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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.47)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.47)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.22)

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.47)

2. The Chairman drew attention to document WT/DS176/11/Add.47, 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 13 October 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.

4. The representative of the European Communities said that, at the previous DSB meeting, the United States had asserted that it was second to none in providing strong protection for intellectual property rights, and that the United States' commitment and efforts to comply with the DSB's rulings could not undermine the authority of the TRIPS Agreement. The EC was pleased to hear the US statement, but had difficulties reconciling that statement with the present situation with which Members had been confronted, not just in this dispute but also in the Section 110 dispute. A commitment was one thing, living up to that commitment was another. For more than four and a half years, the United States had not made any serious efforts to implement the DSB's rulings and recommendations which had condemned Section 211 for not respecting the obligations of national treatment and most-favoured-nation treatment. This month again, the United States could not do better than submit a status report, which but for the date of circulation, was absolutely identical to the report submitted in the previous month and actually to all reports that had been submitted since March 2005.

5. The truth was that the failure to respect these core principles of the TRIPS Agreement several years after the WTO condemnation had sent the message that the disciplines of the TRIPS Agreement could be ignored. This was necessarily damaging especially since it had come from one of the main promoters of that agreement. To make it worse, the recent decision of the US administration to refuse the specific licence that would have allowed the renewal of the registration of the Havana Club mark, once again had sent the wrong message. The renewal would not have given away or granted rights. It would have only preserved the status quo and would thus allow the US courts to decide, in pending proceedings, who was the legitimate owner of that mark. What purpose was the United States pursuing by refusing the very possibility to defend potential rights to a mark in a court of law? What was even more worrying was the US explanation that this decision had been made on foreign policy grounds. Ownership of intellectual property rights should be decided in courts on the basis of the rule of law and free from the interference of political considerations. If this US policy were to be followed by other countries, it would seriously undermine the efforts to promote rules-based protection of intellectual property rights worldwide. Therefore, the EC invited the United States to reconsider its position, in light of its seriously damaging effects. Finally, the EC urged the United States, the only WTO Member that consistently did not comply with panel rulings under the TRIPS Agreement, to bring itself into compliance.

6. The representative of Cuba regretted that, after more than four years, during which the DSB had examined, month after month, the implementation of the recommendations and rulings in this dispute, the United States had continued to present status reports such as the one submitted at the present meeting, which suggested that there was not the slightest possibility that a solution would be found. Repeated denunciations of non-compliance, exhortations and systemic concerns expressed by Members had been ignored by the United States. This showed complete disregard for the interests of Members. At the previous DSB meeting, the EC had denounced the politicization of the recent decision of the US Patent and Trademark Office to reject the application for renewal of registration of the Havana Club trademark by its owner, the Cuban company CUBAEXPORT. The federal entity had followed instructions from the Office of Foreign Assets Control (OFAC) of the US Department of Treasury, which had previously rejected the licence application filed by CUBAEXPORT to renew the registration of the Havana Club trademark, on the grounds that the granting of such a licence was inconsistent with the US government policy. With such conduct, the decisions adopted by US State agencies and institutions were, once again, contrary to the legislation and the international agreements to which the US government was party. Not only political interests were behind that decision, but also pettier interests, namely those of the Bacardi company in appropriating the prestigious and internationally recognized Havana Club brand, and in trying to eliminate its competitors in a dishonest and unscrupulous way. The company had spared neither effort nor expense to achieve that aim. The Bacardi company had spent vast amounts of money on lobbying and donating generous sums to the Republican Party, including Senator Mel Martínez, who had been accused by a political corruption watchdog group called Citizens for Responsibility and Ethics in Washington (CREW) of accepting more than US$60,000 from the Bacardi company. This was how the rum company ensured that, in October 1998, the US Congress had approved the insertion of a clause in the Federal Budget Bill: i.e. Section 211, also known as the Bacardi Law, which had been declared to be inconsistent with WTO rules. This was also how the company ensured that the US Patent and Trademark Office had denied renewal of the Havana Club trademark to its legitimate owner, so that it could announce on 8 August 2006 that it would be re-launching the brand in the US market.

7. It was regrettable that the United States benefited individual interests while jeopardizing the interests of hundreds of US businesspersons who owned trademarks registered in Cuba. Section 211 could set a precedent for other governments to enact laws based upon it, thereby violating the Paris Convention, the TRIPS Agreement and other international rules in this sphere and departing from the classical doctrine on which these Agreements had been found. Consequently, this would lead to the nullification or impairment of the legitimate rights of the affected Members. Among the bills that had been presented to the US Senate and the House of Representatives, there was a bipartisan bill

endorsed by several senators that would invalidate Section 211 and reflected the general feeling of the US business sector, which believed that disregard for trademark rights was a tremendous heresy. Cuba reiterated its call for prompt and effective action to enforce the letter of the WTO Agreements before it was too late. Cuba considered that the only possible solution was to repeal Section 211 and request that the United States immediately and unconditionally implement the rulings and recommendations adopted by the DSB.

8. The representative of Brazil said that, in view of the systemic relevance of the issue, his country wished to reiterate its concerns about the continuation of the non-compliance situation in this dispute. The Panel and the Appellate Body Reports in this dispute had been adopted by the DSB in January 2002, more than four and a half years ago. However, no implementing action had been taken thus far. Based on the status report submitted by the United States, it appeared that there was no tangible sign that the matter would be resolved soon. This situation could not be reconciled with the principle of prompt implementation of the DSB's rulings and recommendations, a cornerstone of the multilateral trading system. This also impaired the credibility of the dispute settlement mechanism as an effective means to solve trade problems, irrespective of the parties involved. In light of these considerations, Brazil urged the United States to take the necessary steps to implement the relevant DSB's rulings and recommendations.

9. The representative of India said that his country wished to thank the United States for the situation report and its statement. However, India felt compelled again to stress that the principle of prompt compliance with the DSB's rulings and recommendations appeared to be missing in this dispute. This was a matter of systemic concerns, especially since almost five years had elapsed after the adoption of the DSB's recommendations and rulings in this dispute. India again urged the parties to this dispute to inform the DSB as to how they intended to fulfil the objective of prompt settlement.

10. The representative of the Bolivarian Republic of Venezuela said that his country wished to thank the United States for its status report. His country thanked Cuba for its statement and wished to be fully associated with that statement. Cuba's complaint was legitimate since the DSB had demonstrated that Section 211 was inconsistent with the WTO Agreements and the fundamental principles of the WTO. As his delegation had stated on several occasions, his country was deeply concerned about the continued failure by the United States, as well as other Members, to comply with the DSB's recommendations. This not only had serious systemic implications, but also undermined the credibility of the DSB and, even worse, the credibility of the WTO since it had set a serious precedent that could adversely affect other Members in future, in particular it could affect developing countries for whom the WTO dispute settlement system was an essential element in providing security and predictability to the multilateral trading system. The attitude of the United States not only undermined the DSU, it also affected the basic pillars on which the TRIPS Agreement and the Appellate Body rested. Moreover, that demonstrated the arbitrariness and discretionary attitude of the United States, which his country had condemned at the previous DSB meetings, and had understandably made his country reluctant to negotiate and assume new commitments in the DSU negotiations, as well as in the Doha Round negotiations in general. At the same time, his country was particularly concerned at the recent decision by the US Patent and Trademark Office to reject the application for renewal of the registration of the "Havana Club" trademark submitted by the Cuban company that owned it, on the basis of the arbitrary and illegal Section 211. This situation had been brought to the attention of the DSB by Cuba some time ago – so that now Members were faced with yet further evidence that the obvious reason for the US delay in compliance with the DSB's recommendations and hence with the WTO rules, was to enable a powerful American company to appropriate the Havana Club trademark. Unfortunately, the United States had shown, once again, that it had little intention of finding a compromise solution to the matter. His country, nevertheless, repeated its call for a prompt solution to this dispute, a solution which would be satisfactory to the parties and which, above all, would respect the Agreements that constituted the *raison d'être* of the WTO.

11. The representative of China said that his country thanked the Unites States for its status report and its statement. However, it was regrettable that the US status report did not provide new information as to when this matter would be resolved to the satisfaction of the parties and other WTO Members. As other delegations had stated, it had been more than four years since the adoption by the DSB of both the Panel and the Appellate Body Reports pertaining to this dispute, but the implementation in this dispute was still before the DSB under discussion. Although China was conscious of possible difficulties involved in the implementation, the undue delay of full implementation of the DSB's rulings had caused systemic concerns about the functioning and efficiency of the dispute settlement system. As provided for in Article 21.1 of the DSU, prompt compliance with the DSB's recommendation or rulings was essential to ensure effective resolution of disputes to the benefit of all Members. Therefore, China again urged the United States to fully implement the decision of the DSB pertaining to this dispute as soon as possible.

12. The representative of Bolivia said that, once again, Members had heard the US status report and yet again, Bolivia noted with concern that there had been no progress towards compliance with the DSB's rulings and recommendations, which provided that the restrictions set forth in Section 211 should be lifted. This was a source of concern for Bolivia because the failure to comply with the DSU provisions, which had been intended to provide Members with certainty, undermined the credibility of the WTO. As Bolivia had stated on previous occasions, this non-compliance, which had been going on for more than four years, drew the attention of governments and other social actors to the functioning of the multilateral trading system, in particular in the area of intellectual property rights. Once again, his delegation wished to join other Members in urging the United States to implement the DSB's rulings and recommendations in this dispute since significant injuries were being caused to a developing country Member.

13. The representative of Uruguay said that her country recognized the legitimate right of the parties to the dispute to seek a mutually acceptable solution that was consistent with the covered agreements. Nevertheless, Uruguay shared the systemic concerns expressed by Cuba, Brazil, India, Venezuela, China and Bolivia regarding the importance for Members to comply promptly with the DSB's recommendations, which was an essential element in ensuring the smooth operation and the credibility of the dispute settlement system, as well as the legal certainty and the effective balance of rights and obligations provided under the multilateral trading system. Members must, therefore, do their utmost to comply promptly with the DSB's recommendations.

14. The representative of Argentina said that, like others, his country also wished to thank the United States for its status report. In light of the current situation and, in particular since a long period of time had elapsed following the adoption of the DSB's recommendations and rulings in this dispute, Argentina requested that the United States undertake the necessary efforts in order to implement those recommendations and rulings as soon as possible.

15. The representative of the United States said that, for several meetings now, the EC had been criticizing the US commitment to intellectual property rights and to the TRIPS Agreement. The EC's comments were regrettable, and its criticisms were completely unfounded. It was of course true that the United States had been and remained a strong advocate of substantial protections for intellectual property internationally. The EC, and its member States, were well placed to be aware of this. However, it was equally true – and once again, the EC knew this very well – that the United States was second to none in providing strong intellectual property protection within its own territory. The United States reiterated that the US administration continued to work with the US Congress to implement the DSB's recommendations and rulings in this dispute. With respect to the comment directed at a particular trademark registration, none of the recommendations and rulings of the DSB in this proceeding related to the renewal of specific trademarks, so this was not an issue related to the implementation of the DSB's recommendations and rulings.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.47)

17. The Chairman drew attention to document WT/DS184/15/Add.47, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 13 October 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.

19. The representative of Japan said that his country noted the statement made by the United States along with its most recent status report. While Japan was encouraged that the US administration would continue to work with the US Congress to enact legislation H.R. 2473, it regretted that there had been no progress since that legislation had been introduced in the US Congress in May 2005. As his delegation had repeatedly stated before the DSB, Japan believed that a full and prompt implementation of the DSB's recommendations and rulings was essential in order to maintain the credibility of the WTO dispute settlement system. Japan wished to renew its strong hope that the US administration would accelerate its efforts to work with the US Congress in order to pass the necessary legislation without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.22)

21. The Chairman drew attention to document WT/DS160/24/Add.22, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

22. The representative of the United States said that his country had provided a status report in this dispute on 13 October 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.

23. The representative of the European Communities said that, once again, the United States had submitted before the DSB a status report empty of any meaningful content. From that report, it seemed clear that there was a total lack of progress in solving this long-standing dispute. This situation had lasted now for more than five years. If one were to judge the commitment of the United States to its obligations under the TRIPS Agreement on the basis of this dispute, the appraisal would be anything but positive. 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. The United States was failing to comply at home with the rules that it actively sought to enforce abroad. This situation of double standards created damage that went beyond the boundaries of this specific

dispute. Therefore, the EC urged, once again, the United States to provide information on the specific steps that it had taken or intended to take to solve this dispute. This situation of non-compliance had already lasted for too long. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration proceedings on retaliation.

24. 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

25. 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.

26. The representative of Honduras noted that the provisions of Article 21 of the DSU set forth two objectives: first, to ensure prompt compliance with the DSB's recommendations or rulings and second, to pay particular attention to matters affecting the interests of developing-country Members. The Banana dispute was about the violation of both provisions more openly and persistently than any other WTO dispute. He noted that the Bananas III dispute was a result of two GATT panel rulings, which had not been enforced. This dispute had been initiated by Honduras and some other Members in 1996 and had perpetuated that unfortunate legacy. Following the adoption of the Bananas III report by the DSB in 1997, the EC had modified its regime in a way that had disregarded the DSB's rulings. Even when the procedures for suspension of concessions and the compliance procedures under Article 21.5 of the DSU had been initiated, the EC had persisted in its refusal to comply. The EC had agreed with the United States and Ecuador to a series of measures, to be phased over several years, in an effort to resolve the Bananas III dispute. However, Honduras was not a signatory to such agreement and had continued to reserve its rights to refer this matter to an Article 21.5 panel, if necessary. Given that the EC agreement called for a waiver, additional waiver requirements had been established. As of 2006, which had marked the final stage of the EC multi-year agreement, the EC had again implemented a series of measures which had disregarded its obligations under the Bananas III dispute, and was in breach of its commitments made to resolve this long-standing dispute. Thus, Honduras was still awaiting the EC's compliance with the Bananas III report, nearly a decade after its adoption. Therefore, should Honduras' rightful claim go without redress, this decade-long DSU action would result in a WTO-illegal discrimination, which proved to be more adverse to MFN interests than the very measures that had been challenged in this dispute. Such an outcome would discredit the key objectives of the DSU, cast doubt on the system in general, and would cause irreparable harm to Honduras and other countries in the region. His country accordingly renewed its request that the DSB enforce the rulings and recommendations of the Bananas III dispute so as to ensure that particular attention was paid to Honduras and the other Latin American countries that had sought the support of the DSB.

27. The representative of Panama said that, for almost a year now, the EC had insisted that the "monitoring process" was the appropriate framework in which to discuss this matter. Over that lengthy period of time, which would have been sufficient to reach a satisfactory solution had there been the will to do so, the "monitoring process" had monitored a number of developments – none of them was favourable. Thus, the following developments had been monitored: (i) month after month market gains by the ACP countries had exceeded trade by MFN suppliers by a factor of 2.5, according

[1] WT/DS27.

to Eurostat information; (ii) the EC prices had dropped by almost 35 per cent compared with 2005 levels, if one excluded the tariff of €176/mt that was paid to the EC Treasury; (iii) massive increases occurred in amber box banana subsidies in the EC, which would be financed through the onerous tariff being paid by the countries concerned; (iv) inevitably, unlimited duty-free access for ACP countries was about to become a reality; (v) the Commission had repeatedly confirmed that, in the short-term, it was not prepared to take remedial action regarding MFN access; (vi) the Commission had repeatedly refused to reveal the bound tariff to which Panama's bananas were now subject. The situation that he had described summarized the true meaning of the EC's assertion that it remained open to addressing the concerns of Latin American suppliers under the monitoring process. After eleven long months, the overriding objective of the monitoring process was clearly to force Latin American countries into resignation. Since Panama's banana exports were vital to its rural communities' economic and social well-being, his country could not afford to become resigned in this respect. Consequently, Panama, once again, joined Honduras and called for prompt and full compliance by the EC, in accordance with Article 21 of the DSU.

28. The representative of Nicaragua said that since the previous DSB meeting in September, there had been mounting evidence that the EC's discriminatory import arrangement was causing a major commercial shift away from traditional Latin American suppliers, such as Nicaragua, towards the countries that benefited from that discrimination. Two weeks ago, for example, press reports had confirmed that yet another substantial multinational investment had been made in an ACP country, in this particular instance to cover the acquisition of a well-known ACP banana marketing company. What had induced that ACP investment, and the many others in recent months, was the US$4.22/box EC tariff advantage, which ACP preferential suppliers enjoyed over countries like Nicaragua. There was no comparable investment activity in either Nicaragua or any other Latin American developing-country supplier, and no such activity was expected as long as the EC's discrimination continued. Nicaragua's view was shared by a well-known credit agency, which had issued a report a few weeks ago confirming that none of the major banana marketers had any choice now, but to shift their sourcing out of Latin America to countries where the US$4.22/box tariff did not apply. That report had been out at about the same time as a new EC Council document on bananas had been circulated confirming that ACP access benefits would multiply several-fold in another year, when unlimited duty- and quota-free access would be accorded to all ACP bananas at a US$4.22/box advantage. That meant that the discriminatory incentives that were now shifting investments and sourcing decisions away from countries like Nicaragua were about to get far worse. Since the previous DSB meeting, the Commission's response to Nicaragua's access concerns had been no different than in previous months. It has been reaffirmed, at the highest levels of the Commission, that no near-term relief of any kind would be possible for MFN suppliers. Thus, after hearing Nicaragua's urgent requests month after month, the EC's only response had been to schedule far greater discrimination for 2008 and to deny any MFN relief in the interim. If this was how Nicaragua's major trade concerns were being addressed, Nicaragua's affected sectors would have no hope of attracting investment, creating jobs or expanding its impoverished economy. Nicaragua again urged Members to join it as well as other countries in calling for a solution consistent with the obligation of compliance and the developing-country objectives.

29. The representative of the European Communities said that the EC wished to refer to its previous statements on why this matter was not an "implementation issue" covered by Article 21 of the DSU. The EC remained open to addressing the concerns of Latin American suppliers in relation to its import regime in the appropriate fora. The EC was well aware of the importance of the banana industry for Latin American countries, as well as ACP countries, and had always taken these interests into consideration. The EC was in regular contact with the WTO Members involved to discuss this issue, including the rebinding of the MFN tariff. The EC had always been and remained committed to maintaining access to its market by all banana supplying countries. Contrary to the statements made by Honduras, Nicaragua and Panama at the previous DSB meeting, which had been reiterated at the present meeting, data on overall MFN imports available to-date gave no reason to believe that such

access was not maintained. The new EC tariff had thus far resulted in an increase in imports from both MFN and ACP suppliers as compared to previous years. With regard to the statement by Panama, he said that the EC commitments did not include a commitment to "guarantee specific market shares", but only equivalent market access. The envisaged reform was by no means intended to increase subsidies to the EC banana producers or to promote the production of bananas in the EC. The objective of the reform was to bring the current aid scheme for banana producers in line with the objectives of the 2003 reform of the EC Common Agricultural Policy and to ensure that aid took into account the particularities of each of the producing regions in the EC.

30. The representative of the United States said that this item involved a dispute that had left several Members waiting for full compliance for nearly a decade following the adoption of the DSB's recommendations and rulings. The current EC banana regime had now been in place for almost one year. Serious concerns had been raised about this regime repeatedly by Members for whom the market situation had become untenable and continued to deteriorate. Yet, the United States understood that the EC had taken no steps to address the concerns. This was not an acceptable situation, especially given the great social and economic importance of this issue to many Members. The United States was continuing to hold informal discussions with interested Members to determine the most appropriate way to address the concerns with the EC's regime. At the same time, the United States strongly urged the EC to work with interested Members to resolve this dispute as expeditiously as possible.

31. The representative of Brazil said that his country wished to thank Honduras, Nicaragua and Panama for bringing this matter to the attention of the DSB. This issue had serious systemic implications and raised concerns among all Members and not only those that had a direct trade interest. Almost one year after the issuance of the Award of the Arbitrator on 27 October 2005, concerning the second recourse to Arbitration pursuant to the Decision of 14 November 2001, the EC had not yet established a definitive tariff only regime for MFN bananas. In this regard, Brazil recalled that the EC had initiated Article XXVIII negotiations, but no new MFN tariff had been rebound in the EC's Schedule. Brazil was not questioning the existence or maintenance of preferential schemes by the EC. Brazil understood, however, that MFN suppliers of bananas were entitled to a clear and transparent set of rules that would provide predictability regarding market access conditions to the EC and future investment decisions in producing and exporting countries.

32. The representative of Ecuador said that her country fully supported the statements made by Honduras, Nicaragua and Panama on the matter at issue and asked the EC to seek a definitive solution to the discrimination against MFN suppliers and illegal actions arising from the implementation of the new banana import regime. Contrary to what had been suggested by the European Commission, internal statistics of Ecuador's Ministry of Agriculture showed that since the new regime had entered into force, there had been a fall in exports from Ecuador to the EC market of almost 3 per cent by September 2006. This represented a significant decline in Ecuador's share in the EC's market. Meanwhile, exports from the ACP suppliers, which had a tariff-free quota of 775,000 tonnes, had increased by more than 18 per cent. The current tariff of €176 per tonne applied on a discriminatory basis to the MFN countries and the absence of tariff bindings had not only undermined the competitiveness of Latin American producers and exporters, but had also deprived them of any legal guarantee, while at the same time deterring potential investors and violating the obligation to maintain "at least total access for MFN suppliers", as stipulated in the Annex to the Doha waiver. If one added to this the new EC's proposal to increase domestic subsidies for the EC producers, which had currently exceeded €250,000,000 per year, the future looked bleak for MFN suppliers. Indeed, thousands of jobs, which in Ecuador depended directly on the exportation of bananas, were in serious jeopardy, and the social cost would be aggravated by serious consequences facing more than a million and a half persons who depended on this lawful activity for their subsistence. At the same time, Ecuador was one of the few countries which, having had its rights under Article XXVIII of the GATT 1994 recognized, had received no compensation for its trade losses resulting from the enlargement of

the European Union under Article XXIV of the GATT 1994. Ecuador had participated in good faith and with great interest in the good offices process set up by the Hong Kong Ministerial Conference for the purpose of achieving a comprehensive, balanced and definitive solution to the banana dispute with the EC, in spite of the fact that it would soon be one year since two Arbitrations had ruled in favour of the MFN banana exporters and had recognized that a high tariff did not maintain at least total access to the EC market for Latin American suppliers. As Ecuador had repeated throughout the good offices process conducted by the Norwegian Minister of Foreign Affairs, Ecuador had reserved its legal rights under the WTO. It should be stressed that the negotiation of the Andean Community-EU Association Agreement was a separate matter, which should not be confused with the negotiation of MFN banana exports to the EC. She noted, in this connection, a decision by Ecuador to initiate a legal dispute settlement process in the WTO to ensure that the EC complied with its commitments towards Ecuador and the MFN suppliers, and with the rulings in favour of Ecuador, by introducing a non-discriminatory tariff-only regime that guaranteed the principles of free trade on which Membership in the WTO was based and which constituted the keystone of the WTO.

33. The representative of Argentina said that, once again, Members were faced with a situation of non-compliance with the two WTO Arbitrators' decisions. The EC had stated that this matter was not an implementation issue covered by Article 21 of the DSU. However, it was difficult to accept that interpretation. As stated by other delegations, two Arbitrations had been carried out about a year ago, but the rules applied by the EC did not seem to be compatible with neither the letter nor the spirit of the Arbitrators' decisions. They rather seemed to undermine the interests and rights of MFN suppliers. In this respect, Argentina hoped that the EC would cooperate with the interested parties in an attempt to find a satisfactory solution to all Members.

34. The representative of the European Communities said that the EC had been quite satisfied with the way the good offices process had been conducted thus far with the help of Norway. The EC would have been ready to draw the necessary conclusions from this process when the representative data had been examined. It would be unfortunate if Ecuador decided not to give this process a real chance and instead opted for dispute settlement proceedings.

35. 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

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

37. The representative of the European Communities said that the United States had had until 27 December 2003 to stop the distribution of the collected anti-dumping and countervailing duties to its industry. Almost three years later, on 1 October 2006, the United States had started the distribution of the duties collected during the fiscal year 2006 that had ended on 30 September 2006. Details of that distribution had not yet been known, but the provisional estimates made available by the US Customs and Border Protection in June 2006 indicated that the distribution would exceed the amount distributed in the previous year. In addition, this distribution would, for the first time, treat imports subject to anti-dumping measures differently depending on their origin. Duties collected on products from NAFTA partners would not be distributed following an order of the Court of International Trade ruling that the Byrd Amendment could not apply to them. It went without saying that this did not solve the problem of compliance for the WTO Membership as a whole. The US Congressional Budget Office had also foreseen that the distribution of the anti-dumping and

countervailing duties would continue until at least the fiscal year 2010, starting on 1 October 2009. As long as those transfers continued, the United States would be in breach of Articles 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement and full implementation would still have to be delivered. At the previous DSB meeting, the United States had denied again its obligation to take further steps so as to stop immediately the distributions under the CDSOA by asserting that it had taken all steps to bring itself into compliance with its WTO obligations. This actually meant that the United States granted itself the right to comply with the DSB's rulings at some undetermined date in the future regardless of the Members' duty to comply promptly with the DSB's rulings. The FSC dispute where the US Congress had finally put an end to WTO-illegal grandfathering periods 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 again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports in this dispute.

38. 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 eight months ago – that it had "taken the actions necessary to implement the rulings and recommendations" in this dispute was not accurate. Canada, therefore, called on the United States to resume the submission of status reports and to repeal the Byrd Amendment.

39. The representative of Japan said that his country had to reiterate its disappointment that the United States, once again, had not submitted a status report this month regardless of its statements in the previous DSB meetings. Despite the enactment of the Deficit Reduction Act of 2005, illegal distribution was continuing under the transitional clause of the CDSOA. Japan was convinced that, as long as this situation did not change, the United States had not fully implemented the DSB's recommendations and rulings. The United States shall take the necessary steps to stop immediately illegal distribution under the CDSOA. Japan urged the United States to provide status reports and to comply fully with the DSB's recommendations and rulings as soon as possible. Japan reserved all its rights under the DSU until the full implementation by the United States had taken place.

40. The representative of Brazil said that his country wished to thank Canada, the EC and Japan for bringing, once again, this matter to the attention of the DSB. He reiterated that Brazil did not take issue with the repeal of the Byrd Amendment as such. This was a rather late, but still welcome action by the United States. Brazil could not, however, accept the statement that this prospective repeal alone meant that the United States had fully complied with the DSB's rulings and recommendations in the present dispute. Brazil and others had been urging the United States to present the rationale behind its statement that the issue had been resolved within the meaning of Article 21.6 of the DSU. But no reply had been provided by the United States. In particular, no explanation had been given about the fact that the repeal would allow illegal disbursements to continue until, at least, October 2007. By persistently refusing to provide any explanation to sustain its allegation of compliance, the United States reinforced the perception that its assertion had no legal basis. Full compliance on the part of the United States would only come through the complete elimination of all disbursements under the Byrd Amendment. 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.

41. The representative of China said that his country thanked and supported the EC, Canada and Japan for raising this item at this meeting. China shared the views expressed by the previous speakers that the implementation issue had not been resolved in this dispute within the framework of Article 21

of the DSU. It was clear that a legislative provision providing for prospective repeal of the WTO-inconsistent Byrd Amendment in October 2007 had not resulted in full compliance with the DSB's rulings. Implementation was critically important to ensure the credibility and efficiency of the dispute settlement system. Should the prospective repeal of a WTO-inconsistent measure be treated as equal to immediate compliance, the legal basis of the DSU regarding prompt and full compliance with the DSB's recommendations and rulings would be greatly undermined. Therefore, China wished to join the previous speakers in urging the United States to comply fully and promptly with the DSB's rulings.

42. The representative of India said that his country wished to thank Canada, the EC and Japan for raising this issue at the DSB again. Unfortunately, India was still awaiting a response from the United States to the question put by India at earlier DSB meetings as to how continued disbursements of duties collected on imports entering the United States squared up with its compliance obligations. Clearly, the United States needed to do more than to reiterate its indefensible position on compliance, in the face of the new administration action based on the very CDSOA that it admitted had been found inconsistent with WTO rules, and asserted that it had been withdrawn. Such unilateral action undermined the WTO dispute settlement system. India, therefore, again urged the United States to inform the DSB of the steps it proposed to take to ensure full compliance, and reiterated its request, that the United States resume submitting status reports in this dispute.

43. The representative of Thailand said that his country thanked Canada, the EC, and Japan for continuing to bring this item before the DSB. Thailand remained disappointed at the US continued illegal disbursement of funds under the CDSOA, and at its continued refusal to submit any status report on its outstanding implementation in "US – Continued Dumping and Subsidy Offset Act of 2000". At the present meeting, Thailand must therefore repeat its call for the United States to cease these illegal disbursements, to immediately repeal the Byrd Amendment, and to resume providing status reports in relation to this dispute until such actions had been taken and this matter had been fully resolved.

44. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. With respect to the comments regarding further status reports in this matter, as it had already been explained, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. Those Members who had inscribed this item on the agenda of the present meeting were, of course, free to do so, but the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

45. The DSB took note of the statements.

4. China – Measures affecting imports of automobile parts

(a) Request for the establishment of a panel by the European Communities (WT/DS339/8)

(b) Request for the establishment of a panel by the United States (WT/DS340/8)

(c) Request for the establishment of a panel by Canada (WT/DS342/8)

46. The Chairman proposed that the three sub-items to which he had just referred be considered together. He recalled that the DSB had considered these matters at its meeting on 28 September 2006 and had agreed to revert to them. First, he drew attention to the communication from the European Communities contained in document WT/DS339/8 and invited the representative of the European Communities to speak.

47. The representative of the European Communities said that, for the sake of time, he would not repeat the reasons which had forced the EC to request the establishment of a panel on China's measures on the import of automobile components. At the previous DSB meeting, the EC had explained the fundamental concerns raised by China's measures and all details were contained in the EC's request for the establishment of a panel to which he had referred. The present meeting was the second time that the EC's request had been submitted before the DSB, as was the case with the requests submitted by Canada and the United States. As the matter raised in the three requests was the same, the EC requested that a single panel be established to examine the three complaints pursuant to Article 9.1 of the DSU.

48. The Chairman drew attention to the communication from the United States contained in document WT/DS340/8 and invited the representative of the United States to speak.

49. The representative of the United States said that, as discussed in more detail at the previous DSB meeting, all vehicle manufacturers in China that used imported parts in the assembly of vehicles must provide specific information about each vehicle they assembled, including a list of the imported parts to be used, and the value and supplier of each part. If the number or value of imported parts exceeded specified thresholds, China assessed a charge on each imported auto part that was equal to the higher tariff on a complete motor vehicle, rather than assessing the lower tariff for the auto part. These measures discouraged auto manufacturers in China from using imported parts in the assembly of new vehicles. Contrary to China's suggestion made at the previous DSB meeting, the measures could not be justified as intended to avoid circumvention. The United States renewed its request that the DSB establish a panel to resolve this dispute. The United States further requested that a single panel be established to examine the US, the EC and Canadian complaints in accordance with Article 9.1 of the DSU.

50. The Chairman drew attention to the communication from Canada contained in document WT/DS342/8 and invited the representative of Canada to speak.

51. The representative of Canada recalled that, at the DSB meeting on 28 September 2006, her country had presented its first request for the establishment of a panel in this matter. Canada had done so because of its concerns with certain Chinese charges on imported automobiles parts and related administrative measures that had given rise to advantages for domestic production. Canada believed that these measures were not in conformity with China's commitments and obligations under the WTO Agreement. Canada had already set out its reasons for proceeding with this case in its request for the establishment of a panel, and she wished to refer Members to Canada's request circulated on 18 September 2006 in document WT/DS342/8. The EC and the United States had also made separate requests for a panel. For the reasons set out in its panel request, Canada asked, once again, that the DSB establish a panel pursuant to Article 6 of the DSU in order to resolve this dispute.

52. The Chairman invited the representative of China to speak.

53. The representative of China said that his country had fully articulated its position on this matter at the DSB meeting held on 28 September 2006 and, in the same spirit as expressed by the EC, the US and Canada in order to save time, China would not repeat its position at the present meeting. China was greatly disappointed that the United States, the EC and Canada had ignored China's arguments and good faith to resolve the dispute under discussion through consultations and had decided to proceed with their requests for a panel for the second time, an action that was unproductive for an appropriate solution to the dispute. China would defend its position and interests before the panel and remained confident that China's relevant measures were consistent with its accession commitments and the relevant WTO rules. Although it was deeply regrettable that the above-mentioned Members had insisted in pursuing their panel requests, China would respect any decision the DSB might take on the possibility of establishing a single panel to examine the three complaints in accordance with Article 9.1 of the DSU.

54. The DSB took note of the statements and agreed to establish a single panel, pursuant to Article 9.1 of the DSU, with standard terms of reference, to examine the complaints by the European Communities, the United States and Canada.

55. The representatives of Argentina, Australia, Japan, Mexico and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

5. United States – Measures relating to shrimp from Thailand

(a) Request for the establishment of a panel by Thailand (WT/DS343/7)

56. The Chairman recalled that the DSB had considered this matter at its meeting on 28 September 2006 and had agreed to revert to it. At the present meeting, he drew attention to the communication from Thailand contained in document WT/DS343/7, and invited the representative of Thailand to speak.

57. The representative of Thailand said that the DSB had first examined Thailand's request for the establishment of a panel pertaining to this dispute on 28 September 2006. Thailand's request was circulated to Members as document WT/DS343/7 and, at the present meeting, Thailand again requested that the DSB establish a panel to examine the matter described in that document. He would not reiterate the specifics of Thailand's request, but wished to emphasize that the United States' imposition of the WTO-inconsistent continuous bond requirement and its utilization of "zeroing", repeatedly outlawed by the Appellate Body, were endangering both the livelihood of Thailand's shrimp farmers and the existence of its recovering shrimp industry, which was one of the key sectors of Thailand's economy and its development. Unfortunately, in the period between the first consideration by the DSB of Thailand's panel request and now, the United States had failed to address Thailand's concerns. Therefore, Thailand had no choice but to seek recourse to dispute settlement, and requested the establishment of a panel to resolve this matter.

58. The representative of the United States said that his country would not repeat all of the points made at the previous DSB meeting concerning this matter. The United States continued to be disappointed that Thailand had chosen to pursue this matter further by requesting the establishment of a panel. Members had the right to ensure that importers paid duties owed. The United States was confident that the panel established at the present meeting would recognize this fact and would reject Thailand's claims on the bonding measures at issue.

59. The representative of India said that Thailand had identified two measures in its request for a panel on this matter. The first related to the use of the practice of "zeroing" to calculate dumping

margins. The other was the requirement imposed by the United States on importers of shrimp for a continuous bond, on which India had separately requested the establishment of a panel. India believed that the Amended Bond Directive measure was inconsistent as such with various provisions of the GATT 1994, Anti-Dumping Agreement and the SCM Agreement and, as applied to importers of warm water shrimp from six countries (including Thailand and India), was inconsistent with a number of provisions of the GATT 1994 and the Anti-Dumping Agreement. The use of "zeroing" in the final margin determination by the United States had also been repeatedly declared WTO-inconsistent by various panels and the Appellate Body. India supported the request by Thailand for the establishment of a panel in this dispute and reserved its third-party rights to participate in the Panel's proceedings

60. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

61. The representatives of Brazil, Chile, China, the European Communities, India, Japan, Korea and Mexico reserved their third-party rights to participate in the Panel's proceedings.

6. United States – Final anti-dumping measures on stainless steel from Mexico

(a) Request for the establishment of a panel by Mexico (WT/DS344/4)

62. The Chairman drew attention to the communication from Mexico contained in document WT/DS344/4, and invited the representative of Mexico to speak.

63. The representative of Mexico said that this was Mexico's first presentation of its panel request before the DSB although this was not the first time that the matter had been raised against the use of the so-called "zeroing" methodology. On several occasions, the Appellate Body had pronounced itself on the use by the United States of that methodology in practically all possible circumstances, and in every case had determined that the methodology was inconsistent with the WTO Agreements. This had been done in the "Softwood Lumber" case with respect to original investigations using a weighted-average-to-weighted-average method; in the Article 21.5 proceedings, also concerning "Softwood Lumber", with respect to original investigations using transaction-to-transaction comparisons; and in the "Zeroing" case presented by the EC with respect to administrative reviews using the methodology of comparison between weighted averages and transactions. In all these cases, the Appellate Body had identified and had appropriately applied the same coherent reasoning, which had resulted in the methodology used by the United States being found to be inconsistent with the definition of the terms "dumping" and "margins of dumping" contained in the GATT 1994 and the Anti-Dumping Agreement, inasmuch as it had disregarded or had arbitrarily altered the results of negative price comparisons and had thus failed to establish a margin of dumping for the "product as a whole". Mexico was extremely patient about initiating this proceeding, as long as there were other proceedings on the same issues, the results of which were still pending. These past cases had enabled Mexico to present a case in which the measures identified were identical in substance to those that had been previously examined by the Appellate Body. For that reason, Mexico was confident that it would obtain a favourable decision and that such decisions should also be obtained by other parties that were currently participating or seeking to participate in proceedings on similar issues. Mexico was pleased to hear that US legislation could be amended so as to eliminate the practice of "zeroing". However, there was no certainty about the scope of such a reform or the proposed time-frame for its introduction. Mexico did not rule out and, indeed, preferred voluntary compliance by Members with their WTO obligations, or else an agreed solution between Members, rather than the initiation of dispute settlement proceedings. Nevertheless, given the current circumstances faced by all Members that were subjected to the "zeroing" methodology, Mexico had no alternative but to submit a formal panel request.

64. Mexico also wished to make a few additional comments concerning the cancellation of the special DSB meeting scheduled for 13 October 2006. Although at the beginning of his statement he had mentioned that this was the first time that Mexico was presenting its panel request, he wished to take this opportunity to explain why it was the first and not the second time. He noted that Mexico had previously requested the convening of a special meeting on the same matter and had subsequently requested its cancellation. He recalled that Mexico had held consultations, starting on 5 Janauary 2005, with the United States on some of the measures referred to in its current panel request. Since then and up to the present date, Mexico had patiently awaited the outcome of other dispute settlement proceedings dealing with the practice of "zeroing", in the expectation that, among other things, this practice would be declared inconsistent as such, and that ultimately Mexico would not have to resort to the dispute settlement mechanism. However, the precedents that had been established, though favourable, made it necessary for Mexico to submit this request. It was for that reason that, after waiting more than one year and ten months, Mexico had considered it important to initiate this proceeding without delay, using all the facilities offered by the DSU for that purpose, including the request for a special DSB meeting. Once Mexico's request for a special meeting had been made, it had been drawn to its attention that the Spanish-language request, despite the submission of a courtesy translation, had posed certain difficulties in terms of its translation into English. In order to avoid any misunderstanding, Mexico had agreed to submit the new request, which was before the DSB at the present meeting and which, without changing the substance of the claims, Mexico had hoped, would facilitate translation of the document into English. This "new" document was also designed to obviate discussions as to whether panel requests could be amended or corrected once they had already been submitted or circulated, discussions which would only undermine these proceedings. These were the reasons which had made it necessary for Mexico to cancel the 13 October DSB meeting and to present its request at the present meeting. Mexico regretted any inconvenience that this cancellation might have caused to Members and hoped that its explanation clarified the action taken by Mexico, which in any case Mexico considered to form part of the formal dispute settlement procedures to which all Members were subject.

65. The representative of the United States said that, as his country had previously noted, the US Department of Commerce had already announced its intention to abandon the use of "zeroing" with average-to-average comparisons in anti-dumping investigations. In addition, the issue of "zeroing" in administrative reviews was currently the subject of a separate dispute. Therefore, even if a panel were established at the present meeting, the United States hoped that it would be able to work with Mexico to resolve this matter.

66. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

67. The representatives of Chile, China, the EC, Japan and Thailand reserved their third-party rights to participate in the Panel's proceedings.

7. United States – Customs Bond Directive for merchandise subject to anti-dumping/countervailing duties

(a) Request for the establishment of a panel by India (WT/DS345/6)

68. The Chairman drew attention to the communication from India contained in document WT/DS345/6, and invited the representative of India to speak.

69. The representative of India said that his country requested that the DSB establish a panel to examine the matter described by India in its request for the establishment of a panel dated 13 October 2006 contained in document WT/DS345/6. Consultations had been held with the United States in Geneva as well as in Washington and were quite constructive, but had not led to a

resolution of the issue. In view of the ongoing and escalating harm to its industry, India considered it necessary to request the establishment of a panel to resolve this matter as quickly as possible. The measures at issue included: (i) Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991, as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise subject to Antidumping/Countervailing Duties dated 9 July 2004; (ii) the document entitled "Clarification to 9 July 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases"; (iii) the document entitled "Current Bond Formulas"; and (iv) any amendments, clarifications or extensions to these measures and all related or implementing measures (together, the "Amended Bond Directive"). Prior to the Amended Bond Directive, the United States had required importers-of-record in the United States, including importers of merchandise subject to anti-dumping duties or countervailing duties to furnish continuous entry bonds ("Continuous Bonds") only for an amount equal to 10 per cent of the duties, taxes and fees paid by the importer on the same merchandise imported in the previous year as general security for compliance with customs regulations.

70. Under the Amended Bond Directive, however, the United States might require importers of certain merchandise subject to anti-dumping or countervailing duties designated by US Customs as a "Special Category" or a "Covered Case" within a Special Category to replace their existing Continuous Bonds with Continuous Bonds for a larger amount that would, in addition, cover the total estimated anti-dumping duties or countervailing duties on the value of imports of such for the previous 12 months (the "Continuous Bond Requirement"). This requirement was in addition to the obligation under the anti-dumping and countervailing duty laws of the United States to provide bonds or make cash deposits at the time of importation equal to the estimated anti-dumping or countervailing duties on imports of such merchandise. It was understood that at this time, US Customs had designated only agriculture and aquaculture merchandise as a "Special Category" and only shrimp as a "Covered Case" to which a different standard or formula for determining the bond amount will be applied. US Customs had imposed the Continuous Bond Requirement on importers of certain frozen warm water shrimp from India subject to anti-dumping duties imposed pursuant to the anti-dumping investigation with respect to imports of certain frozen and canned warm water shrimp from India and five other countries. India understood that US Customs had actually applied the Continuous Bond Requirement only to the subject merchandise. This singling out of the subject merchandise emphasized the arbitrary and discriminatory character of the Amended Bond Directive. India considered that the Amended Bond Directive measure was inconsistent as such with various provisions of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. It further considered that the Continuous Bond Requirement under the Amended Bond Directive, as applied to importers of the subject merchandise from India, was inconsistent with a number of provisions of GATT 1994 and the Anti-Dumping Agreement. A summary of the legal basis of India's claims was contained in India's request for establishment of panel (WT/DS345/6). Accordingly, India requested that the DSB establish a panel pursuant to Article 6 of the DSU to examine this matter with standard terms of reference as set out in Article 7.1 of the DSU.

71. The representative of the United States said that, as with Thailand's complaint, the United States was disappointed that India had requested a panel on this matter. As noted previously, Members had the right to ensure that importers paid duties owed. Nevertheless, the United States had been working with India in an effort to understand its concerns and to address them. In light of these efforts, the United States believed that this panel request was premature, and was unable to agree to the establishment of a panel at this time.

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

8. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/332)

73. The Chairman drew attention to document WT/DSB/W/332, 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 proposed that the DSB approve the names contained in document WT/DSB/W/332.

74. The DSB so agreed.

9. United States – Subsidies on upland cotton

(a) Statement by Brazil

75. The representative of Brazil, speaking under "Other Business", said that his country wished to make a few comments on the letter from the Director-General received on 25 October 2006, regarding the composition of the Panel established on 28 September 2006, pursuant to Article 21.5 of the DSU, pertaining to the dispute: "United States – Subsidies on Upland Cotton". The Director-General had informed Brazil of the composition of the compliance Panel in this dispute, in response to Brazil's request under Article 8.7 of the DSU. Brazil thanked the Director-General for nominating the panelists and for doing so in such a prompt fashion. In its request, Brazil had asked the Director-General to nominate the three members of the Panel in the original proceedings. Although all three members of the original Panel had been available for service in the Article 21.5 proceedings, the Director-General had called only one of the panelists back to service, and had nominated two new panelists. Brazil believed that Members should be made aware of the circumstances that had led to the Director-General's decision. In a letter to the Director-General, following Brazil's request for appointing panelists, in accordance with Article 8.7 of the DSU, the United States had objected to the re-nomination of two original panelists, on the basis that they were nationals of the third-parties to the dispute. The United States' objection was curious, to say the very least. First, the United States had not objected to these panelists in the original proceedings. Second, the United States had not objected to the nomination of these panelists as Arbitrators in the Article 22.6 proceedings in this dispute. Third, the United States had often accepted the re-nomination of third-party nationals (including government officials) as panelists in Article 21.5 proceedings.

76. Brazil was left to conclude that the United States' position on this matter had little to do with any principled objection on the participation of third-party nationals as panelists, and more to do with the fact that the original panelists had ruled against the United States in this dispute. This was a terrible precedent for the WTO. An implementing Member should not be entitled to decide that one or more original panelists that had ruled against it in the original proceedings was no longer acceptable as a panelist in compliance proceedings under Article 21.5 of the DSU. Nor did Article 21.5 of the DSU entitle an implementing Member to do so. Article 21.5 of the DSU stated that an implementation dispute "shall be decided ... wherever possible [by] resort to the original panel". The reasons were clear. Article 21.5 of the DSU provided for fast-track proceedings aimed at the rapid resolution of a lingering dispute that was already subject to DSB's rulings and recommendations. Unlike original proceedings, for which panels were given six months to issue a report to the parties, Article 21.5 of the DSU provided a compliance panel with only 90 days to issue and circulate its report to all Members. A compliance panel must do its work very quickly. To facilitate the expeditious disposal of Article 21.5 proceedings, the provision called for resort to the original panel in all but those narrow circumstances in which it was impossible for the original panelists to serve. The Appellate Body had underscored this requirement in two recent cases. In "United States – Lumber IV" (Article 21.5 – Canada) and "Mexico – HFCS" (Article 21.5 – US), the Appellate Body had emphasized the important role the original panelists played in fast-track proceedings, since they ensured an Article 21.5 panel's ability to fulfil its mandate, which included

taking full account of the factual and legal background to the expedited proceedings.[2] In the present case, the factual and legal background was reflected in a set of documents that numbered more than 2500 pages, accompanied by 589 exhibits. The evidence was clear: the United States had no principled reason to object to the continued service of two of the original panelists in this dispute. Nonetheless, the United States had noted Article 8.3 of the DSU, and its apparent "right" to object to the service of third-party nationals. One should not be fooled. While Article 8.3 of the DSU allowed Members to object to the service of third-party nationals as panelists, Article 21.5 of the DSU trumped this right of objection. The Appellate Body had ruled that the phrase in Article 21.5 of the DSU "recourse to these dispute settlement procedures" meant that other provisions of the DSU must be "interpreted in the light of Article 21.5" and, as need be, "adapted" to meet the needs of that provision.[3]

77. The option under Article 8.3 to object to the continued service of original panelists who happened to be third-party nationals was one of those rights that must be "adapted" to meet the needs of Article 21.5. Should Article 8.3 override the requirement of Article 21.5 of the DSU that directed disputes over implementation to be taken up by the original panel, the same precedent could be invoked in respect of other provisions of the DSU. In this case, implementing Members could always object to the participation, in Article 21.5 proceedings, of panelists who ruled against them in the original dispute. Brazil said that, given the precedent created by the US objection in the "Cotton" case, any Member, including Brazil, would feel entitled in future to resort to similar actions whenever its implementation measures were challenged under Article 21.5 of the DSU. Brazil wished to thank the new panelists for accepting this responsibility and availed itself of this opportunity to express its full confidence in their competence and capacity to carry out the task they had been entrusted with. While Brazil welcomed their commitment to service, Brazil did not welcome the precedent set by the United States. The interests served by the United States' actions in this dispute were decidedly not systemic. They were contrary to the entitlement Brazil and indeed all Members had to the expeditious resolution of a dispute, which the United States had lost and had stubbornly refused to implement.

78. The representative of the United States said that normally the DSB did not hear Members make statements when the Director-General composed a panel. The United States noted that there were factual inaccuracies in Brazil's statement, but that it would not go into those at the present meeting, fully respecting the confidentiality of the panel composition process. But, in light of Brazil's comment regarding its "systemic" concerns, the United States said the following. The systemic issue in composing this panel was simple. Under Article 8.3 of the DSU, "citizens of members whose governments are ... third parties ... shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise" (emphasis added). The United States had not agreed otherwise. The United States had sought to agree with Brazil on replacement panelists. The panel selection process envisaged in Article 8.6 of the DSU would have given the parties the opportunity to work together to identify mutually acceptable candidates. That would not only have been appropriate in a dispute of this significance and sensitivity, but was the preferred approach under the DSU. Regrettably, Brazil had chosen to go directly to the Director-General to compose the panel. The issue of third-party nationals not serving on a DSU Article 21.5 panel was not new. For example, in DS257, the "Lumber IV" dispute, the United States had informed Canada that, under Article 8.3 of the DSU, it could not accept a third-party national serving on the Article 21.5 panel. Similarly, in DS207, the "Chile – Price Bands" dispute, Chile had objected to the participation of a panelist from the original proceeding because he was a third-party national. The difference between those disputes and the present one was that, in those disputes, the United States, Canada, Chile, and Argentina had been all able to cooperate to find replacements for panelists who were third-party nationals. But in the present dispute Brazil had rejected US efforts to cooperate. Therefore, the real systemic issue here

[2]Appellate Body Report: "United States – Lumber IV"(Article 21.5 – Canada), para. 71; Appellate Body Report: "Mexico – HFCS" (Article 21.5 – US), para. 121.

[3]Appellate Body Report: "United States – FSC"(Article 21.5 II – EC), para. 59.

was whether the Director-General, in exercising his discretion under Article 8.7 of the DSU to appoint "panelists whom the Director-General considers most appropriate" (emphasis added), could disregard the dispute settlement procedures set out in the DSU, particularly Article 8.3 of the DSU. In the US view, it would never be "appropriate" for the Director-General to act contrary to the express terms of the DSU. The United States thanked Director-General Lamy for composing the Panel appropriately.

79. The DSB took note of the statements.