WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/261
6 March 2009

(09-1161)

Dispute Settlement Body
22 December 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 December 2008

Chairman: Mr. Mario Matus (Chile)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.73)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.73)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.48)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.11 – WT/DS292/31/Add.11 – WT/DS293/31/Add.11)

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.73)

2. The Chairman drew attention to document WT/DS176/11/Add.73, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 11 December 2008, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced during this past congressional session, in both the US Senate and the US House of Representatives. Since the US status report, the US Congress had completed its work for this calendar year. A new Congress would convene in January 2009, and the US administration would work with that Congress with respect to appropriate statutory measures to resolve this matter.

4. The representative of the European Communities said that, at the present meeting, the United States was presenting its seventy-third status report on its lack of progress in the implementation of the DSB's ruling in this dispute. In fact, since the condemnation of Section 211 in February 2002, the United States had failed to take any steps to implement the DSB's ruling. The EC hoped that the United States would put itself into compliance with its TRIPS obligations before the status report number reached a 3-digit figure.

5. The representative of Cuba said that the current year was drawing to a close, and every month his country had been denouncing US non-compliance in the Section 211 case. For more than six years now, the US administration had been repeating that it was working with the US Congress to comply with the DSB's recommendations and rulings. Since the circulation of the Appellate Body Report in January 2002, the parties clearly had not made the slightest step towards settling this dispute. Cuba deeply regretted that, year after year, requests by Members that the provisions of the TRIPS Agreement be respected had been ignored. Cuba, for its part, would continue to insist on compliance with the DSB's recommendations and rulings in the Section 211 case until the dispute had been settled. Article XVI:4 of the Marrakesh Agreement clearly stated that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations under the

WTO Agreements. Consequently, there was nothing to justify the US attitude of indifference to the decisions of the DSB and the complaints raised in the DSB meetings. The shortcomings of the dispute settlement mechanism, however few there might be, pointed to an urgent need to reform the system. In Doha, Members had agreed to carry out negotiations to "improve and clarify the Dispute Settlement Understanding". And yet, this was one of the areas that lagged behind in its work programme. At the November regular DSB meeting, certain Members expressed hope that with the election of a new US President, this dispute would definitely be settled. The United States had referred to its history of compliance. In the area of international law, Cuba had a lot to say to the United States about compliance. The non-complying Member and all other Members present at this meeting knew very well what Cuba was referring to. One would run out of time if one were to talk about it in this forum. The US history of non-compliance, where Cuba was concerned, was hardly encouraging. However, Cuba believed that the new US administration should review its intellectual property policies and bring its legislation into conformity with the TRIPS Agreement which, moreover, protected the interests of right-owners in the more developed countries. The more sensitive issues like intellectual property on the Internet and free trade agreements, which had been designated as priorities for the new US government, would involve considerable efforts. On the other hand, revoking the absurd and retrograde Section 211 was something that could be done rapidly if there was the political will to do so.

6. The representative of Thailand said that his country thanked the United States for its status report. Like previous speakers, Thailand remained concerned about the systemic implications of this dispute. The integrity of the rules-based multilateral trading system was undermined by non-implementation of the DSB's rulings and recommendations. Therefore, Thailand urged the United States to take all necessary steps to comply with its obligations under the TRIPS Agreement as soon as possible.

7. The representative of the Bolivarian Republic of Venezuela said that, once again, his delegation had taken note of the US status report. His country wished to be fully associated with the statement made by Cuba and joined Cuba in expressing concerns, as a country that respected the rules and values of democracy, at the repeated failure by the United States to comply with the DSB's ruling in the case at issue. His country was concerned because this non-compliance demonstrated a lack of respect, and in this particular case it was a lack of respect for Cuba, and for the North American people, who respected democracy, trusted in their representatives to reinforce that democracy, and in the WTO as well as its Members. His country could not disassociate the WTO from the United Nations, an institution which grouped together practically all countries of the world, and 185 of whose Members, as recently as of October 2008, had voted once again against a blockade which, in the name of an alleged quest for democracy, violated the human rights of the Cuban people. The United States, by seeking to impede the development of foreign investment in Cuba associated with the international marketing of Cuban products whose trademarks carried a certain amount of prestige at the world level, was causing Cuba irreparable damage.

8. If it was true that trade was fundamental to development, then the United States was the main cause of the sufferings of the Cuban people. The United States had been pushing forward the deadlines granted for the revocation of Section 211. The United States had been acting ambiguously and persistently; but his country refused to let the US tactics to become a habit, and still less to accept it, because in many spheres of international relations, in an alleged attempt to ensure compliance with the law and to establish its own vision of democracy, which was always whatever suited its interests, it violated the very principles of democracy and laws that it purported to uphold. In the DSB, Cuba challenged those US actions. Thus, for six years now there had been a firm decision taken by a body that member countries were seeking to reinforce – convinced as they were of the advantages of multilateralism – and yet there was non-compliance. Once again, the message to the world was "do as I say, but not as I do". His country wished to express, once again, its concern at the systemic damage being done to this institution while in other areas of the WTO, the United States repeatedly used that argument to attain its objectives. For all of these reasons, his country urged the United States to act

without further delay and to take real and concrete measures thereby complying with its obligations under the TRIPS Agreement.

9. The representative of China said that his country thanked the United States for its status report and the statement made at the present meeting. However, it was very regrettable that, once again, there was no indication of any progress towards implementation. As previous speakers had correctly mentioned, the current situation seriously damaged the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. China hoped that the US Government and the new US Congress would realize that putting an end to this situation was in the interest of not only other Members, but also in the interest of the United States, as a major WTO Member and main player of the dispute settlement system. Therefore, China supported the statements made by the EC and Cuba and urged the United States to make an extra effort to bring itself into conformity with the decision of the DSB without further delay.

10. The representative of Chile said that his delegation hoped that, in the year to come, this matter would take a positive turn in terms of compliance with the DSB's recommendations and resolutions.

11. The representative of Ecuador said that his country thanked the United States for its status report. All WTO Members must comply with the DSB's recommendations and rulings. After the banana dispute, this was the oldest dispute that was still pending. Ecuador, therefore, urged the United States to honour its WTO commitments, and supported the statements made by Cuba and other Members in that respect. Ecuador hoped that the new US administration and the US Congress would put an end to this matter and to the injustice of the economic blockade imposed on Cuba.

12. The representative of India said that her country thanked the United States for its status report and the statement made at the present meeting. India noted that there was no substantive change in the situation, and felt compelled yet again to stress that the principle of prompt compliance was missing in this dispute. India, therefore, wished to renew its systemic concerns about this situation of non-compliance as this continuous non-compliance situation by WTO Members clearly undermined the credibility and confidence that all reposed in the system.

13. The representative of Brazil said that his country thanked the United States for its status report. The lack of compliance in this dispute was a cause of concern not only for the complainants, but also for the broader Membership that relied on settlement of disputes as one of the WTO principles. Brazil, once again, urged the United States to implement the DSB's recommendations in this dispute.

14. The representative of Nicaragua said that her delegation had taken note of the status report submitted by the United States. As indicated in that report, since 18 February 2002, the United States had been reporting to the DSB on its intention to comply with the DSB's recommendations. However, Nicaragua noted with concern that there was no clear indication in that report as to how this would be done. Therefore, further clarification was required. This case had been discussed for almost seven years and, in light of the situation, Nicaragua called upon the United States, once again, to swiftly seek to comply with the commitments and the decision of the DSU and to ensure that Members be kept informed about this matter.

15. The representative of Bolivia said that, once again, her country wished to reiterate its concern at the lack of progress in this dispute and the negative impact that this non-compliance would have on the credibility of the WTO multilateral trading system and the DSB. Bolivia hoped that the new US administration would be able to implement the DSB's rulings and remove the restrictions imposed under the Omnibus Appropriations Act.

16. The representative of Argentina said that his country also thanked the United States for its status report. All Members had to ensure that disputes were resolved and Argentina, therefore, called

on both parties, particularly the United States, to ensure that the necessary steps were taken to avoid discussions of this matter at each DSB meeting and to make sure that this matter should not be a standing item on the DSB's Agenda.

17. The representative of Uruguay said that his country shared the systemic concerns expressed by previous speakers. For Uruguay it was essential that Members must ensure swift implementation of decisions of the DSB to preserve the credibility and proper functioning of the dispute settlement system, as well as the effective observance of the rights and obligations under the multilateral trading system. Uruguay reiterated its concern and called on the United States to ensure that the decisions of the DSB be swiftly implemented.

18. The representative of the United States said that, as in some past meetings, some Members had expressed systemic concerns about a situation of non-compliance, and as in past meetings, the United States wished to make clear that it had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where the US efforts to do so had not yet been entirely successful, the United States continued to work actively towards compliance. But, in light of the assertion that the concerns expressed by these Members were "systemic" in nature, the United States was looking forward to hearing all these Members' interventions under Item 4 of the Agenda of the present meeting.

19. 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.73)

20. The Chairman drew attention to document WT/DS184/15/Add.73, 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.

21. The representative of the United States said that his country had provided a status report in this dispute on 11 December 2008, 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. As mentioned under the previous sub-item, the US Congress had completed its work for this calendar year, and a new Congress would convene in January. The US administration would work with the next Congress with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

22. The representative of Japan said that his country thanked the United States for its statement and the latest status report. As reported by the United States, certain measures had been taken to implement part of the DSB's recommendations in November 2002. Since then, however, there had been little tangible progress for the remaining part of the DSB's recommendations and rulings. A full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[1] Japan hoped that this long-standing dispute would be resolved finally and promptly in the coming year.

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

[1] Article 3.3 of the DSU.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.48)

24. The Chairman drew attention to document WT/DS160/24/Add.48, 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.

25. The representative of the United States said that his country had provided a status report in this dispute on 11 December 2008, in accordance with Article 21.6 of the DSU. As mentioned earlier at the present meeting, the US Congress had completed its work for this calendar year, and a new Congress would convene in January. The US administration would work closely with the new US Congress and continue to confer with the European Communities, in order to reach a mutually satisfactory resolution of this matter.

26. The representative of the European Communities said that the present meeting was the forty-eighth time that the United States reported on continued non-compliance without offering any concrete means to bring itself into compliance. She said that "given that the luck of the Irish had gotten them nowhere, the EC hoped that Father Christmas might have something in his bag for the EC on this one". Unfortunately that seemed now the most likely avenue.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.11 – WT/DS292/31/Add.11 – WT/DS293/31/Add.11)

28. The Chairman drew attention to document WT/DS291/37/Add.11 – WT/DS292/31/Add.11 – WT/DS293/31/Add.11, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

29. The representative of the European Communities said that the EC welcomed the decision by both Argentina and Canada to further extend the reasonable period of time until 1 March 2009. This seemed recognition that the best way forward was continued dialogue and cooperation, rather than litigation. The EC continued to be willing to maintain a regular dialogue with the three complainants on all relevant biotech-related issues of their concern, not limited to the implementation of the WTO Panel Report. Further meetings with Canada and Argentina were planned to take place early next year. Since the last discussion of this issue before the DSB, substantive progress had been made both in relation to pending applications and on national measures. On 4 December 2008, the Commission had approved the commercially important soybean variety known as Roundup Ready 2 (19th authorization since the time of establishment of the Panel). That authorization came only after four months since the opinion by EFSA had been issued. This eliminated any risk of trade disruption on this product due to asynchronous authorizations. And this showed that the EC regulatory regime worked normally. With respect to the GM oilseed rape to which Canada had made reference at past meetings (T-45), the EC was happy to report that a vote in the Council was expected by mid-January. An authorization decision could be adopted in February 2009. Progress had also been made in the authorization process of two maize events. An EFSA opinion had been issued for one of them (59122 x NK603) and another EFSA opinion was to be published tomorrow (MON89034). With regard to the products covered by the Panel Report, the Commission was preparing a draft decision to the regulatory committee on the two pending applications for cultivation of GM maize 1507 and Bt11, following a positive opinion by EFSA on 31 October. With respect to national measures, progress continued in the application of the corresponding EC regulatory procedures. Scientific assessment by EFSA had been delivered and the Commission was preparing a proposal to the Council. The EC

believed that the progress described in such a sensitive area showed that the only appropriate way forward was dialogue and cooperation. The EC remained open to continue discussions with the three complainants.

30. The representative of the United States said that his country thanked the EC for its written status report and for its statement made at the present meeting. The DSB had adopted its recommendations and rulings in this dispute in November 2006. The United States recalled that the DSB had found that the EC had adopted a moratorium on biotech approvals starting in 1999, and lasting at least up through the time of panel establishment in August 2003. The DSB had gone on to find that this moratorium had resulted in the undue delay of pending biotech product applications, and that the delay breached the EC's obligations under the SPS Agreement. The EC's delays had resulted in a backlog of approximately 50 pending biotech applications. Many of the biotech varieties caught up in this backlog were approved in the United States and other major markets, were currently in production, and were being used safely around the world. As a result, the backlog of pending applications was not simply a stack of paper dossiers. Rather, the backlog resulted in actual, on-going and serious trade harm to the United States.

31. More than two years had passed since the DSB made its recommendations and rulings. Unfortunately, delays were still endemic in the EC's biotech approval system. In calendar year 2007, the EC had managed to reach a decision on just four of the dozens of pending biotech applications. Not one of those products had been approved in the standard procedure set out in the EC's regulations, which contemplated a decision in a regulatory committee based on a scientific assessment. Instead, each one of those applications had been referred to political level decision-makers, and had ultimately been approved over the objection of a substantial number of EC member States. In fact, since the adoption of the moratorium in 1999, the EC had not made a single decision on a biotech application without resort to this extraordinary, time-consuming, and politically controversial procedure. During its on-going dialogue with the EC over the past two years, the United States had expressed its concerns with delays and the glacial pace of decision-making. The EC had, however, asked for patience. The EC had explained that it was undertaking far-ranging improvements in its process, and the EC had assured the United States that soon it would see the positive results of those supposed improvements. And now another calendar year had passed. And again, during an entire year, the EC had been able to reach a decision on only four of the dozens of pending biotech applications. And again, the EC was not able to reach a decision on a single application without resort to political-level decision-makers and an ultimate approval over the objections of a substantial number of EC member States. The United States was left in the position of asking what, exactly, were the positive results of the supposed improvements in the EC's operation of its biotech approval system. One product application had been pending for over 12 years, another for over seven years. The backlog of pending applications was even greater than in November 2006, when the reasonable period of time had begun. US producers remained shut out of major EC markets. The United States thanked the DSB for its attention to this matter.

32. The representative of Argentina said that his country was grateful for the status report submitted by the EC at the present meeting, and recognized that the continued dialogue between the parties had yielded concrete signs of progress. There remained a few concerns regarding the process of approval of GMOs in the EC, certain prohibitions that were still in force, as well as the attitude of certain member States towards GMOs, which his country was following closely. In this connection, Argentina and the EC had signed a new agreement extending the reasonable period of time for implementation up to 1 March 2009 in the belief that this would enable the parties, through open dialogue, to continue discussions that would lead to the final and satisfactory implementation of the DSB's recommendations.

33. The representative of Canada said that her country thanked the EC for its statement. Canada and the EC had agreed to an extension of the reasonable period of time for the EC to bring itself into compliance with the DSB's findings until 1 March 2009. Canada had done so as it valued the

constructive dialogue it had had to date with the EC. However, as Canada had previously stated, Canada had significant on-going concerns. There were, for example, still member State bans in place on the cultivation and marketing of approved biotech products. Canada also remained deeply concerned that undue delays were reappearing in the EC approval system for biotech products. Canada would continue to monitor the situation closely.

34. The representative of the European Communities said that the United States had referred to the so-called comitologie, which was a procedure for the EC Council to delegate powers of implementation to the Commission under the supervision of a Committee. This procedure was a standard procedure under EC law and was also set out in the EC regulatory regime. That regime was not the subject of the original Panel's findings and neither its "operation" nor the status of specific applications not dealt with in the original Panel was covered by this Agenda item. In any event, the GMO regulatory regime was working normally. Its functioning should not be rigidly assessed purely quantitatively and in abstract, in terms of number of authorization per year, since this was dependent on various product and case specific elements and in particular on the quality of applications and on the time needed by applicants to answer requests from EFSA on additional scientific information. Currently, only 38 complete applications were pending assessment by EFSA (four of them submitted very recently).

35. The representative of the United States said that no one should be surprised that the EC had stated that the DSB should not be discussing the operation of its approval system given that the EC had only reached decisions on four pending applications in all of 2008. It was easy to see why the EC did not want to talk about the backlog of pending applications or the operation of the EC approval system. But, the EC might wish to recall what it had told the DSB on 19 February and even again at the present meeting: namely, that "Numbers [of approvals] may be illustrative in assessing progress".[2] Of course, what the numbers showed was precisely the opposite of progress: an assessment based on the number of approvals in 2008 showed that EC progress had been nil.

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

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

(a) Statements by the European Communities and Japan

37. The Chairman said that this matter was on the Agenda of the present meeting at the request of the EC and Japan. He then invited the respective representatives to speak.

38. The representative of Japan said that, although it had not been officially announced, the distribution for FY 2008 under the CDSOA appeared to have been completed, except for the funds available for certain warm shrimp.[3] Thus the CDSOA still remained operational.[4] Japan urged the United States to immediately terminate the illegal distributions, and repeal the CDSOA not just in form but in substance so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance. Japan noted that, according to several press reports, US Customs and Border

[2] WT/DSB/M/247, para. 28.

[3] The distribution of those funds appear to be currently suspended to the pending domestic litigation. See US Customs and Border Protection's website at:
http://www.cpb.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/warm_water_shrimp.xml

[4] In the words of the US Customs, "the distribution process will continue for an undetermined period". See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xm

Protection demanded the US companies to repay money distributed to them from the duties collected on imports from the US NAFTA partners. This was an interesting development, not least because it may show the US administration's view that the illegally distributed funds under the CDSOA could be subject to repayment.

39. The representative of the European Communities said that on 1 October, the United States had started the eighth distribution of the anti-dumping and countervailing duties collected on imports made prior to 1 October 2007. Such illegal distributions would continue for an undetermined number of years. Therefore, the EC would like to ask again the United States when it would stop the transfer of those duties to its industry and finally put an end to the condemned measure. 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.

40. The representative of Brazil said that his country wished to thank Japan and the EC for keeping this item in the Agenda of the DSB. As Brazil had been repeating on many occasions, it was Brazil's understanding that the disbursements made by the United States to its domestic industry under the Byrd Amendment continued to affect the rights of other WTO Members. Brazil stressed, once more, the need for the United States to take the necessary actions in order to fully implement the DSB's recommendations and rulings in this dispute by ceasing all disbursements under the CDSOA.

41. The representative of India said that her country thanked the EC and Japan for maintaining this issue before the DSB once again. As India had repeatedly pointed out, the disbursements made by the United States to its industry under the Byrd Amendment continued to affect the rights of WTO Members. Furthermore, attempts to reintroduce this legislation were a cause of serious concern. India reiterated that the United States bring this situation to an end and thus fully implement the DSB's recommendations and rulings. India, therefore, urged the United States to cease its WTO inconsistent disbursement. India supported the view that continued surveillance by the DSB was needed.

42. The representative of Canada said that her country agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

43. The representative of China said that his country thanked the EC and Japan for, once again, raising this matter at the DSB meeting. China shared the views expressed by previous speakers and wished to join them in urging the United States to fully comply with the DSB's rulings.

44. The representative of Thailand said that his country thanked the EC and Japan for bringing this item before the DSB. As his delegation had repeatedly stated, Thailand was disappointed at the US maintenance of those WTO-inconsistent disbursements. Thailand thus urged the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume providing status reports until such actions were taken and this matter was fully resolved.

45. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that Members, including the EC and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EC and Japan had inscribed this item again on the Agenda of the present meeting. With respect to comments regarding further DSB surveillance in this matter, the United States failed to see what purpose would

be served by further submission of status reports repeating again that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

46. The DSB took note of the statements.

3. United States – Definitive anti-dumping and countervailing duties on certain products from China

(a) Request for the establishment of a panel by China (WT/DS379/2)

47. The Chairman drew attention to the communication from China contained in document WT/DS379/2, and invited the representative of China to speak.

48. The representative of China said that, on 19 September 2008, China had requested consultations with the United States on the four sets of parallel anti-dumping and countervailing duties imposed pursuant to certain final anti-dumping and countervailing duty determinations and orders on Chinese products, including circular welded carbon quality steel pipe ("CWP"), new pneumatic off-the-road tires ("OTR"), light-walled rectangular pipe and tube ("LWRP") and laminated woven sacks ("LWS"). The parties had held consultations on 14 November 2008, but regrettably, these consultations had failed to resolve the dispute. In China's view, the measures at issue appeared to raise a number of WTO concerns. China was deeply concerned about the compatibility of those measures and the subsequent investigations by the United States with its treaty obligations under the GATT 1994, the SCM Agreement, the Anti-Dumping Agreement and the Protocol on the Accession of China. A summary of the specific measures at issue and the legal basis for China's concerns was contained in China's request for the establishment of a panel (WT/DS379/2) circulated on 12 December 2008. For the sake of time, China would not repeat the specifics of its request at the present meeting, but wished to highlight three sets of issues in the identified measures.

49. First, the US authorities appeared to fail to make a valid determination that certainly alleged subsidy programmes were countervailable subsidies within the meaning of the SCM Agreement. For example, the finding by the US authorities that certain state-owned entities were "public bodies" appeared to violate Article 1.1(a)(1) of the SCM Agreement. The US authorities also appeared to improperly resort to a benchmark outside of China in determining the existence and extent of alleged subsidy benefits. Second, the use by the United States of non-market economy methodology for determining the existence and extent of alleged dumping for products from China necessarily gave rise to double remedy when it was applied simultaneously with the imposition of countervailing duties on the same product. Third, in the conduct of the anti-dumping and countervailing duty investigations, the US authorities appeared to seriously deprive the Chinese Government and other interested parties of their rights to due process under the Anti-Dumping Agreement and the SCM Agreement. This dispute was of great significance and urgency for China given its far-reaching legal and economic implications. Subsequent to the four anti-dumping and countervailing duty investigations at issue, the United States had by far initiated eight sets of parallel anti-dumping and countervailing duty investigations, and had imposed definitive anti-dumping and countervailing duties on four subject products originating from China. In those subsequent investigations, the US authorities appeared to have followed the same arbitrary and discriminatory approach in the four measures at issue. Should such protectionist approach not be corrected in a timely fashion, there would be escalating harm to various Chinese industries. China had called the United States' attention to its concerns on numerous occasions. However, China was disappointed that, thus far, it had not received any concrete solution from the United States. Therefore, given its immediate and systemic concerns, China was compelled to pursue this matter further and to request that the DSB establish a panel at the present meeting to examine China's complaint in accordance with Articles 4.7 and 6 of the DSU.

50. The representative of the United States said that his country was disappointed that China had chosen to move forward with a request for panel establishment at the present meeting. In the investigations at issue in this dispute, the US investigating authorities had found that the Chinese products in question were dumped in the United States. They had also found that the products in question benefited from Chinese subsidies. And, they had found that the effect of such dumped and subsidized imports was material injury to US industry. Therefore, to remedy both of these types of unfair practice, the US authorities imposed both anti-dumping duty and countervailing duty measures. China's complaint appeared to be an effort to hinder the effectiveness of the two remedies permitted under the WTO Agreements for these two injurious practices. The United States was confident that, if this dispute were to proceed to a panel, the anti-dumping and countervailing duty determinations identified by China, and the anti-dumping and countervailing duty measures imposed pursuant to those determinations, would be found to be consistent with US WTO obligations. The United States also pointed out that the panel request before the DSB at the present meeting included an item that did not appear to be a measure that was the subject of consultations. China identified in its panel request something that it described as an "omission", which it purported to challenge "as such". However, nowhere in its request for consultations did China identify the "absence" of "legal authority for the Department of Commerce" as a measure that was a subject of consultations. Rather, China's request for consultations was clearly limited to "the definitive anti-dumping and countervailing duties imposed by the United States pursuant to the final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce in the investigations" that were identified in that request. For all of those reasons, the United States strongly urged China to reconsider its decision to pursue a panel in this dispute, and the United States was not in a position to agree to the establishment of a panel at this time.

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

4. European Communities – Regime for the importation, sale and distribution of bananas: Recourse to Article 21.5 of the DSU by the United States

(a) Report of the Appellate Body (WT/DS27/AB/RW/USA and Corr.1) and Report of the Panel (WT/DS27/RW/USA and Corr.1)

52. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS27/93 transmitting the Appellate Body Report on: "European Communities – Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5 of the DSU by the United States", which had been circulated on 26 November 2008 in document WT/DS27/AB/RW/USA, in accordance with Article 17.5 of the DSU. Subsequently, a corrigendum to the Appellate Body Report had been circulated on 11 December. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute 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 is without prejudice to the right of Members to express their views on an Appellate Body report".

53. The representative of the United States said that his delegation wished to begin by, once again, thanking the members of the Appellate Body, the members of the Panel, and the Secretariat for their work in this proceeding. As the United States had noted at the 11 December DSB meeting, the United States greatly appreciated the effort that the Appellate Body and the Secretariat had undertaken to ensure that the Report in Ecuador's proceeding and the Report in the US proceeding contained distinct findings and conclusions. And, the United States wished to thank the Appellate Body for agreeing to correct two typographical errors in its Reports. Errors could occur in long and complex documents such as Appellate Body reports, and it was very important for the dispute settlement system to be able to address them. Furthermore, the United States again thanked both the

Panel and the Appellate Body for agreeing to make the hearings in this dispute open to public observation for those Members who had chosen to make their statements openly. Such transparency was very valuable to the dispute settlement system and the WTO as a whole.

54. Turning to the substance of the Reports before the DSB at the present meeting, the Panel and the Appellate Body had thoroughly and properly rejected this most recent attempt by the EC to avoid its WTO obligations with respect to bananas. The EC had taken issue with the Appellate Body's interpretation of Article XIII of the GATT 1994, calling it "far-reaching", in "disregard of the specific nature of 'preferential' TRQs" and bound to "have serious implications in WTO practice". In the US view, nothing could be further from the truth. The Appellate Body had instead merely confirmed, once again, the proper reading of Article XIII, a reading that followed from the text of the Article and that the Appellate Body had recognized in its first report on Bananas in 1997. Given the EC's attitude towards adopted Appellate Body reports, it was surprising that the EC had taken the positions it did in this compliance proceeding contesting the earlier Appellate Body report in this dispute. And, it was regrettable that the EC had, once again, refused to abide by its obligations under that Article. In addition, the Appellate Body and the Panel had correctly rejected the EC's attempt to avoid the merits of this dispute with a variety of procedural arguments. Some of those arguments had already been addressed – and rejected – in the proceedings in this dispute in 1995-1997, and the United States thanked the Panel and Appellate Body for clearly rejecting them this time as well.

55. In addition, the United States was particularly gratified by the emphasis given by the Appellate Body to a proper textual analysis of the US-EC Understanding on Bananas. It was clear from the text of the Understanding, that in early 2001 the EC had agreed to implement, as a means of resolving this dispute, a tariff-only regime by 1 January 2006. The EC, unfortunately, had not done what it had said it would do. Furthermore, it was also clear from the Understanding that the United States had not relinquished its right to further proceedings under Article 21.5 of the DSU. The United States only wished it had not been necessary to exercise that right. The United States also appreciated the Panel's clear analysis of the EC's failure to comply with its obligations under Article I of the GATT 1994. The EC had not even appealed this point. For all these reasons, the United States welcomed the Panel and the Appellate Body Reports, and supported their adoption.

56. The United States did wish to note its concern with three points in the Appellate Body Report. First, the United States considered it was incorrect for the Appellate Body to state in paragraph 479 that "the measure at issue ... is no longer in existence". It was clear from the Panel Report that the Panel had made no factual finding to that effect. To the contrary, the Panel had found the EC's attempt to make such a factual assertion for the first time during interim review to be inadmissible.[5] What was more, the EC explicitly had not raised a DSU Article 11 claim with respect to this issue on appeal.[6] The Appellate Body should therefore not have made this statement relating to an alleged fact not on the Panel record. That statement was even more puzzling in light of the fact that it was neither supported nor explained in the Report. Second, the United States was very concerned by the Appellate Body's statement in paragraph 245 that "[i]n the event that the measure at issue is found not to be in itself a measure taken to comply, our analysis will turn to the question of whether a 'particularly close relationship' exists between the measure at issue and the declared measure taken to comply, which would warrant subjecting the measure at issue to the scope of Article 21.5 of the DSU". The United States did not understand how this statement was to be reconciled with the provisions of Article 21.5, which made the task of a compliance panel the resolution of "disagreement[s] as to the existence or consistency with a covered agreement of measures taken to comply". Consequently, if a measure was not a "measure taken to comply", there was no textual basis for it to be within the terms of reference of an Article 21.5 compliance proceeding. Third, another troubling aspect of the Appellate Body Report was the Appellate Body's view that measures that had expired might nonetheless be subject to challenge in WTO dispute settlement. As the United States

[5] Panel Report, paras. 6.18, 6.42, 6.50.
[6] See, e.g., Appellate Body Report, para. 274.

had previously explained, this view, which the Appellate Body had expressed in the context of claims under the Subsidies Agreement, was quite troubling in that context. Repeating that view in a context divorced from the Subsidies Agreement only increased the US concern. Members would need to carefully review this position and consider its implications for the dispute settlement system.

57. The United States was somewhat encouraged by the EC statements made at the 11 December DSB meeting regarding its commitment to finding a definitive solution to this dispute. The United States was, therefore, hoping that the EC would have good news to report now. Unfortunately, from statements made at the TNC and the General Council meetings, that did not appear to be the case. The United States would like to draw Members' attention to the conclusions of the Panel and Appellate Body: the result of these proceedings was that the "DSB recommendations and rulings from the original proceedings remain in effect until the European Communities brings itself into substantive compliance".[7] The EC, therefore, must resolve the bananas issue. Once again, the United States encouraged the EC to continue and conclude discussions with the MFN suppliers. In the meantime, the United States recalled the obligation of the EC under Article 21.6 of the DSU to resume providing status reports to the DSB. Indeed, the United States expected the EC to provide one at the present meeting, given that the DSB had adopted the Panel and Appellate Body Reports in the Ecuador proceeding on 11 December. Perhaps the fact that the Agenda for the present meeting had closed on that same day had led the EC to miss the deadline inadvertently. The United States trusted that problem would not recur in January. Finally, the United States was looking forward to hearing the interventions of those Members who had spoken under Agenda Item 1A.

58. The representative of the European Communities said that the EC wished, once more, to express its regret at the US disingenuous attempt to modify important findings and conclusions of the Appellate Body Report after being issued. The EC welcomed the Appellate Body's firm decision to reject any modifications other than clerical errors. With respect to the Appellate Body and Panel Reports themselves, the EC wished to reiterate its disappointment at the approach taken by both the Panel and the Appellate Body with respect to the admissibility of this case and the question of the lack of "nullification and impairment" of US rights. This set a bad precedent since it encouraged WTO challenges by WTO Members who barely produced, let alone exported, the goods at stake. Indeed, it was regrettable that the WTO dispute settlement mechanism could be successfully resorted to by a WTO Member only on the basis of a less than likely potential to export a very marginal amount of the product concerned. The United States was not an exporter of bananas (it was in fact a net importer by large). US production was limited to 30,000 tons in Puerto Rico and Hawaii. The fact that US multinationals were engaged in distribution of Latin American bananas to the EC market should not be sufficient to establish "prejudice" under the WTO DSU for GATT purposes. This was even more regrettable if one took into consideration that the US challenge had referred to a measure that was to become obsolete in the course of the proceedings. The EC did not think that this was the best use of dispute settlement resources. The EC, however, welcomed the confirmation by the Appellate Body that the Panel should have taken into consideration, in drawing any recommendation, of the fact that the measure under examination had expired on 31 December 2007, by means of EC Regulation 1528/2007. This conclusion had been further confirmed by the Appellate Body's rejection of the US request to modify the Report on this particular issue. As a result of the expiry of the measure examined, the original DSB recommendations had become obsolete with respect to the claims under Articles I and XIII. The EC, therefore, did not have to take any specific action in the US case.

59. The representative of Honduras said that, both as an original complainant in the Bananas III case and as a country with a right to have its interest as a substantial supplier of bananas recognized by the EC, Honduras clearly had an interest in this dispute. Honduras, therefore, welcomed the Appellate Body's decision in the proceedings initiated by the United States, and hoped that this would pave the way to a positive outcome. As the EC had stated, it would prefer to resolve the matter by means of a comprehensive arrangement. However, such a comprehensive arrangement had already

[7] Appellate Body Report, para. 273; Panel Report, para. 8.13.

been reached. He recalled that on 27 July 2008, an agreement had been concluded whereby the EC was required to lower its tariff to €114/mt in order to settle all outstanding disputes and claims under the WTO. The EC had unilaterally decided to forgo this agreement without providing a credible explanation of its reasons. This attitude had earned the EC two more negative rulings from the Appellate Body, thus bringing the total number of rulings against it to 13. If the EC continued to disregard the July Agreement or to insist on renegotiating terms of the agreement, which it itself approved, it was highly probable that it would have to face further legal proceedings. Over the past few days, Members had heard allusions to further disputes arising from the Bananas III case, retaliation procedures, appeals against tariff binding violations, complaints regarding the EC's enlargement, and new measures against the discrimination perpetuated by the EC. As must be evident to all Members, this dispute had already penalized Latin American developing countries and harmed the very WTO system itself for far too long. The following options were open to the EC: (i) to increase the systemic tension that currently existed in respect of bananas and maintain its illegal protectionism, at a time when tension and protectionism were best avoided; or (ii) live up to its earlier promise of settling this long-standing dispute in accordance with the terms of the July Agreement. Individual interests and those of the community would be better served if the EC were to choose the latter of these two options. Honduras, once again, called on the EC to adopt and honour the July Agreement in order to put an end to this dispute, which had been going on for the past 15 years.

60. The representative of Nicaragua said that her country, which had participated as a third party in the proceedings brought by Ecuador, had also participated as a third party in the dispute initiated by the United States. Nicaragua wished to congratulate the Appellate Body, once again, on its sound decisions. Nicaragua had listened carefully to the statements made by the EC at the present meeting and in the past few days since the Appellate Body had issued its rulings. Nicaragua had taken due note of the EC's assurances that it would bring its bananas import regime into line with Article II of the GATT 1994. As a country that has participated in almost all of the 13 complaints dealt with under the GATT and the WTO, Nicaragua would welcome a lasting and WTO-consistent solution to the bananas dispute. Article II of the GATT 1994 was an important element of full compliance. Nicaragua had heard about the EC's intention to rebind its tariffs "unilaterally". Since 2005, three review bodies had prohibited three different tariffs imposed unilaterally by the EC. Any form of rebinding that did not maintain the tariff treatment historically afforded to MFN suppliers in the 27 EC member States, or that did not grant them the rights and benefits that had been reflected in the EC's Schedules of Concessions since 1963, would pose a problem for Nicaragua. Looking back, some of the best years for Nicaraguan exports to the EC were those in which the 20 per cent *ad valorem* tariff had been applied. This tariff appeared in the EC's schedules from 1963 to 1993. The time had come to reset the banana tariff at a level that gave the Nicaraguan banana industry the opportunity to re-establish its competitive presence in the EC market. However, even if the bound banana tariffs were vastly reduced, one would still have to deal with the issues related to Article I of the GATT 1994. In the action brought by the United States and the action brought by Ecuador, the Appellate Body had ruled that the tariff preference granted by the EC in favour of the ACP countries was inconsistent with Article I. The EC continued to grant duty-free access to ACP suppliers, which was discriminatory. In almost every case, these preferential suppliers were much better placed economically than Nicaragua. Nicaragua did not see how it would be possible to ensure full compliance in this dispute without remedying the tariff discrimination exercised by the EC. Nicaragua's producers were entitled to fair and non-discriminatory access, which legitimately provided them with the opportunity to combat poverty through trade. Nicaragua would continue to pursue its interests in this dispute until the above result was achieved.

61. The representative of Panama said that, as a third party in the compliance proceedings, his country welcomed the Appellate Body's detailed Report and congratulated the United States on its sixth successful banana-related action in this long-standing dispute. Panama's views concerning this dispute were the same as those expressed at the 11 December DSB meeting. For the sake of brevity, Panama would summarize the main points at the present meeting. First, like the United States and other countries, Panama regretted that so many actions had been necessary in relation to bananas. A

better way of dealing with this issue did exist. Five months ago, in July 2008, the EC had concluded an agreement on bananas, but subsequently had chosen to ignore it. If the EC had honoured its word, this Agenda item would not appear at the present meeting, and the Membership of the WTO would not have to listen to so many statements on bananas. Second, the July Agreement reflected the difficult balance achieved after several months of efforts, which should not be jeopardized. In July, when the compliance proceedings had still been ongoing, Latin American negotiators had accepted eight cuts that would reduce the banana tariff from €148/mt to €114/mt, in return for the termination of all pending disputes and claims under the WTO. Now that the Appellate Body had ruled in his country's favour, any effort made by the EC to reopen this delicate compromise would only give rise to demands for improved access for MFN bananas and would aggravate the dispute. Third, over the past two weeks, the EC had made several references to the possibility of "unilateral" rebinding. In the 15 years since this dispute had begun, the EC had taken unilateral measures on four occasions, on the premise that it was seeking to comply with its WTO obligations. Each one of those unilateral arrangements had been declared illegal. At present, when so many banana-related claims and interests still remained pending, including those concerning significant adjustments due to the EC's enlargement and the tariff discrimination exercised by the EC, a mutually negotiated solution was the least contentious course of action. Such a text had already been drafted and was ready to be signed. Finally, Panama noted the call by certain Members for the EC to bring itself into conformity with its obligations and to prevent any further undermining of the objectives and functioning of the WTO. Panama was of the same opinion and, therefore, made a fresh call for the EC to overcome protectionism and put an end to its negative cycle of non-compliance and to this dispute, in accordance with the terms of the 27 July Agreement.

62. The representative of Ecuador said that his country had participated in this dispute as a third party and supported the legal arguments put forward by the United States, most of which had been endorsed by the Panel and the Appellate Body. Ecuador thanked the United States for supporting Ecuador as a third party in its own case and for ongoing coordination. Ecuador also thanked the members of the Panel, the Appellate Body, the Legal Affairs Division and the Appellate Body Secretariat for the balance and fairness observed in the treatment of third parties in this dispute. The Panel and the Appellate Body had found that: (i) the United States was not barred by the 2001 Understanding from initiating this compliance proceeding; (ii) that the EC banana import regime was inconsistent with Articles I and XIII of the GATT 1994; and (iii) that the EC had nullified or impaired benefits accruing to the United States under that Agreement. The EC could not dismiss those, or Ecuador's Reports on the basis of whether or not the banana regime at issue was in place. The Appellate Body had confirmed that a measure not in effect might indeed be challenged. The Reports had confirmed that the EC had not yet complied with the Bananas III recommendations and findings. In addition to the aforementioned inconsistencies, the EC had been in breach of Article I of the GATT 1994 since 2006. Many of the Agreements concluded with the ACP countries had either not been notified to the WTO or had yet to be submitted for examination of conformity with WTO rules. The EC bananas import regime had, once again, been condemned in the WTO, and still the EC refused to comply with its WTO obligations, a lack of compliance which had cost his country more than US$100 million a year in extra tariff payments alone. Ecuador again called upon the EC to sign the Agreement on Bananas of 27 July 2008 and thus put an end to this long-standing dispute, so that it would not be necessary to exercise retaliation rights or bring renewed legal complaints. Ecuador looked forward to a status report from the EC on these two disputes.

63. The representative of Colombia said that his country thanked the Appellate Body and the Secretariat for their work done on this case and, at this point, Colombia simply wished to reiterate its statement made at the 11 December DSB meeting on the same issue, in the context of Ecuador's Reports.

64. The representative of Costa Rica said that his delegation had had the opportunity to comment on this matter at the 11 December DSB meeting, in connection with the adoption of the Panel and the Appellate Body Reports in the case brought by Ecuador. The content of that statement was also valid

in the case under consideration. At the present meeting, Costa Rica wished to emphasize a number of points and to endorse the statements made by previous speakers. Since 1992, the EC bananas import regime and its member States had been examined by various bodies, which, as in this case, had always confirmed its illegality with the rules of the multilateral trading system under the GATT and the WTO. His delegation wished to draw Members' attention to the Panel and Appellate Body's conclusions to the effect that the DSB's recommendations in the original proceedings remained valid until the EC substantially complied with them. The EC must, therefore, comply, and must implement a definitive solution to the banana issue. Such a solution had been found on 27 July 2008, when the Latin American MFN banana-exporting countries had concluded an agreement with the EC; i.e. the Geneva Agreement on Trade in Bananas. In a surprising turn of events, the EC had subsequently linked its compliance with that Agreement, which was to put an end to all bananas disputes, to an agreement on negotiating modalities under the Doha Round. This unilateral position of the EC had no support in the text of the Agreement reached, which made specific reference to the autonomous nature of the Agreement in relation to the Doha Round; nor was it supported by the Agreement's negotiating history or its objective, which was to settle any disputes and claims brought before the WTO in relation to this matter. Finally, and as a follow-up to the DSB's recommendations, his delegation also believed that the EC should provide status reports on compliance, in accordance with Article 21.6 of the DSU, in relation to both the dispute brought by the United States as well as the dispute brought by Ecuador.

65. The representative of Guatemala said that his country, which was a developing country Member of the WTO, believed in the multilateral trading system, the main strength of which was, precisely, its dispute settlement mechanism. Every adopted report of a panel or the Appellate Body further confirmed the determination of Members to ensure that their trade relations were governed by WTO rules. However, the mere adoption of the reports was not, in itself, the ultimate objective of the dispute settlement mechanism. The ultimate objective was to achieve compliance with WTO rules. If the EC had not announced its decision to ignore rather than honour the Geneva Agreement on Trade in Bananas of 27 July 2008, the Appellate Body Report in this dispute would not have been adopted at the present meeting nor would Ecuador's Report have been adopted. The Bananas Agreement of 27 July 2008 could have been the solution to all pending banana disputes. Guatemala urged the EC to reflect on this valuable opportunity to settle this long-standing dispute. In the meantime, it should be stressed that this was not the first time that a panel or the Appellate Body had found that the EC bananas import regime was inconsistent with WTO rules. Nor was it the first time that Guatemala was waiting for the EC to apply the conclusions and recommendations of panels and of the Appellate Body. Guatemala, therefore, urged the EC to bring its measures into conformity with the WTO Agreements and, as requested by other delegations, hoped that the EC would report on the implementation of the recommendations and rulings contained in adopted Reports, and that the issue would remain on the DSB's Agenda until it was resolved.

66. The representative of Chile said that his country had no specific trade interest in this long and costly dispute. However, Chile had a systemic interest in this issue and, therefore, wished to make a statement on this matter. Chile urged the EC to swiftly take the necessary measures to put an end to the inconsistencies found by the Panel and the Appellate Body with regard to a number of provisions of the GATT 1994, which continued to damage the multilateral trading system because of this continued inconsistency and failure to comply with its obligations.

67. The representative of the United States said that with respect to the EC's assertion that the original DSB's recommendations and rulings had become obsolete, the United States referred Members, including the EC, to the statements in the Appellate Body Report, paragraph 273, and the Panel Report, paragraph 8.13, namely, that the recommendations and rulings in the original proceedings remained in effect until the EC brought itself into substantive compliance. With respect to the EC's comments criticizing the rejection by the Panel and the Appellate Body of the EC's efforts to prevent a WTO Member from bringing a dispute because of an alleged lack of nullification or impairment, first, the United States had an economic interest in the EC's implementation of its WTO

obligations in the case of bananas, as well as a systemic interest. As the Appellate Body had pointed out[8], the Article 22.6 arbitrator in this dispute stated that there was a "continuation of nullification or impairment of US benefits under the revised EC regime", including as a consequence of an inconsistency with Article XIII of the GATT 1994. Finally, the United States thought that Members should be concerned about the EC's position on this matter that the United States, despite being a producer, importer, and potential exporter of bananas, should be prevented from even bringing this dispute. Such an argument found no support in the DSU. What was more, the EC's position would effectively curtail the dispute settlement rights of any Member not yet exporting to a particular market, including, for example, developing country Members trying to diversify their export industries.

68. The representative of the European Communities noted that most points raised at the present meeting related to Ecuador's Report adopted on 11 December, and not to the US Report before the DSB at the present meeting. Many delegations had pointed out that the EC was obliged to bring its bananas import regime into compliance by re-binding its tariff. The EC was glad to confirm, once again, that it did indeed intend to rebind, as required under Ecuador's Appellate Body Report. As pointed out by Nicaragua a few minutes ago, the EC could do this unilaterally – or "autonomously". However, the EC preferred to do this in agreement with the MFN suppliers and in the context of a comprehensive framework addressing all issues relevant to the Banana dossier like the issue of settlement of all disputes, adjustments reflecting Articles XXIV:6 and XXVIII negotiations, but also tariff cuts that represented the EC's contribution to the Doha Round or a future round. The EC had held two meetings with the MFN suppliers in recent weeks to try to explore how, in the current situation, this agreement could be designed and implemented. A number of delegations had implied that the only way to implement was to sign the 27 July Agreement. The EC was under no obligation to implement the Appellate Body Report via the 27 July Agreement. He also pointed out, once again, that there was no such formal "agreement". There was a text that would have been initialled had certain conditions been met, and in particular, had the modalities been adopted. Those conditions had not materialized. It was, therefore, absolutely incorrect to allege that the EC had unilaterally walked away from the deal. As one notorious person once said: "if allegations are repeated often enough, people start believing it is the truth". This was why the EC had to refute these allegations time and again.

69. Some delegations had also suggested that the EC maintained a protectionist regime on bananas in continuing to give preferences to the ACPs. The EC bananas import regime, far from being protectionist, had been an attempt to balance out the sometimes conflicting economic and developmental interests of two different regions in the world: the ACPs and Latin American suppliers. If one looked at trade figures since the EC's tariff-only regime had been adopted, this had led to an increase in market shares for MFN suppliers by on average 10 per cent and to a decrease of exports from ACP countries. Common sense would suggest that the EC regime had served MFN supplier interest well. The discriminatory measures that the United States and others had today alleged, no longer existed. Now there was a number of GATT compatible FTAs, namely the EPAs. And with respect to those ACP countries who had not signed EPAs, they either came under the General System of Preferences or under the "Everything but Arms"-regime, both of which regimes were consistent with the Enabling Clause. Thus, there were no longer any discriminatory preferences for ACPs. As for the lack of notification alleged by Ecuador, the EC pointed out that the EPA, which had been concluded with the Cariforum, had been notified and would now be examined by the CRTA. Recently, the EC had also notified the EPA concluded with Côte d'Ivoire, another important banana supplier. It could now be considered by CRTA as well. The EC hoped that those remarks clarified further that the EC intended to rebind and thus implement the rulings and recommendations of the Appellate Body Report.

[8] Appellate Body Report, para. 475.

70. The representative of Ecuador said that his country did not agree with the EC statement, which contained a number of errors. First, the EC did not take into account the losses of Ecuador since 2006 and there had been substantial losses. Ecuador wished to remind the EC that a recent decision of the Appellate Body stated that a unilateral decision by a Member could not be interpreted as compliance, unless it was approved by the DSB. A unilateral decision by the EC would be catastrophic in this case. Finally, with regard to the notifications of partnership agreements with the ACP countries, the EC forgot that those agreements still had to be evaluated as to their consistency with Article XXIV of the GATT 1994. Many of those agreements, for a number of years, had not benefited from a waiver that would have justified them. This represented even further failure by the EC to comply with its obligations in this case.

71. The representative of Panama said that the 27 July Agreement had been concluded and all WTO Members were aware of this. That Agreement would have settled all pending bananas disputes under the WTO. The Appellate Body had confirmed Panama's legal position. Any efforts by the EC to reopen the delicate balance that had been achieved would compromise and aggravate the dispute. Panama hoped that the EC, in the coming weeks, would reconsider its position and finally resolve this long-standing dispute.

72. The representative of the United States said that his country took note of the EC's statements made at the present meeting and would refer those to capital. The United States was not in a position to agree with the EC's assertions relating to the alleged effects of any new agreements or measures taken by the EC. In this regard, the United States agreed with the statement by Ecuador recalling that there was no DSB finding that the EC had implemented the DSB's recommendations and rulings in the Bananas III dispute.

73. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS27/AB/RW/USA and Corr.1 and the Panel Report contained in WT/DS27/RW/USA and Corr.1, as upheld by the Appellate Body Report.

5. Appointment of Appellate Body members

74. The Chairman said that under this Agenda item, as he had announced at the informal DSB meeting held on 11 December 2008, he wished to submit formally his proposal on this matter to the DSB for its consideration. A copy of this proposal was available as a room document. Before introducing his proposal he would like to make some observations. He recalled that the second four-year terms of Mr. Luiz Olavo Baptista and Mr. Giorgio Sacerdoti, and the first term of Mr. David Unterhalter were all set to expire on 11 December 2009. He drew attention to the communication from the Appellate Body of 12 November 2008, circulated in document WT/DSB/46, in which Mr. Luiz Olavo Baptista, the Chairman of the Appellate Body, had informed the Chairman of the DSB that he was compelled to resign from the office of Appellate Body member, owing to health reasons, with effect from 11 February 2009. As all were aware, the remainder of Mr. Baptista's second term would last for only ten months after 11 February 2009 and that the DSB would, in any event, have to decide, in the year 2009, on appointments of persons to serve on the Appellate Body. He noted that it would be desirable for the Appellate Body to be composed of seven persons again as rapidly as feasible and for the person appointed to replace Mr. Baptista to serve a four-year term. Finally as all knew, Mr. Unterhalter was eligible for a second four-year term and had expressed his interest and willingness to be reappointed. Therefore taking into consideration the facts and circumstances which he had just outlined, the Chairman proposed that the DSB agree to the following: "(i) to carry out a single selection process for the two positions in the Appellate Body presently held by Mr. Baptista and Mr. Sacerdoti; (ii) to set a deadline of 20 March 2009 for Members' nominations of candidates for these two positions; (iii) in light of the exceptional circumstances resulting from the resignation of Mr. Baptista, to deem the term of the position to which Mr. Baptista was appointed to expire on 30 June 2009, and to agree that the position previously held by Mr. Baptista be filled for a four-year term; (iv) to follow the procedures set forth in document WT/DSB/1, and, in accordance with them,

to agree to establish a Selection Committee consisting of the Director-General and the 2009 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, and to be chaired by the 2009 DSB Chairperson; (v) to request the Selection Committee to conduct interviews with candidates and to hear views of delegations in April and the first half of May 2009, and to make its recommendations to the DSB by no later than the end of May, so that the DSB can take a final decision by mid-June 2009; and (vi) to ask the DSB Chairman to continue to carry out consultations on the possible reappointment of Mr. Unterhalter".

75. The Chairman asked if the proposal that he had just read out was acceptable to all delegations.

76. The representative of Uruguay said that his country approached this matter from a different angle, and consequently arrived at a different solution. In the first place, Uruguay considered that vacancies in the Appellate Body must be filled immediately and for the remainder of the term. Second, in Uruguay's view, an incomplete Appellate Body was not a good thing, and Uruguay did not share the view that there would be no problem in ensuring the proper and efficient functioning of the Appellate Body pending the completion of the process, as suggested by the Chairman. On the contrary, Uruguay could confirm, on the basis of experience, that it was not impossible that the Appellate Body could malfunction if the vacancy left by Mr. Baptista did not have to be filled before the middle of June 2009, as suggested by the Chairman. Uruguay would have preferred the immediate appointment of a replacement for Mr. Baptista, taking advantage of the 90 days left until 11 February 2009. It would have also liked to see that person appointed only for the remainder of Mr. Baptista's term, as set forth in Article 17.2 of the DSU. However, while Uruguay would not oppose the Chairman's proposal, it would like to have its position reflected in the minutes of the present meeting to ensure that this solution did not constitute a precedent for the future.

77. The DSB took note of the statements and agreed to the Chairman's proposal.

78. The Chairman thanked delegations and said that, at this point, he wished to recall that, in accordance with the procedures that had just been agreed to, nominations shall be submitted by Members by no later than close-of-business on 20 March 2009. As had been done in the past, the nominations, along with the curricula vitae of the nominees, should be sent to the Chairman of the DSB in care of the Council and TNC Division. This information would then be circulated to all Members as Job documents. He would also like to take this opportunity to inform delegations that in the past week he had received a letter from Brazil announcing that once the DSB took a decision on the procedures for appointment of Appellate Body members, Brazil would present its candidate. Of course since the DSB had already taken a decision on this matter, Brazil was welcome to send its formal nomination.

79. The DSB took note of the statement.