the authority of the Agreement and compromised the interests of the industry at large by preserving legislation that benefited the limited interests of very few companies.

5. The EC was also extremely disappointed and concerned by 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 trademark. The specific licence had been refused on the grounds that "it would be inconsistent with US policy to issue a specific license authorizing transactions related to the renewal of the Havana Club trademark". This statement was disturbing. The renewal would not have given away or granted rights. It would only have preserved the status quo and would thus allow the US courts to decide in pending proceedings who was the legitimate owner of that mark. How could this be inconsistent with general US policy? Conversely, how could refusing the registration's renewal and thus the very possibility of defending potential rights to the mark be consistent with the US policy? This was in clear contradiction with the principle strongly promoted worldwide by the United States that ownership of intellectual property rights should be decided in courts on the basis of the law without interference of political considerations. If this US policy were to be followed, it would seriously undermine the efforts to promote rules-based protection of intellectual property rights. The EC urged the United States, the only WTO Member that consistently did not comply with its obligations under the TRIPS Agreement, to accept the multilateral disciplines and the rule of law. Finally, he noted that there was no relationship between the matter under discussion and the matter to be raised under Item 2 of the agenda of the present meeting.

6. The representative of Cuba recalled that, at the 19 July DSB meeting, his delegation had stated that there was a reason for the excessive delay in implementing WTO rules by the United States pertaining to the Section 211 dispute, namely, to prevent a Cuban firm from renewing the "Havana Club" rum trademark at the US Patent and Trademark Office. The despicable intention of this action was to enable the powerful firm Bacardi, closely linked to the anti-Cuban mafia in Miami and to the US far right, to appropriate the trademark in the US territory. Recent events had proved Cuba to be right. On 28 July, the US Office of Foreign Assets Control had rejected an application from the Cuban firm "Cubaexport" for a specific licence for renewal of the registration of the "Havana Club" trademark in the United States. In reality, the application had been rejected in order to satisfy the interests of Bacardi, which for over a decade had made countless moves in the United States to take over the ownership of the "Havana Club" trademark. The "Havana Club" trademark, registered in the United States since 1976 by "Cubaexport", enjoyed prestige and recognition in the international market, designating a premium product with an ever-increasing volume in the world market and a rum which was genuinely Cuban. Consequently, Barcardi's decision to begin marketing rum produced in Puerto Rico under the trademark "Havana Club" constituted a fraudulent act that would mislead

consumers, who had traditionally identified "Havana Club" as rum produced in Cuba and not elsewhere. This conduct on the part of Bacardi, which disregarded the most fundamental principles of ethical trade, was attributable to Section 211, an arbitrary and illegal provision, which had been declared to be inconsistent with basic WTO principles by the DSB on 2 February 2002.

7. Despite several reasonable periods of time for implementation agreed by the EC and the United States within which the latter was to comply with the DSB's recommendations and conclusions, Section 211 remained in effect. The conduct of the United States had clearly demonstrated its Government's lack of compliance with the guiding principles of the DSU and had turned into a consistent pattern of disregard for the multilateral agreements and the WTO, which had serious systemic implications. Persistent conduct of this kind set a dangerous precedent that might affect other Members in the future, particularly developing countries, which viewed the dispute settlement system as a central element in providing security and predictability to the multilateral trading system. The conduct of the United States in this and other disputes eroded the DSU and the foundations on which the TRIPS Agreement had been built. He asked whether any credibility could be attributed to the multilateral trading system based on rules and obligations that were supposedly equal for all its Members, when one of its key players maintained an attitude of persistent and open defiance and did not respect international disciplines. Cuba reiterated its call for Members to take prompt and effective action to enforce the WTO Agreements and their own decisions and to demand that the United States comply immediately and unconditionally with the DSB's rulings and recommendations, in particular those pertaining to this dispute, by repealing the unfair and discriminatory provision, Section 211.

8. The representative of the Bolivarian Republic of Venezuela said that her delegation thanked the United States for its status report of 1 September on the implementation of the recommendations and rulings of the DSB pertaining to the dispute: "United States – Section 211 Omnibus Appropriations Act of 1998". Her country wished to be fully associated with the statement made by Cuba, given that it considered that the indefinite postponement by the United States of compliance with the recommendations and rulings merely encouraged the application of Section 211, a piece of legislation, which the Appellate Body had considered to be inconsistent with WTO rules. Her country was increasingly concerned by the systemic aspect that this issue had acquired: the status report submitted by the United States offered no certainty whatsoever as to the implementation of the DSB's recommendations and rulings in the near future, which set a negative precedent for the WTO and constituted a lack of transparency. Respect for the principles of the DSB was of concern and interest to all WTO Members and the principle of prompt compliance with the DSB's rulings and recommendations was the cornerstone of the dispute settlement mechanism. Finally, her country urged the United States to make every possible effort to implement the DSB's rulings and recommendations immediately and without any further delay by repealing Section 211 of the Omnibus Appropriations Act of 1998 in accordance with the WTO Agreements.

9. The representative of Bolivia said that having heard the report by the United States, his delegation wished to express, once again, its concern at the failure of the United States to comply with the recommendations and rulings of the DSB in this particular dispute. Indeed, for more than four years now, there had been no progress towards lifting the restrictions provided for in Section 211 of the Omnibus Appropriations Act of the United States, which was causing considerable prejudice to Cuba. As had already been stated on other occasions, the failure to comply with the recommendations and rulings of the DSB was undermining the credibility of the judicial body and alerting the relevant actors, including civil society, with respect to the proper functioning of the multilateral judicial system. The continued delay in applying the DSB's rulings should, therefore, be a source of concern to all Members. It not only weakened the authority of the DSB, but also undermined the legitimacy of the intellectual property rights area which had achieved considerable progress under the TRIPS Agreement. Once again, his delegation wished to join other Members in urging the United States to

implement the recommendations and rulings of the DSB in this dispute, because the lack of such implementation was causing considerable prejudice to another WTO Member.

10. The representative of Brazil said that his country wished to thank the United States for its status report and the statement made at the present meeting. Based on systemic considerations, however, Brazil wished to express its concerns with the protracted implementation process in this dispute. Article 21.3(c) of the DSU provided that the period for implementation of recommendations should not exceed 15 months from the date of adoption of a panel or the Appellate Body report by the DSB. In the present case, the adoption of the Panel and the Appellate Body Reports had occurred more than 55 months ago. However, no implementing action had been taken during that period. The United States had, therefore, granted itself a grace period of more than three years on top of the Article 21 indicative time-frame for the outer limit of an implementation period. Furthermore, based on the statement made by the United States, there was no clear signal that the issue would be resolved in the near future. This could not be reconciled with the principle of prompt settlement of disputes, one of the core objectives of the WTO dispute settlement system. Brazil strongly urged the United States to take the necessary steps to implement the relevant DSB's rulings and recommendations.

11. The representative of Argentina said that his delegation wished to reiterate its systemic concern over the delays in the implementation of the recommendations and rulings adopted by the DSB more than four years ago. Prompt compliance with the rulings and recommendations of the DSB was a key element of the WTO dispute settlement system. The lack of progress in implementation adversely affected the credibility of the system and harmed all WTO Members, in particular developing countries, which viewed the dispute settlement system as an important instrument. Argentina, therefore, urged the United States to redouble its efforts to comply with the recommendations and rulings of the DSB in this dispute.

12. The representative of India said that his delegation wished to thank the United States for its status report, but India continued to be concerned that due consideration of the principle of prompt compliance with the rulings and recommendation of the DSB, essential to effective resolution of disputes to the benefit of all Members, appeared to be missing in this dispute. Although a solution mutually acceptable to the parties was preferred, parties should keep the DSB informed of progress towards such resolution in a meaningful manner. This was not apparent from the statements made by the parties, even four years after adoption of the recommendations and rulings of the DSB, thus ignoring the systemic concerns of WTO Members in general. India urged the parties to this dispute to be responsive to these systemic concerns and to shed some light on the way they intended to fulfil the objective of prompt settlement and the actions they proposed to take to achieve that objective.

13. The representative of China said that, due to systemic interests, his delegation wished to express its continued concern in this dispute. First, China wished to thank the Unites States for its status report and the statement made at the present meeting. However, China regretted that there was no clear indication when this matter would be resolved to the satisfaction of the parties and other Members. It was now more than four years since the adoption by the DSB of both the Panel and the Appellate Body Reports in this case. Such a delay raised systemic concerns about the functioning and efficacy of the dispute settlement system. China firmly believed that prompt and full implementation of the DSB's rulings and recommendations was one of the major cornerstones of the WTO dispute settlement. Therefore, China once again wished to urge the United States to implement the decision of the DSB in this dispute as soon as possible.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.45)

15. The Chairman drew attention to document WT/DS184/15/Add.45, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

16. The representative of the United States said that his country had provided a status report in this dispute on 22 August 2006, in accordance with Article 21.6 of the DSU. As of 23 November 2002 the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration continued to support legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass such amendments.

17. The representative of Japan said that his country noted the statement made by the United States along with its latest status report. While Japan was encouraged that the US administration continued to work with the US Congress to enact the legislation H.R. 2473, it was regrettable that Members had not seen any progress in the dispute under consideration for more than one year since the legislation had been introduced in the US Congress. As Japan had repeatedly stated before the DSB, a full and prompt implementation of the recommendations and rulings of the DSB was a principal element in ensuring the credibility of the WTO dispute settlement system. Japan wished to renew its strong hope that the United States would make further efforts to implement the DSB's recommendations and rulings as soon as possible.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.20)

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

20. The representative of the United States said that his country had provided a status report in this dispute on 22 August 2006, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration was working closely with the US Congress, and conferring with the EC, to reach a mutually satisfactory resolution of this matter.

21. The representative of the European Communities said that, once again, the EC wished to express its disappointment with the lack of progress in solving this long-standing dispute. For more than five years the United States had failed to take any steps to amend a piece of legislation that violated intellectual property rights and hurt the interests of music creators. As he had already stressed previously – in the course of the meeting when dealing with the Section 211 dispute – the damage resulting from the failure of the United States to comply with the DSB's rulings had gone beyond the boundaries of this specific dispute as it had called into question the US commitment to the TRIPS Agreement. In spite of the seriousness of the situation, the United States had persisted in its refusal to provide specific information to the DSB on its intentions with regard to implementation. The EC urged, once again, that the United States provide information on the specific steps that it had taken or intended to take to solve this dispute. This situation of non-compliance had already lasted for

too long. Finally, the EC recalled that it had reserved its right to reactivate, at any point in time, the arbitration proceedings regarding the level of retaliation.

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

2. Implementation by the European Communities of the recommendations and rulings of the DSB in relation to "European Communities – Regime for the Importation, Sale and Distribution of Bananas"[1] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

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

24. The representative of Honduras said that his country wished to refer, once again, to its previous statements in which it had explained why it was addressing under this item an implementation issue relevant to Article 21 of the DSU. The EC's response to this agenda item had, in essence, remained unchanged. The EC had stated that it was "aware of the importance of the banana industry for Latin America" and that it was seeking "the good offices of Norway" to discuss "the rebinding of the MFN tariff". Eight months of "monitoring" had made clear what this language meant and what it did not mean. It did not mean that the EC had an interest in altering the current arrangement. It meant only, at best, that the EC might be considering binding the tariff at a rate higher than the current applied tariff, while continuing to maintain the applied rate of €176/mt. for an indefinite period. This continued to be the EC's unyielding position, even though the evidence of harm to Latin America intensified. Irrefutable proof of the increasing harm being done was demonstrated in the EC's data, not in Honduras' data. Year-to-year Eurostat statistics, when compared with the same period in 2005, had confirmed that Latin America's market position was eroding even faster than most had expected. While traditional Latin American suppliers had collectively lost EC market share, the ACP had collectively increased their market share by more than 10 per cent. The gains of the most competitive ACP sources were especially pronounced. Côte d'Ivoire's market share had increased by 22 per cent, Ghana's by 307 per cent and the Dominican Republic's by over 12 per cent. Meanwhile, Honduras, a country engaged in a constant struggle against poverty, had lost over 60 per cent of its EC volume and 63 per cent of its market share. If the EC was truly "aware of the importance of the banana industry" for the developing countries of Latin America, it was difficult to see why it would impose these escalating losses on their fragile economies and struggling workforce. It was equally difficult to understand why the EC had insisted on a so-called "solution" aimed only at eroding Honduras' interests and forcing Latin America into a position of resigned defeat. Honduras was unwilling to resign itself to defeat and stood ready, together with other interested Members, to take the steps necessary to ensure prompt compliance by the EC.

25. The representative of Nicaragua said that his country also noted the worsening of the market situation for bananas and the increasingly difficult circumstances affecting traditional Latin American suppliers in the EC market and wished, yet again, to draw the attention of the DSB to its plight in this regard. Despite the fact that Nicaragua's banana industry had historically exported bananas to the EC and had enjoyed considerable comparative advantages in the banana sector, Nicaragua now found itself completely out of the EC market and unless the current arrangement was improved considerably, there was no hope of Nicaragua getting back into it. That was why when Nicaragua had heard the EC insisting that its new regime would remain "trade neutral", it had been bound to refute such a claim. This regime, which was blocking access for impoverished countries such as Nicaragua,

[1] WT/DS27.

had unfairly altered market shares more quickly than most of those countries had expected and had eroded prices to new levels of non-profitability. This regime was a framework for maintaining devastation and trade damage and certainly did not maintain trade "neutrality". Ironically, the havoc in the EC market was of no benefit even to the European Commission's price administration objectives. The EC had more than doubled its tariffs on 1 January 2006 to ensure that its own banana producers "did not find themselves in a less favourable situation than that existing prior to the entry into force in 1993 of the import quota regime [for bananas]". The EC had thought that a tariff of US$4.20/box, imposed on the poorest nations in the hemisphere, would help to raise internal prices and thus safeguard the high reference prices of its subsidies. This more than doubled preferential tariff had precisely the opposite effect. It had led to enormous ACP gains through the "cross–subsidization", which in turn had helped to bring about an 18 per cent drop in the price of bananas produced in the EC and an increase of 170 per cent in banana subsidies. As Nicaragua had been warning ever since the EC had first announced this arrangement at the end of November 2005, these new measures were ill conceived, caused distortion in most of the sector and was clearly illegal. It was essential that the EC comply soon and restore fair market access for Nicaragua.

26. The representative of Panama said that Honduras had just shared with Members the worrying statistical picture that had already emerged as a result of months of the EC's non-compliance. Panama's market situation was one of the most worrying. As a principal supplier of bananas to the EC, Panama had already suffered a decline of over 6 per cent in the volume exported to that market. Panama's market share had declined by 13 per cent. Because the EC prices had completely collapsed, bananas from Panama, which were normally sent to the EC market, were now being sold for a greatly reduced profit. The market situation for competitive ACP suppliers was dramatically different. ACP producers were using their illegal US$4.20/box preference margin to secure a huge increase in over-quota sales, which were projected to reach 125,000 mt. by the end of the year. This volume was 132 times greater than ACP over-quota sales in 2005. Because ACP profit margins would increase as over-quota sales rose, a two-fold increase above and beyond 125,000 mt. was expected in the short term. There would be ample ACP suppliers to achieve this increase, since all significant banana investments were now being transferred to Africa. Economists had already modelled the consequences of these emerging trends. Left unchecked, the US$4.20/box ACP preference would reduce Latin America's exports by 1 million mt; its export revenues by approximately US$600 million; its income by almost US$500 million; and its jobs by approximately 125,000. Given Panama's current situation, his country feared that a substantial part of this macroeconomic damage would be borne by its own rural banana-producing population. Faced with this prospect, Panama had no option but to insist on prompt compliance and was working with other interested parties to ensure that this was achieved.

27. The representative of the European Communities said that the EC had listened to the statements made by WTO Members on this matter. The EC wished to refer to its previous statements in which it had explained why this matter was not an "implementation issue" covered by Article 21 of the DSU. The EC had 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 was in regular contact with the WTO Members involved to discuss this issue, including the rebinding of the MFN tariff. The EC remained committed to maintain access to the EC market from all banana supplying countries. Contrary to the statements made by Honduras and Panama at the previous DSB meeting, data on overall MFN imports, available to date, had given 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 2005. These data were being regularly discussed in the context of the monitoring process under the good offices of Norway.

28. The representative of the United States said that his country continued to be concerned about the lack of progress on the part of the EC in resolving this dispute. Although Members had voiced important and pressing concerns in this and several previous DSB meetings, the United States was not aware of any steps that the EC had taken to address Members' concerns. In light of this, the United States was continuing to hold informal discussions with interested Members. As it had done in each of the previous DSB meetings, the United States again urged the EC to work with interested Members to resolve this dispute as expeditiously as possible. And, again, the United States looked forward to hearing from those several Members, having previously spoken of their systemic interest in compliance, under this agenda item.

29. 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

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

31. The representative of Canada said that his country had repeatedly expressed its appreciation with the steps the United States had taken towards implementing the DSB's rulings and recommendations in this dispute. However, 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 six 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 immediately repeal the Byrd Amendment.

32. The representative of the European Communities said that the EC wished to record again its disagreement with the statement made by the United States that it had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute. The CDSOA breached Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement for transferring anti-dumping and countervailing duties to the US complaining industry. The US Congressional Budget Office had foreseen that the distribution of the anti-dumping and countervailing duties would continue until at least the fiscal year of 2010 starting on 1 October 2009. As long as those transfers continued, the United States would continue to be in breach of its WTO obligations and full implementation would still have to be delivered. By denying this, the United States had actually asserted that it had the right to comply with the DSB's ruling at some undetermined date in the future regardless of Members' duty to comply promptly with the DSB's rulings. The FSC dispute where US Congress had finally put an end to WTO-illegal grandfathering clauses showed that the United States could revisit the delayed termination of the Byrd Amendment if the political will was there. The EC wished to ask the United States again 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 submit status reports on implementation in this dispute.

33. The representative of Japan said that his country regretted to express, yet again, its disappointment with another failure of the United States to submit a status report to the DSB this month regarding the implementation of the DSB's recommendations and rulings in this case, in accordance with Article 21.6 of the DSU. Although, as Japan had stated repeatedly, the enactment of the law by the United States that included provisions to repeal the CDSOA was an important step

forward in the right direction, those provisions also included the transitional clause that stipulated that duties collected on imports entered prior to 1 October 2007 would continue to be distributed to the US domestic industries. In fact, the US Customs and Border Protection published in April 2006, stated that the fiscal year 2006 preliminary amounts available for disbursements wiould be around US$172 million.[2] Following that announcement, the US authority had issued in June 2006, the "Notice of Intent to Distribute Offset for Fiscal Year 2006"[3] pursuant to the CDSOA. This notice set forth the detailed instructions and guidance for US domestic producers to claim distributions for the fiscal year 2006, in accordance with the regulations implementing the CDSOA.

34. The announcement and notice demonstrated that the CDSOA had been repealed only *in form* but *in effect* would be maintained "for an undetermined period". Thus the US authority's preparatory work for the next round of disbursement supported the view that the United States had still failed to fully implement the DSB's recommendations and rulings in this case. Under these circumstances, Japan had decided to continue, as from 1 September 2006, its suspension of concessions and related obligations under the GATT 1994 on imports of certain products originating in the United States for another one year to induce full compliance by the United States. As explained in the communication to the Chairman of the DSB dated 22 August 2006, the products subject to an additional duty of 15 per cent under that suspension were unchanged. Finally, Japan called on the United States to make further efforts to terminate the illegal distribution under the CDSOA and to fully implement the DSB's recommendations and rulings. Until the CDSOA was repealed completely, Japan reserved all its rights under the DSU.

35. The representative of Brazil said that his country wished to thank Canada, the EC and Japan for raising this issue on the DSB agenda. This was the appropriate forum to debate about non-compliance – a matter that concerned the whole Membership. Brazil shared the view of those three Members that the "issue" had not been resolved in this dispute within the meaning of Article 21.6 of the DSU. The conditions under which the repeal of the Byrd Amendment would operate did not support the assertion that the United States had implemented the relevant DSB's recommendations. According to those recommendations, there would be no full compliance on the part of the United States until and unless all disbursements under the Byrd Amendment ceased. Based on the applicable provisions of the "Deficit Reduction Omnibus Reconciliation Act", disbursements would continue, at least, until late 2007. In this context, the co-complainants could not be deprived of any right conferred by the DSU with respect to this situation of non-compliance.

36. The representative of Thailand said that first he wished to thank Canada, the EC, and Japan for once again raising this matter in the DSB. Thailand joined previous speakers in expressing ongoing disappointment that the United States continued to illegally disburse funds under the CDSOA, and that it continued to refuse to submit any status report on its outstanding implementation in the case: "United States – Continued Dumping and Subsidy Offset Act of 2000". To this end, Thailand reaffirmed its previous views expressed during DSB meetings since February 2006, and urged the United States to continue providing status reports until it brought its actions into conformity with the DSB's rulings and recommendations in this dispute, and until this matter was fully resolved.

[2] See US Customs and Border Protection's website at:
http:// www.customs.treas.gov/xp/cgov/import/add_cvd/cont_ dump/cdsoa_06/.

[3] 71 Federal Register at 31336 et seq. (dated 1 June 2006). In this Notice, the US Customs and Border Protection admitted that as a result of transitional clause "the effect of the repeal will be delayed for several years." It further explained that "the distribution process will continue until all entries made before 1 October 2007, are liquidated and the duties are collected" and "[b]ecause of the statutory constraints in the assessments of antidumping and countervailing duties, the distribution process will be continued for an undetermined period".

37. The representative of India noted that there had not been any response from the United States to the question put by India in the previous DSB meeting as to how continued disbursements of duties collected on imports entering the United States squared up with its compliance obligations. The United States needed to do more than re-iterate a clearly indefensible position on compliance in the face of the new administration action based on the very CDSOA that it had admitted was found inconsistent with WTO rules and had asserted that it had been withdrawn. Such unilateral action undermined the WTO dispute settlement system. India urged the United States again to inform the DSB of the steps it proposed to take to ensure full compliance. India reiterated its request that the United States should resume submitting status reports in this dispute.

38. The representative of Indonesia said that his country fully supported the statement made by Canada, the EC and Japan. Although Indonesia had signed a bilateral agreement with the United States, however, like other Members, it strongly urged the United States to fully implement the DSB's rulings by repealing the CDSOA.

39. 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 recommendations and rulings in these disputes. The United States had in past meetings invited Canada, the EC, and Japan to explain what purpose would be served by the submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings. Unfortunately, however, these Members had failed to explain themselves. With regard to suggestions of further consideration by the US Congress, the United States also questioned the wisdom of re-opening congressional debate over the Continued Dumping and Subsidy Offset Act. The United states was surprised by the assertions of Brazil, India, and others that the United States would not have implemented the DSB's recommendations and rulings until the last CDSOA distribution was made. Of course, it was not their place within the WTO dispute settlement system to determine unilaterally when another Member achieved compliance.

40. The DSB took note of the statements.

4. United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico

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

41. The Chairman said that this item was on the agenda of the present meeting at the request of the United States, and invited the representative of the United States to speak.

42. The representative of the United States said that his country was pleased to report that it had implemented the recommendations and rulings of the DSB in this dispute. On 27 April 2006, the US Department of Commerce had issued a draft Section 129 determination, addressing the Panel's finding that the original determination did not indicate that certain information and argument had been considered. The respondent and domestic interested parties had submitted comments on the draft, as well as rebuttal comments. In addition, both parties had filed additional factual information that had not been solicited. The Department of Commerce had accepted the unsolicited information and had added other factual information to the record, providing interested parties an additional opportunity to comment on all new factual information on the record. The Department of Commerce had undertaken an extensive analysis of the information and argument presented by interested parties. In light of the DSB's recommendations and rulings, based on the totality of the evidence on the record of the Section 129 proceeding, the Department of Commerce had found that there was a likelihood of

continuation or recurrence of dumping had the anti-dumping duty order on OCTG from Mexico been revoked at the end of the original sunset review period. Accordingly, on 9 June 2006, the Department of Commerce had issued a revised determination that implemented the recommendations and rulings of the DSB.

43. The representative of Mexico said that it should not come as a surprise to other Members that, in Mexico's view, the United States had failed to comply with the recommendations and rulings of the DSB and was, therefore, still in breach of its WTO obligations, in particular under the Anti-Dumping Agreement. Mexico and the United States, therefore, had reached a procedural agreement and, on 21 August 2006, Mexico had requested consultations with a view to initiating Article 21.5 proceedings, given that his country considered, *inter alia*, that the Determination issued by the US Department of Commerce and the continued existence of the anti-dumping duty order on OCTG from Mexico had failed to comply with the recommendations and rulings of the DSB since the anti-dumping order was being improperly applied to Mexican exports. Mexico and the United States were currently engaged in consultations with a view to resolving this dispute.

44. The DSB took note of the statements.

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

(a) Statement by Indonesia

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

46. The representative of Indonesia said that his country noted that the reasonable period of time for compliance with the rulings of the Panel in this dispute had expired on 28 July 2006. The Korean Trade Commission had notified its implementing measure on 27 July 2006. During the 28 November 2005 DSB meeting, Korea had stated that in its implementation of the Panel's rulings, it had intended "to provide an example of the conduct of anti-dumping investigations in a manner consistent with the highest standards of procedural and substantive fairness". He wished to take this opportunity to highlight certain aspects of Korea's implementing measures that were difficult to reconcile with Korea's stated intentions. Korea had stated that its implementation would comply with the highest standards of procedural fairness. Yet, Indonesian exporters had not been provided with any opportunity to comment on Korea's injury and causal link re-determinations. Moreover, Korea appeared to have taken the position that disclosure failures in the underlying investigation could be rectified by simply making the relevant disclosures during the reasonable period of time. Indonesia noted that this had not placed the Indonesian exporters in the position that they would have been if disclosure had been made in a timely manner. For instance, Indonesian exporters had not been provided access to the precise figures and sources used in their dumping margin calculations and, therefore, could not make targeted arguments to the Korean Trade Commission (KTC). This prejudice was not rectified by letting them see the relevant calculations almost three years later at a point in time when the exporters could not exert any influence on the outcome. Korea's posture implied that violations of procedural obligations in the Anti-Dumping Agreement incurred not cost. Countries whose exporters were regularly subject to anti-dumping investigations should consider the implications of Korea's position carefully.

47. As far as the substance of the implementing measures was concerned, Indonesia was extremely disappointed with the approach taken by Korea. The KTC had not altered its dumping margin calculations in any way. Korea had continued to rely on the information obtained from a manufacturing company to calculate the interest expenses attributable to a re-seller. In Indonesia's view, the KTC's reasoning on this point directly contracted the rulings and recommendations of the Panel. Indonesia was also disappointed with the injury and causal link re-determinations conducted

by the KTC. Korea's continuing non-compliance left Indonesia no choice but to initiate Article 21.5 proceedings soon. His country hoped that the Panel would quickly and definitely resolve this dispute between the two countries. Finally, he noted that Indonesia hoped to obtain a better understanding of the KTC's measures in consultations with Korea in the coming days. Indonesia's understanding would be greatly facilitated if Korea could provide an English translation of its report as a courtesy to the Indonesian delegation.

48. The representative of Korea said that it was regrettable that Indonesia was not satisfied with the measures taken by Korea in order to comply with the rulings and recommendations of the DSB in the case: "Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia" (WT/DS312). Korea had fulfilled its compliance obligations set out in Article 21 of the DSU by taking implementation measures in a prompt and faithful manner. The simple fact that Korea had never stood before any compliance panel as a defendant was a testimony to Korea's genuine and sincere efforts. In this regard, Indonesia's previous intervention and its decision to file further legal suits in this case were hard to understand. Korea believed that Indonesia's action did not stem from the lack of full implementation by Korea, but from the lack of Indonesia's understanding of the substance of Korea's implementating measures.

49. He said that what had been recommended by the DSB in this case were mostly procedural steps that the Korean investigation authority had not fully considered. The Panel had found that Korea had not acted inconsistently with the Anti-Dumping Agreement in the area of substantive aspects on which Korea's anti-dumping duties were based with respect to Indonesian paper. In order to implement the DSB's recommendations, the KTC had undertaken an extensive review of its earlier determination to ensure that it had fully complied with Korea's obligations under the Anti-Dumping Agreement, as clarified by the Panel Report. The KTC had provided the requisite additional disclosure to the Indonesian respondents, granted those respondents an opportunity to comment, and had then fully considered the comments it had received before making its final decision. Finally, the result had been published as an Implementation Report in the Korean Gazette on 27 July 2006, one day before the expiry of the reasonable period of time for the implementation. Korea felt confident that all of the instances of non-conformity identified in the Panel Report had now been corrected in a manner consistent with the WTO Agreement, and that Korea's measures imposing anti-dumping duties on imports of uncoated wood-free paper from Indonesia were now fully in compliance with Korea's obligations in accordance with the Anti-Dumping Agreement and the GATT, both procedurally and substantively.

50. Korea regretted that the compliance measures taken by Korea were not duly recognized by Indonesia. Upon Indonesia's request, however, Korea and Indonesia had reached a bilateral understanding regarding procedures under Articles 21 and 22 of the DSU, which was contained in document WT/DS312/7. Taking this opportunity, Korea wished to assure all WTO Members, including Indonesia, that Korea would respect all the procedural steps stipulated in the sequencing agreement. In accordance with that agreement, Indonesia had the right to request consultations. If so requested, the Korean government would respond quickly and participate in the consultations with utmost sincerity. However, Korea strongly urged Indonesia to review thoroughly, once again, the compliance measures taken by Korea, before making its request for consultations. A more careful review would make it clear that compliance litigation was not necessary at all. Finally, with respect to Indonesia's request that Korea provide an English translation of Korea Implementation Report, he believed that this was not necessary because Indonesia's Government had already made its decision that Korea had fallen short of implementation based on its examination of the orginal Report that had been submitted to it. Therefore, in his view, there was no point providing an English translation at this stage.

51. The DSB took note of the statements.

6. United States – Subsidies on upland cotton

(a) Recourse to Article 21.5 of the DSU by Brazil: Request for the establishment of a panel (WT/DS267/30)

52. The Chairman drew attention to the communication from Brazil contained in document WT/DS267/30, and invited the representative of Brazil to speak.

53. The representative of Brazil said that his country had submitted, for the DSB's consideration, a request for the establishment of a panel pursuant to Article 21.5 of the DSU in the case: "United States – Subsidies on Upland Cotton". Brazil's request was contained in document WT/DS267/30. On 21 March 2005, the DSB had adopted the Reports of the Panel and the Appellate Body in this dispute. He noted that the time made available to the United States to comply with the recommendations and rulings of the DSB had expired on 1 July 2005 and on 21 September 2005 with regard to, respectively, the prohibited and the actionable subsidies found to be inconsistent with WTO Agreements. Brazil considered that with respect to some of the DSB's recommendations and rulings, the United States had adopted no implemention measures at all, and that the implementation measures it had adopted fell far short of compliance with the covered agreements and the DSB's recommendations and rulings. Accordingly, because there was disagreement as to the existence and consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB, Brazil sought recourse to the dispute settlement mechanism pursuant to Article 21.5 of the DSU. Pursuant to that same provision, Brazil requested that the DSB refer the matter to the original Panel.

54. The representative of the United States said that his country regretted that Brazil had chosen to request the establishment of a compliance panel in this dispute. The United States had fully implemented the DSB's recommendations and rulings. Significantly, as previously announced to the DSB, the United States had repealed the so-called "Step 2" program. The DSB had found that program, with annual payments in the hundreds of millions of dollars, to be a prohibited subsidy. Step 2 payments were also part of a measure found to have caused adverse effects in the period analyzed by the Panel. Indeed, Brazil itself had previously stated in the DSB that "the repeal by the United States of the Step 2 programme was a very important step towards compliance in this case." WT/DSB/M/205 (DSB meeting of 17 February 2006).

55. But the Step 2 program was actually only one of three programs that the United States had ceased operating following the DSB's adoption of its recommendations and rulings. With respect to two of the three export credit guarantee programs at issue in the dispute, the United States had also stopped issuing any guarantees. The United States had overhauled the single export credit guarantee program that remained in operation. The United States had changed its fee structure and had even eliminated certain markets entirely as eligible destinations. These changes responded to key DSB findings about charging premiums that were "risk-based" and designed to cover the long-term operating costs and losses of such programs. Given the significant – and, frankly, difficult – steps that the United States had taken to implement the DSB's recommendations and rulings, it was particularly disappointing that Brazil alleged in its panel request the "non-existence of measures taken to comply".

56. The facts had also failed to support Brazil's claims – apparently, in the alternative – that certain of the US measures taken to comply were WTO-inconsistent. Accordingly, the United States considered that Brazil's request for a compliance panel was unnecessary and without basis. For the reasons that it had mentioned, the United States was not in a position to accept the establishment of a panel at the present meeting, as requested by Brazil. In particular, the United States noted that while certain of Brazil's claims were covered by a sequencing agreement between the United States and Brazil, which had been circulated to Members in WT/DS267/22, others were not. In order to demonstrate its willingness to cooperate procedurally, the United States had proposed to Brazil that

the parties enter into an additional sequencing agreement to cover the remainder of the claims in Brazil's panel request. Brazil had not wished to do so. In that light, the United States was not in a position to accept establishment of a panel since Brazil's request included measures and claims that were not covered by the sequencing agreement. Nonetheless, the United States would continue to make every effort to cooperate on procedural matters and hoped that Brazil would do the same.

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

7. United States – Final dumping determination on softwood lumber from Canada: Recourse to Article 21.5 of the DSU by Canada

(a) Report of the Appellate Body (WT/DS264/AB/RW) and Report of the Panel (WT/DS264/RW)

58. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS264/27 transmitting the Appellate Body Report on: "United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada", which had been circulated on 15 August 2006 in document WT/DS264/AB/RW, in accordance with Article 17.5 of the DSU. He noted that the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. As Members were aware, 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 was without prejudice to the right of Members to express their views on an Appellate Body report".

59. The representative of Canada said that his country wished to thank the Panel, the Appellate Body, and the respective Secretariats for their work towards resolving the dispute concerning the US softwood lumber anti-dumping determination. Canada welcomed the 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. He said that at issue in this case was the alleged compliance of the United States with the rulings and recommendations of the DSB. Specifically, the United States had continued to perform "zeroing" in determining the margins of dumping in the Section 129 Determination, the "measure taken to comply". Through analysis that was both thorough and compelling, the Appellate Body had confirmed that in determining margins of dumping in an anti-dumping investigation, the use of "zeroing" in the transaction-to-transaction methodology was inconsistent with a Member's obligations under Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement. And so, the Appellate Body had found that the United States had failed to implement the recommendations and rulings of the DSB.

60. He said that the Appellate Body's findings had confirmed a host of prior consistent interpretations of the terms "margins of dumping" in Article 2.4.2 and "fair comparison" in Article 2.4. There could be no doubt now that the use of "zeroing" was impermissible under the Agreement. Specifically, the Appellate Body had found that when the transaction-to-transaction methodology in the first sentence of Article 2.4.2 was used, the term "margins of dumping" described the full results of an aggregation of transaction-specific comparisons of export prices and normal values. The Appellate Body had concluded that in aggregating such comparison results: "an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal values" (para. 122 of the AB Report). The Appellate Body had also found that the use of "zeroing" under the transaction-to-transaction methodology artificially inflated the magnitude of dumping and, therefore, did not meet the "fair comparison" requirement of Article 2.4, which called for calculations that were "impartial", "even-handed", and "unbiased". Again, the Appellate Body's findings in this respect were clear and

cogent; they brought a further and welcomed understanding of the rights and obligations of Members under the Anti-Dumping Agreement.

61. Finally, he said that Members might be aware that Canada and the United States had recently announced that an agreement had been reached to resolve the Softwood Lumber dispute. The agreement would result in the full revocation of the anti-dumping and countervailing duty orders and would offer stability and certainty for the Canadian softwood lumber industry. In that sense, by clarifying their respective rights and obligations, the WTO dispute settlement mechanism had also functioned as a central element in bringing predictability and security to trading relations between Canada and the United States. Canada requested that the DSB adopt the Panel and the Appellate Body Reports in this matter.

62. The representative of the United States said that his country wished to thank the members of the Panel, the Appellate Body, and the Secretariat for their hard work. In particular, the United States wished to convey special thanks to the two Panel members who had worked on this dispute a second time by serving in this Article 21.5 proceeding. As had been widely reported, and as the representative of Canada had just mentioned, on 1 July 2006 the US Trade Representative and the Canadian Trade Minister had initialled an agreement that would bring to an end this long-running dispute over softwood lumber trade. On 22 August 2006, Canada's Prime Minister had announced that a majority of support for the agreement from companies in all regions had been obtained, and that the Government would proceed with implementation when Parliament reconvened in the fall. The United States welcomed these developments. The United States looked forward to signing the lumber agreement and bringing it into force as soon as possible.

63. The sole issue in this dispute was whether the US Department of Commerce had been permitted to use "zeroing" in an original anti-dumping investigation, where it had determined margins of dumping using the transaction-to-transaction approach provided for in Article 2.4.2 of the Anti-Dumping Agreement. The United States noted that the Appellate Body had expressly stated that its findings to date had not addressed this issue. The Panel, which included experts with extensive experience in administering trade remedy laws, had found unanimously that the Department's approach was consistent with the Anti-Dumping Agreement. The United States called attention to certain highlights of the Panel's careful, rigorous analysis. The Panel had begun its analysis, appropriately, with a careful examination of the relevant text in Article 2.4.2 of the Anti-Dumping Agreement. In particular, it had distinguished the text pertaining to the transaction-to-transaction approach to calculating dumping margins – which was at issue here – from the text pertaining to the weighted-average-to-weighted-average approach – which was not.

64. Second, the Panel had carefully tested the implications of Canada's main textual argument: that the term "margin of dumping" – wherever that term was used in Article VI of the GATT 1994 and in the Anti-Dumping Agreement – necessarily referred to a single margin of dumping covering the entire universe of export transactions at issue in an investigation, as opposed to a transaction-specific margin. The Panel had reviewed various Articles in both agreements where the term "margin of dumping" was used and had demonstrated that in those contexts the term could not possibly be construed to refer to the entire universe of export transactions involving the product at issue.

65. Third, after engaging in a thorough textual analysis, the Panel had proceeded to undertake an equally thorough analysis of context. In particular, it had referred to the second sentence of Article 2.4.2, which pertained to the methodology for calculating dumping margins in the case of so-called "targeted dumping". It had posed the question of how that methodology was distinguishable from the weighted-average-to-weighted-average methodology if, as Canada had argued, "zeroing" was never permitted. It had demonstrated that neither Canada nor any third party could answer that question. The Panel had also examined other elements of context, demonstrating, for example, that

Canada's proposed interpretation of Article 2.4.2 would yield anomalous results for prospective normal value systems for anti-dumping duty assessment. The Panel's thorough approach to the text and context of Article 2.4.2 contrasted sharply with the approach reflected in the Appellate Body Report. Thus, the United States regretted that it had to take this occasion to express its serious concern and disappointment with the Appellate Body Report.

66. He said that the Appellate Body Reports could perform an important service for Members in helping to resolve disputes. And a key aspect of that service was for the Appellate Body report to present its reasoning, findings, and conclusions in a clear and well-explained manner. Unfortunately the Appellate Body Report in this dispute was disappointing in a number of respects. The Appellate Body had reversed the Panel's findings, but its reasoning was absent, cursory, circular, or unclear in many places. His authorities had instructed him to comment in detail on some of the more troubling aspects of the Appellate Body Report. The Appellate Body Report had accepted that Members were permitted to determine the existence of dumping by comparing the normal value and export price of a product on a transaction specific basis. However, the Appellate Body Report had gone on to find that the Anti-Dumping Agreement "suggests" and "implies" that these comparisons must be aggregated. Furthermore, when aggregating these comparisons, the Appellate Body Report had found that the Anti-Dumping Agreement "suggests" that Members were required not just to aggregate those transactions involving dumping, but Members must include any non-dumped transactions as well, and use those non-dumped transactions to offset any dumping. Based on these "suggestions" and "implications", the Appellate Body Report had concluded that the Anti-Dumping Agreement "does not admit an interpretation" that would allow the use of "zeroing" when using transaction-specific comparisons in investigations. The Appellate Body had not explained how it had jumped from the "suggestion" and "implication" of the text to the certainty that the text did not permit of any other interpretation. Normally one would think that if the text merely suggested or implied one interpretation, that another interpretation was also possible. Indeed, the Panel Report's careful and extensive analysis, a report by experts in the field, had demonstrated that the Anti-Dumping Agreement admitted more than one interpretation on this issue. Therefore, the Appellate Body Report was difficult to reconcile with the standard of review specifically required under the Anti-Dumping Agreement.

67. It might be helpful to consider more closely the reasoning in the Appellate Body Report. What was the textual basis that the Appellate Body had used for requiring aggregation? The text at issue was: "the existence of margins of dumping during the investigation phase shall normally be established . . . by a comparison of normal value and export prices on a transaction-to-transaction basis." The Appellate Body Report had relied on the fact that the text used "export prices" in the plural, used "a comparison" in the singular, and used the term "basis". That was it. The text had never referred to aggregation. The Appellate Body had not discussed the fact that the phrase "margins of dumping" was also in the plural, which would match up with the plural "export prices". Nor had the Appellate Body discussed the fact that if one was comparing the normal value and export price for a single transaction, then necessarily this would be "a comparison" in the singular. And the Appellate Body had engaged in no discussion of the flexibility inherent in the term "basis".

68. And what was the textual basis for requiring that non-dumped transactions be included in any aggregation? The Appellate Body had relied only on the fact that "export prices" was in the plural. Yet as the Panel had found, the term "export prices" did not answer the question as to whether aggregation could be only of dumped transactions or whether it must also include non-dumped transactions to offset any dumping. The Appellate Body's only additional response was that "export price" and "normal value" were sometimes "real values" and that allowing zeroing would result in "real values" being altered or disregarded. The United States had looked hard and could find nowhere in the text a reference to "real value". Nor had the Appellate Body explained what was meant by that term or what the significance of this non-textual concept might be. Nor had the Appellate Body Report explained why, since the Appellate Body had itself admitted that these were only sometimes

"real" values, that the fact that sometimes they were "real value" and sometimes not meant that one must draw conclusions from the times that they may be "real".

69. Even more perplexing was the reference to "real values" being altered or disregarded. The Appellate Body had not explained what it meant by this. Indeed, there was no alteration of the normal value or export price if one aggregated dumped transactions. And there was no textual basis that required that non-dumped transactions be aggregated. Interestingly, the Appellate Body Report in this dispute abandoned the "product as a whole" terminology used in prior reports such as "Zeroing": Complaint by the EC and Softwood Lumber V, and on which Canada had heavily relied. Indeed, the Appellate Body Report had acted as though it had never relied on this concept in its past findings and the Appellate Body never referred to it in its own reasoning. The Appellate Body had thus left Members wondering if the Appellate Body had disavowed that concept, but did not want to tell Members, or if the concept still had force for the Appellate Body, but it would leave it to Members to guess how and in what circumstances. This led to the curious situation in which the Appellate Body had referred to the parties' arguments before the Panel and to the Panel's own reasoning, all addressed to the "product as a whole" concept, without recognizing or referring to that concept and appeared surprised that the arguments and reasoning were not focused on another concept.

70. Without explanation, the Appellate Body had also abandoned the logic of its Softwood Lumber V report. There, in considering the average-to-average methodology for determining the existence of margins of dumping, the Appellate Body "emphasize[d]" that the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2 of the Anti-Dumping Agreement "should be interpreted in an integrated manner". Yet, in its present Report, it had simply dismissed the fact that Article 2.4.2 did not use the term "all comparable export transactions" in connection with the transaction-to-transaction methodology as "not pertinent". Consequently, one was now in a position in which the Appellate Body, over the course of three disputes, had appeared to have offered three separate rationales for its findings regarding "zeroing". However, it had not reconciled any of these findings with one another. Such an approach could not be said to contribute to the security and predictability of the dispute settlement system.

71. The Appellate Body's approach to context was equally troubling. As the United States had pointed out – and two expert panels had agreed – finding zeroing to be prohibited for transaction-to-transaction comparisons would render the second sentence in Article 2.4.2 redundant – clearly not an appropriate interpretive approach. The Appellate Body had claimed that it had not found whether "zeroing" was prohibited under the average-to-transaction methodology. But in making that assertion, the Appellate Body knew that later in its Report it had found "zeroing" to be inconsistent with the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement. As the Panel had found, it was difficult to see how "zeroing" could be inconsistent with the requirement to make a "fair comparison" while still being permissible under the average-to-transaction comparison methodology. When the Appellate Body Report had referred to the mathematical equivalence argument in its discussion of Article 2.4, it had simply stated that it was not relevant "for the same reasons" as for Article 2.4.2. Yet those reasons under Article 2.4.2 did not take account of the findings on Article 2.4. In other words, the Appellate Body's reasoning was circular. The Appellate Body had also given credence to hypothetical scenarios offered by Canada and third participants under which there would not be mathematical equivalence between the average-to-average methodology and the average-to-transaction methodology. However, unlike the Panel, the Appellate Body had made no analysis of whether any of these scenarios was realistic.

72. As another example of the US concern with the Appellate Body's Report, the United States referred to its very brief discussion of the implications of its conclusion for prospective normal value systems. As the United States had explained, if "zeroing" was prohibited under the transaction-to-transaction methodology, then under a prospective normal value system of duty assessment, an importer that paid duty on the basis of a dumped transaction could claim a refund on the basis of a

non-dumped transaction involving a different importer. This was because Article 9.3.2 of the Anti-Dumping Agreement provided that the anti-dumping duty paid under a prospective normal value system might not exceed the margin of dumping, and, in the Appellate Body's view, the margin of dumping under the transaction-to-transaction approach must include offsets for non-dumped transactions.

73. Rather than confront this issue, the Appellate Body had simply dismissed it by saying that duty assessment and the determination of margins of dumping were different processes and that, therefore, the former "has no bearing on the permissibility of zeroing" under the latter. That assertion had ignored the fact that by the terms of Article 9.3.2 of the Anti-Dumping Agreement, the margin of dumping was expressly linked to duty assessment under a prospective normal value system. The margin of dumping served as a cap on the duty assessed. It was for that reason that the Appellate Body's analysis would lead to the incongruous result of an importer of dumped product getting credit for another importer's importation of non-dumped product.

74. The Appellate Body Report's treatment of history was also troubling. For example, a Group of Experts report adopted by the Contracting Parties of the GATT 1947 had found that the ideal method of determining dumping would be on an individual transaction basis. This directly contradicted the finding of the Appellate Body Report that a margin of dumping could not exist for a single transaction. The Appellate Body's response? "The Group of Experts Report dates back to 1960." No further explanation. Why was the date of the report relevant? The Appellate Body Report had not stated if the date was relevant because it was too old or too recent or some other reason. Was the Appellate Body saying that the age of the report had rendered it irrelevant, even if the relevant text had not changed since then? Would the negotiating history for the Havana Conference be even more irrelevant because it was older?

75. The United States was also concerned with the Appellate Body Report's statement that: "It could be argued, on the contrary, that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology inutile." The Report had failed to provide any explanation for this speculation, nor had the report explored whether this was a credible argument rather than simple rhetoric. And this supposition was not even supported by the plain language of the text involved. In fact, the third methodology said that it only applied where average-to-average or transaction-to-transaction comparisons did not capture the targeted dumping. So the drafters had already anticipated that, in at least some cases, transaction-to-transaction comparisons would capture targeted dumping, and Members were only permitted to use average-to-transaction comparisons in the limited instances in which targeted dumping would not otherwise be captured. The Appellate Body had not gone so far as to speculate that the use of "zeroing" under the comparison methodologies in the first sentence of Article 2.4.2 would always capture pricing patterns constituting "targeted dumping". To the extent they would not capture such pricing patterns, the second sentence would remain effective, even under the Appellate Body's theory.

76. Finally, the United States was also troubled that the Appellate Body, for the first time, had made a finding that the application of "zeroing" was inconsistent with the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement. The Appellate Body's reasoning involved no textual analysis and, instead, seemed to be based on the view that "zeroing" was not "fair" if it resulted in a margin of dumping higher than the margin that would have resulted absent "zeroing". That approach to construing the term "fair comparison" found no support in the customary rules of interpretation of public international law. The Appellate Body Report's reasoning on this issue was circular – it assumed the conclusion that it had reached. The Report had assumed that zeroing resulted in margins that were "inflated" or "biased" because margins without zeroing would be lower. Yet, if zeroing was permitted, then how would margins derived from a permitted methodology be "inflated" or "biased"? The use of these words indicated that the Appellate Body

Report had assumed that zeroing was disfavoured under the Anti-Dumping Agreement, and then had found that because it was disfavoured, it was unfair and thus not permitted.

77. The United States appreciated the patience of the Chairman and other delegations as it had articulated some of its concerns with the Appellate Body Report in this dispute. As it had stated at the outset, the United States felt it was important to lay these concerns out in light of the important service that Appellate Body Reports could provide. Consistent with the US substantial concerns with the Appellate Body's approach to the issue of "zeroing", the United States would continue to pursue this issue in each of the WTO fora available to it. It concluded by saying again that the United States was pleased that a mutually agreed solution to its lumber dispute with Canada was in sight, and looked forward to informing the DSB of that solution in the very near future.

78. The representative of Hong Kong, China said that her delegation wished to thank the Appellate Body, the Panel and the Secretariat for their work on this case. Hong Kong, China was pleased to note that the Appellate Body had found that the practice of "zeroing" was inconsistent with the requirement to make "fair comparison" in Article 2.4 of the Anti-Dumping Agreement, and once again had ruled that this practice was contrary to the requirements of Article 2.4.2. More importantly, this was the first time the Appellate Body had ruled against the use of "zeroing" under transaction-to-transaction comparison methodology. Together with that ruling, the Appellate Body had decided that "zeroing" should be prohibited in the two comparison methodologies that should normally be used under Article 2.4.2, and in the case of duty assessment under administrative review. The growing list of adverse WTO rulings against the use of "zeroing" confirmed its WTO-inconsistency. The practice of zeroing had long been a problem causing grave concern to many Members. Such practice distorted the price comparison under Article 2.4.2 and violated the requirement of "fair comparison" under Article 4. The present findings of the Appellate Body were most useful in further clarifying that the use of "zeroing" was inconsistent with the Anti-Dumping Agreement and, therefore, should be prohibited. Hong Kong, China urged the United States to implement the DSB's rulings and recommendations, and to bring its dumping calculation methodology into conformity with the Anti-Dumping Agreement. Also, her delegation invited other WTO Members to examine their present rules and practices on dumping margin calculations and to eliminate the use of "zeroing". Hong Kong, China supported the adoption of the Report of the Appellate Body and the Report of the Panel as modified by the Appellate Body.

79. The representative of Japan said that, at the outset, his country wished to express its appreciation to the Appellate Body and its Secretariat for their time and energy dedicated to producing this comprehensive and well-reasoned Report. At the present meeting, Japan would not repeat its well-known position on the issue of the WTO-consistency of the US "zeroing" methodology. Instead, Japan wished to confine its remarks to a few observations regarding this Report of the Appellate Body in this case. First, the Appellate Body Report had properly reversed the Panel's finding and, instead, had concluded that the application of "zeroing" in transaction-to-transaction comparison in the investigation under the Section 129 Determination was inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement. In the previous cases, the Appellate Body had ruled that the "zeroing" methodology as used in weighted-average-to-weighted-average comparison in investigations as well as zeroing applied in weighted-average-to-transaction comparison in duty assessment reviews were inconsistent with the Anti-Dumping Agreement. The Appellate Body's finding in this Report within the context of the transaction-to-transaction comparison further confirmed that "zeroing" was generally prohibited under the Anti-Dumping Agreement.

80. Second, the United States had fiercely criticized the Appellate Body's Report in the case: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins" (WT/DS294/AB/R), claiming that the Appellate Body had failed to address important contextual arguments that the United States had presented and that the Appellate Body's reasoning was fatally

flawed.[4] Perhaps, partly in response to these serious allegations, in this Report the Appellate Body had addressed each and every argument presented by the United States in its defense, had carefully analyzed them, and had come to sound and well-reasoned findings and conclusions. Japan considered that the quality of this Report belied the accusation by the United States of the deficiency in the Appellate Body report in DS294. Japan strongly supported the adoption by the DSB of the Appellate Body Report (WT/DS264/AB/RW) and the Panel Report (WT/DS264/RW).

81. The representative of Korea said that his country welcomed the Appellate Body Report wholeheartedly and praised its correct judgment which had rectified the Panel's misinterpretation of the Anti-Dumping Agreement. In this case, the Panel had hastily jumped into the conclusion that zeroing was permitted in the so-called transaction-to-transaction comparison, because first, neither the Anti-Dumping Agreement nor Article VI of GATT 1994 expressly required calculation of dumping margin on "a product as a whole" basis, and second, transaction-to-transaction comparison was not qualified by the phrase "all comparable export transactions" in Article 2.4.2 of the Anti-Dumping Agreement. However, Korea believed that the Panel had disregarded the fact that the dumping margin was clearly inflated when zeroing was applied, and that this was diametrically opposed to the fair comparison obligation. The Panel had also ignored that the dumping margin was a magnitude of dumping and that the dumping margin was a ceiling that anti-dumping duty could not exceed. Korea was relieved that such narrow and inconsistent interpretations of the panel were neatly corrected by the Appellate Body.

82. Undoubtedly, Korea believed that the Report would be remembered and cited frequently as an important reference on how to treat the troublesome, but die-hard practice of so-called "zeroing". This Report, once again, had made it clear that the "zeroing" practice was not in line with the basic elements of anti-dumping, in particular, the overarching obligation of fair comparison. It was regrettable that the "zeroing" method was still being used by some Members despite repeated condemnation by the Panel and the Appellate Body. Korea hoped that the judgment and logic of the Appellate Body in this case would be respected and supported in the similar on-going cases so that the "zeroing" practice should cease to exist as soon as possible.

83. While welcoming the Appellate Body report in general, Korea wished to comment on some points where the Appellate Body could have been more precise. The Appellate Body had rejected the Panel's argument on the so-called prospective normal value system, by cursively saying that the Panel had confused duty collection with determination dumping margin. Korea understood that what the Panel had argued about was not the nexus between duty collection and determination of final margin of dumping. Rather, it had used the prospective normal value system as an example that dumping margin was not always calculated on a "product as a whole" basis. Certainly, in the prospective normal value system, the dumping margin was calculated on an individual basis, not "product as a whole" that were transacted during the period of investigation. Of course, this did not justify the "zeroing" method in transaction to transaction comparison in the case at hand. However, since the core question of this case was whether dumping margin must be calculated on a "product as a whole" basis or individually, and the Panel took PNV system as an example of individual calculation, the Appellate Body should have clarified its reasoning in a more detailed manner on the implication of PNV system with regard to the principle of dumping margin calculation for a product as a whole.

84. The Appellate Body had not responded to the argument made by one of the third party. This party had argued that zeroing would be permitted in the transaction-to-transaction comparison if there were symmetry between the dumping and injury/causation analyses. In other words, it had argued that this kind of "zeroing" was allowed only if dumped transactions were considered as part of the

[4] See the communications from the United States contained in documents: WT/DS294/16 and WT/DS294/18.

injury/causation analysis. The Appellate Body had bluntly not addressed this issue saying that it was irrelevant to this case. Given the importance of the prohibition of "zeroing", the Appellate Body should have delved into this symmetry argument in order to close any slight possibility that "zeroing" would be continued despite the WTO jurisprudence that prohibited "zeroing".

85. The representative of the European Communities said that the EC was grateful to the Appellate Body for having reversed the Article 21.5 Panel's findings, thus confirming that "zeroing" in the context of a "transaction-to-transaction" comparison was WTO-inconsistent. The Appellate Body had maintained a consistent and coherent line on this issue, and the EC considered that any possible ambiguity on the matter of "zeroing" had now been removed. In several cases, the Appellate Body had ruled that "zeroing" in original investigations, whether the weighted-average-to-weighted-average or transaction-to-transaction comparisons were used, was WTO-inconsistent. It had also found the same for "zeroing" in reviews. In addition, it had confirmed that "zeroing" was in these situations "unfair", in that it did not constitute a fair comparison in the sense of being "impartial, even-handed or unbiased". The EC of course had a direct interest in this matter, as indeed many other Members, and was now awaiting US implementation of the results of its own "Zeroing" case (DS294) against the United States. The EC trusted that the outcome of the softwood lumber 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.

86. The representative of Thailand said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work on this case, and wished to warmly welcome the findings and conclusions of the Appellate Body in its Report. Thailand had participated as a third party in this dispute as a result of its long-standing concern about the use of the "zeroing" methodology in anti-dumping proceedings. In Thailand's view, the "zeroing" methodology utilized by the United States was inconsistent with both the spirit and the substance of Article VI of GATT 1994 and the Anti-Dumping Agreement. Indeed, the Anti-Dumping Agreement, in particular Articles 2.4.2 and 2.4, did not permit the use of "zeroing" in any circumstance, be it with an average-to-average or transaction-to-transaction methodology. Thailand, therefore, fully agreed with the Appellate Body's findings and conclusions in this dispute. In particular, Thailand welcomed the Appellate Body's finding that the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement was an overarching obligation informing those that were more specific under that provision, such as Article 2.4.2. Thailand also believed that the Report served as a timely reaffirmation by the Appellate Body of its recent ruling in the case: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins", in which it had recognized the intrinsic unfairness of the "zeroing" practice without differentiating between different types of "zeroing". In this regard, Thailand agreed with the Appellate Body's finding that the use of "zeroing" was "difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4".

87. The representative of Canada said that his delegation had not had a chance to review the US statement made at the present meeting and, accordingly, it would forward it to capital for further consideration. If necessary, Canada would comment on the US statement at a later date. At this point, he wished to note three points. First, the United States appeared to be re-litigating this case before the DSB. And, in doing so, it had taken some of the Appellate Body's statements out of context. For example, the Appellate Body did not simply dismiss the 1960 Group of Experts Report out of hand on the basis that it had been drafted in 1960. Rather, the Appellate Body had noted that it had dealt with these same arguments before in the original case. Moreover, the Appellate Body had noted that the "United States acknowledged that the historical materials did not constitute 'travaux préparatoires'" and that these Reports had been made long before the entry into force of the Anti-Dumping Agreement. Second, he wished to turn to the United States' "textual" critique of the Appellate Body Report. What the United States had proposed in this case and continued to assert

now: that the phrase "margins of dumping" could have two different meanings in respect of the two primary methodologies set out in the first sentence of Article 2.4.2. The Appellate Body had found the proposition intellectually and systemically untenable. Third, the United States had continued to assert its position in respect of the interpretive value as "context" of the WA-T methodology. What was this argument? Simply that an exceptional methodology provided for in the second sentence of Article 2.4.2 defined the scope of the primary methodology in the first sentence of Article 2.4.2. In support of its argument, the United States had proposed hypotheticals that it had never tested. That was, the United States had argued, and still continued to argue, that the obligations of Members under Article 2.4.2 were to be determined on the basis of the scope of an untested exception. The Appellate Body had appropriately found that such reliance was incorrect from an interpretative perspective. It had also found that the US argument in this respect had been premised on an "untested hypothetical".

88. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS264/AB/RW and the Panel Report contained in WT/DS264/RW, as reversed by the Appellate Body Report

8. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/328)

89. The Chairman drew attention to document WT/DSB/W/328, 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/328.

90. The DSB so agreed.

9. Swearing-in ceremony of the newly appointed Appellate Body member

(a) Statement by the Chairman

91. The Chairman, speaking under "Other Business", said that as he had announced at the outset of the meeting, he wished to inform delegations that the swearing-in ceremony of the newly appointed Appellate Body member Mr. David Unterhalter would be held on Thursday, 28 September 2006 at 6 p.m. in the Salle des Pas Perdus at the WTO. He said that all delegations were cordially invited to attend the ceremony.

92. The DSB took note of the statement.