WORLD TRADE ORGANIZATION

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Dispute Settlement Body
20 March 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 March 2009

Chairman: Mr. John Gero (Canada)

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.76)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.76)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.51)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.14 – WT/DS292/31/Add.14 – WT/DS293/31/Add.14)

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 by Ecuador: Status report by the European Communities (WT/DS27/96/Add.2)

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DS332/19)

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 six 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.76)

2. The Chairman drew attention to document WT/DS176/11/Add.76, 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 9 March 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, which convened in January. The US administration was working with Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, at the present meeting, the United States was presenting its seventy-sixth status report on its lack of progress in the implementation of the DSB ruling in this dispute. The EC still hoped that this would change and that the United States would take steps to implement the DSB ruling.

5. The representative of Cuba said that, on 16 January 2009, the United States had submitted a proposal on "Improvements for the WTO Appellate Body" (WT/DSB/W398). In the introduction, the United States had stated that "the creation of the Appellate Body in the Uruguay Round was an important innovation, which has enhanced Members' ability to resolve disputes and helped to clarify the meaning of covered agreements". However, the proponent apparently believed there were important rulings of the Appellate Body that did not need to be implemented. In addition to submitting repetitive and empty status reports, the defendant in this, and other disputes, had decided to ignore the DSB's rulings. Although the DSB was not the right forum to discuss the changes to the current dispute settlement system, it seemed necessary to make it clear that the first and most important step to take before modifying the DSU was to ensure compliance with the rulings made to date. Any attempts to change the current DSU provisions would be worth little if the DSB became inefficient – as had happened in some cases – due to the lack of political will of some Members, and if the principle of prompt compliance with its decisions was violated. The enactment of Section 211 prevented all efforts to register and renew certain Cuban trademarks, such as the well-known Havana Club rum brand, which had been duly registered in the United States since 1976. The Havana Club trademark was registered in 124 countries and its sales in 2008 experienced a growth of 13 per cent, which attested to its broad international recognition as a high quality Cuban brand. Despite the current crisis, the sales of this product would continue to increase. The fact that this product could not be sold on US territory due to the commercial, financial and economic blockade was not enough, and the US authorities had decided to attack the intellectual property rights of the Cuban owner. That action had serious implications and was contrary to international law. Recently, an anti-Cuban television channel that broadcasted from the United States had interviewed an expert in intellectual property complaints. That expert had mentioned two elements that should not be forgotten. First, he had said that US companies had always been allowed to register their trademarks in Cuba and then he had added that one of the reasons for this was to avoid piracy. It was clearly impossible, even for those who were more hostile towards Cuba, to ignore the role played by the Cuban authorities in relation to US intangible assets. Cuba respected intellectual property rights under both national and international legislations. Although US trademarks distinguished products that could not be sold in Cuba due to the blockade, their registration was maintained and they were renewed every ten years, as provided for in Cuba's trademark legislation. Once again, Cuba urged the parties to settle this dispute, without further delay, in accordance with the rights of the Cuban owners of this trademark. Such a settlement would constitute nothing more than compliance with the rulings made by the Appellate Body seven years ago and with various international agreements that governed this matter. It was time for the parties to take steps that reflected their real commitment to the protection of intellectual property rights across the world.

6. The representative of the Bolivarian Republic of Venezuela said that, once again, his delegation had taken note of the status report submitted by the United States, and wished to be fully associated with the statement made by Cuba at the present meeting. Trade was fundamental to the development of countries, and unilateral measures such as the one imposed by the United States against Cuba, were without justification. Not only had it distorted Cuba's trade, it had also created problems that were related to human rights issues by seriously undermining Cuba's economy on which the living standard of the population depended. Through the Petrocaribe and Alba initiatives, Venezuela had shown solidarity with Cuba in an effort to alleviate the negative impact of the US blockade, and this solidarity had been amply repaid in the form of support for the implementation of a number of social programmes, which had contributed to integration and poverty relief in Venezuela, demonstrating that the agreements should go beyond the liberalization of trade and the opening up of markets. At the regular DSB meetings, the United States had been pushing forward the deadlines

granted for the revocation of Section 211. At the end of 2008, and the beginning of the current year, the United States had informed the DSB that it was waiting for the new Congress to take up its duties. Three months had now gone by, and the only change in this respect was that the expectations generated by the new administration had now become history. One of the most positive aspects of the WTO was its contractual nature, which was closely related to the principle of commitment that resided in Members' willingness to become part of the multilateral trading system and their intention to comply with the WTO rules. However, violations of those rules, as the United States was doing, caused irreparable damage to the system because it showed that by throwing its weight around, not only could a country simply ignore UN decisions, for example on the blockade on Cuba, which had repeatedly been condemned by the UN, but it could do the same at the WTO, with equal indifference and arrogance. Once again, Venezuela urged the United States to revoke Section 211. By doing so, the United States would immediately bring considerable benefit to Cuba.

7. The representative of Uruguay said that his country had, on a number of occasions, expressed its deep systemic concern about the US long-standing failure to comply with the DSB's rulings in this dispute. Uruguay believed that Members, in particular big trading powers, must comply promptly with the DSB's recommendations. This was an essential factor in ensuring not only the smooth functioning and credibility of the dispute settlement system, but the legal security and effective balance of rights and obligations provided under the multilateral trading system. In this respect, Uruguay urged the United States, more strongly than on previous occasions, to make the new US administration aware of the need to give credibility to its announcement that it would prioritize the implementation of its multilateral commitments, and to do its utmost to comply with the DSB's recommendations in this dispute. Uruguay sincerely believed that it would not be appropriate for international public opinion to perceive the key international player as deciding whether or not to comply with its international commitments while taking issue with the implementation of commitments assumed by other Members.

8. The representative of India said that her country thanked the United States for its status report and the statement made at the present meeting. As stated before, India remained concerned about the non-compliance situation in this dispute. India urged the United States to fully implement the DSB's recommendations in this dispute.

9. The representative of Ecuador said that his country thanked the United States for its status report and supported the statements by Cuba and other Members. All Members were required to respect the WTO Agreements. Ecuador recalled, once again, that the United States, both at home and in the various WTO Councils and Committees, closely monitored the commitments undertaken by Members, particularly in the area of intellectual property rights. Ecuador, therefore, expected it to set a good example in this case. After the disputes on bananas and hormones, this was the longest-standing pending dispute in the WTO and one in respect of which all WTO Members should express their concern. Ecuador, once again, urged the United States to comply with the DSB's recommendations and rulings and to promptly repeal Section 211.

10. 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 regrettable that the US Congress had not begun to consider any implementation action pertinent to this case, despite the endeavours of the US administration. As previous speakers had correctly pointed out, the situation of non-compliance was seriously damaging the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. Therefore, China supported the statements made by the EC and Cuba, and urged the United States to implement the DSB's decision without further delay.

11. The representative of Bolivia said that, once again, his delegation wished to express its concern at the lack of progress in this dispute. Bolivia had already referred, on numerous occasions, to the dangerous consequences of non-compliance with the DSB's recommendations and rulings for

this Organization. Bolivia called upon the United States to transmit to its relevant authorities, and to the US Congress, the numerous and repeated concerns expressed by various Members in this forum and to lift the restrictions imposed under Section 211, so as to help maintain the integrity of the WTO system. Finally, she said that her country supported the statements made by Cuba and other Members.

12. The representative of Viet Nam said that his country thanked the United States for its status report. The dispute settlement mechanism was a very important mechanism to ensure the balance between the rights and obligations of the WTO Members. Therefore, like other Members, Viet Nam urged the United States to comply with the DSB's rulings and recommendations in this dispute.

13. The representative of Brazil said that his country thanked the United States for its status report pertaining to this dispute. Brazil continued to be concerned about the non-compliance situation in this dispute. Full implementation of the DSB's recommendations was still expected.

14. The representative of Mexico recalled that Articles 3.3 and 21.1 of the DSU stated, respectively, that prompt compliance with the DSB's recommendations and rulings was essential to the effective functioning of the WTO and to ensuring effective resolution of disputes to the benefit of all Members. Mexico urged the parties to this dispute to comply with those principles and to take the necessary measures to comply with the DSB's recommendations both to ensure the effective functioning of the WTO and effective resolution of disputes to the benefit of all Members.

15. The representative of Thailand said that his delegation remained positive regarding this matter. Thailand urged the United States to take all necessary steps to comply with its obligations in this dispute as soon as possible.

16. The representative of Chile said that, at the past several DSB meetings, his country had been stating its concern about this dispute and the other disputes examined under Agenda Item 1, regarding the lack of compliance. The fact that those disputes remained unresolved constituted a dangerous situation for the multilateral system. In this respect, Chile urged the parties to promptly take the necessary measures to ensure full compliance with the DSB's recommendations and rulings.

17. The representative of Argentina said that his county wished to join other delegations who had called for prompt compliance with the DSB's recommendations and rulings in this case. In particular, Argentina wished to be associated with the statement made by Uruguay.

18. The representative of the United States said that, in response to the comments made by some Members about the US compliance record, the facts simply did not support those assertions. The record was clear: the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where efforts to do so had not yet been entirely successful, the United States had been working actively towards compliance.

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.76)

20. The Chairman drew attention to document WT/DS184/15/Add.76, 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 9 March 2009, 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. With respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

22. The representative of Japan said that his country thanked the United States for its statement and the most recent status report. The United States had reported that it had taken certain measures to implement part of the DSB's recommendations in November 2002. Japan trusted that the United States would soon be in a position to report to the DSB on 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 the United States would fully implement the DSB's recommendations in this long-standing dispute without further delay.

23. 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.51)

24. The Chairman drew attention to document WT/DS160/24/Add.51, 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 9 March 2009, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and would continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter.

26. The representative of the European Communities said that, yet again, the United States had reported on continued non-compliance. The EC did not see any indication that action was being contemplated. This continued to be unacceptable.

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.14 – WT/DS292/31/Add.14 – WT/DS293/31/Add.14)

28. The Chairman drew attention to document WT/DS291/37/Add.14 – WT/DS292/31/Add.14 – WT/DS293/31/Add.14, which contained the status report by the EC 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.

[1] Article 3.3 of the DSU.

29. The representative of the European Communities said that recent developments had shown that the EC regulatory procedures on biotech products continued to work normally. The Commission had authorized a GM oilseed rape (T-45) on 10 March, and would soon authorize a GM carnation. This would make 21 authorizations since the establishment of the Panel. The Commission would soon transmit to the Council draft Commission's decisions, on authorization of cultivation of GM maize 1507 and Bt11, following the vote at the regulatory Committee on 25 February (no qualified majority). The Commission was also expected to adopt draft authorization decisions on two other maize applications, which had received a positive opinion by EFSA (maize 59122×NK603 and MON89034).

30. With respect to national bans, the Commission had transmitted draft decisions requesting all measures currently prohibiting cultivation of GM maize MON810 (FR, HU, EL and AT) to be lifted. The Council had rejected Commission proposals on the Hungarian and Austrian safeguard measures (2 March). A vote at the regulatory Committee on the French and Greek measures had resulted in no qualified majority (16 February). The EC believed that further progress in such a sensitive area could only be achieved through dialogue and cooperation. The EC remained open to continue discussions with the three complainants.

31. The representative of Argentina said that his country welcomed the EC's status report. Argentina had shown a great deal of flexibility in this dispute, as demonstrated by its decision to extend the period for implementation until 30 June 2009. However, despite the readiness shown by the parties, and the progress made thus far, a number of concerns remained regarding the approval process, the prohibitions, which were still in force, and the attitude of certain member States. Nevertheless, Argentina would continue working with the parties, in the same constructive spirit, with a view to achieving the full implementation of the recommendations adopted by the DSB.

32. The representative of Canada said that her country thanked the EC for its statement. Canada was pleased that the canola event T-45 had been approved by the European Commission on 10 March 2009. Canada appreciated the support of the European Commission during this long process and valued the constructive dialogue it had had to date with the EC. However, Canada was concerned that it had taken over three years for T-45 to be approved – this fact highlighted Canada's deeper concern that undue delays were reappearing in the EC approval system for biotech products. Canada's on-going concerns included continuing member State bans that were currently in place on the cultivation and marketing of EU-wide approved biotech products. There remained a risk that other member States would choose to put in place new bans. Canada would continue to monitor the situation closely.

33. The representative of the United States said that his country thanked the EC for its status report, and the statement made at the present meeting. As noted at prior meetings, the United States had serious concerns with the current operation of the system established by the EC for the purpose of reviewing and approving new biotech products. On-going delays in the EC system were causing substantial trade harm to US producers. The EC's backlog of approximately 50 pending biotech product applications was even greater than the backlog that had existed at the beginning of the reasonable period of time for compliance in November 2006. The United States understood that the EC was asserting progress because it had recently approved one of the 50 pending applications. But the product that reportedly had been approved – rapeseed T-45 – only served to exemplify the problems in the EC system. The application for T-45 had first been submitted in February 1999 – more than ten years ago. By now, the variety was obsolete and no longer marketed; its only significance was the possible presence of negligible amounts of obsolete T-45 in shipments of currently-produced varieties of biotech rapeseed. If the EC's actions in banning products until they reached obsolescence were tolerated, Members would never obtain the market access to which they were entitled under the WTO Agreement. The United States again urged the EC to take prompt action on the many pending applications for biotech products that were currently produced in the

United States and other WTO Members. The United States thanked the DSB for its attention to this matter.

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

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 by Ecuador: Status report by the European Communities (WT/DS27/96/Add.2)

35. The Chairman drew attention to document WT/DS27/96/Add.2, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations and rulings in the case concerning the European Communities' regime for the importation, sale and distribution of bananas.

36. The representative of the European Communities said that the EC stood ready to implement the recommendation made in Ecuador's Report by means of modifying its bound duty. The EC still hoped that this rebinding could be made in the context of a comprehensive agreement with Latin American suppliers, an agreement that had been sought since the EC had initiated GATT Article XXVIII negotiations back in 2004. The EC was fully committed to finding very soon a final solution to this long-standing "banana saga". The EC had already resumed negotiations, not only with Ecuador but also with other MFN suppliers, in the hope of reaching an agreement regarding the rebinding of the EC tariff on bananas. The requests made to the EC to simply sign the draft agreement established in the margins of the 2008 July Ministerial Meeting simply disregarded the fact that the signature of that agreement was subject to the successful adoption of DDA Agriculture modalities. Having said that, the EC was now engaged in negotiations to discuss the possibility of concluding a draft agreement with a number of elements based on the July 2008 text, subject to necessary adjustments to the current situation, and hoped that all banana suppliers would constructively engage in the necessary discussions.

37. The representative of Ecuador said that his country thanked the EC for its status report. In that report, the EC, once again, failed to give any indication of the date by which it hoped to comply with the DSB's recommendations and rulings in this case. Furthermore, the EC again denied the existence of the Geneva Agreement on Bananas reached with the principal Latin American MFN suppliers on 27 July 2008. Nor did the EC express any readiness to honour that Agreement. The EC had recently made a proposal to Latin American MFN suppliers that was characterized by: (i) its lack of any balance between the commitments that were expected of MFN suppliers and those to be undertaken by the EC in exchange; (ii) the linkage of tariff cuts to the uncertain conclusion of Doha Round modalities; (iii) the introduction of further conditions in areas unrelated to compliance with the DSB's recommendations and rulings and the compensation under Articles XXIV and XXVIII of the GATT 1994; and (iv) the way in which the validity of the proposed agreement was made subject to the conclusion of a parallel agreement with another Member, amongst other issues. Ecuador again called upon the EC to sign the Banana Agreement of 27 July 2008 and not to open up Pandora's box of uncertain consequences that could prompt Ecuador to exercise its cross-retaliation rights or bring renewed complaints or even seek better conditions in terms of the final entry tariff, and shorter implementation periods. Ecuador pointed out that a unilateral decision by the EC in this case would have serious political, legal and systemic implications. Finally, Ecuador was surprised that the EC had, once again, refused to submit a status report on the DSB's recommendations and rulings in the proceedings brought by the United States under Article 21.5 of the DSU. The DSB Members should be concerned about this situation.

38. The representative of Honduras said that, once again, his country was compelled to express its concern about the most recent status report submitted by the EC, and about what appeared to be the

EC's approach to the issue of compliance. As other Members had pointed out, the EC's reporting and compliance obligations under Article 21.6 of the DSU were applicable to the rulings and recommendations resulting from the 1997 Bananas III dispute, and not just to one review procedure adopted since the original rulings had been issued. The Appellate Body had confirmed that the EC had not yet implemented the rulings and recommendations in the Bananas III dispute. It had also confirmed that the original rulings would remain in effect until the EC proved that it had complied with them fully, which it had not yet done. Honduras, as an original complainant in the Bananas III dispute, and willing to safeguard its interests in this dispute, requested, once again, that any future references to this matter under the Agenda item concerning "Surveillance of Implementation of Recommendations Adopted by the DSB", and any future EC status reports should duly acknowledge the fact that the EC had yet to comply with the rulings and recommendations in the Bananas III dispute. As for the description of "progress" submitted before the DSB in the current month, Honduras welcomed the EC's interest in concluding an agreement on bananas "promptly", but asked the EC to explain exactly what it meant by a "comprehensive agreement". If the EC meant that any arrangement in respect of bananas had to be linked to future developments in other WTO bodies, and that in the absence of any such developments the EC would never comply with the rulings and recommendations in question, then this approach to compliance would, in fact, have nothing to do with the DSB. If the EC meant that other products, completely unrelated to the bananas dispute, had to be linked to the bananas settlement, and that the EC would never comply if they were not, then this would, once again, run counter to the unconditional obligation that the DSU had imposed on the EC to bring itself into compliance in this dispute. If the EC meant that the tariff cuts promised under the 27 July Agreement had to be diluted or lowered, despite the setbacks that the EC had subsequently suffered in two compliance actions, this would also reflect the EC's worrying indifference towards recent rulings and its compliance obligations. Prompt compliance was not a matter left to the discretion of the complying Member, nor could it be subject to other trade objectives or other factors. If the EC was genuinely interested in having an effective multilateral system, one capable of putting an end to protectionism and inspiring confidence in the WTO, the EC must do its part by bringing itself into compliance, thus ending what was undoubtedly the longest standing case of non-compliance that the system had ever witnessed.

39. The representative of Nicaragua said that his country regretted that the EC was still refusing to comply with the recommendations in this 17-year-long dispute. Although the EC recognized its renewed obligation to bring itself into conformity, and knew that the reasonable period of time for complying had expired, Nicaragua did not yet see that the EC demonstrated any urgency or diligence in meeting its obligation. On the contrary, the EC seemed to be making compliance contingent upon what it called a "comprehensive agreement", one which would not come into effect unless certain Doha-related outcomes were to be decided in the future by the Membership as a whole. The DSU provisions did not allow compliance to be made contingent on subsequent action by the Membership in a broader sphere. Under these rules the EC, and the EC alone, was responsible for reducing its tariff and eliminating any tariff discrimination promptly, in strict conformity with its GATT obligations. It was high time that the EC informed the DSB exactly how and when it intended to bind its MFN tariff at the considerably lower rate required by the WTO rules. It was also high time that the EC should let other Members know how and when it would remedy the tariff discrimination that continued to put Nicaragua at an insurmountable disadvantage. In this regard, the EC referred to "new trading arrangements" with the ACP countries, but Nicaragua did not consider this unexplained reference to be appropriate in terms of compliance with the obligations laid down in Article 21.6 of the DSU, which required due clarity and specificity in demonstrating effective compliance with the provisions of Article I of the GATT. With its negative attitude towards transparency in respect of specific actions taken to comply, and its tendency to continue linking compliance to future Doha outcomes, which had nothing to do with the banana issue and which would, in addition, have to be approved by the entire Membership, the EC was, in effect, making it clear to the DSB that it intended to continue refusing to comply until it considered that its broader objectives had been fulfilled. This position did not honour the rules governing compliance and was in fact undermining them. When the

EC called upon the Membership to refrain from taking WTO-inconsistent measures in these difficult economic times, the EC should perhaps remind itself of its own obligation to honour the rules and bring itself into conformity in respect of the bananas case.

40. The representative of the Dominican Republic, speaking on behalf of the ACP countries, said that, at the DSB meetings on 11 December 2008 and 19 February 2009, the ACP countries had registered their disagreement on substance with certain conclusions reached by the Panel and the Appellate Body in this dispute. As had been stated on those occasions, the ACP countries respected the need to implement final decisions of the DSB. However, of the three substantive legal issues litigated in this proceeding, only the finding of a violation of the EC's obligations under Article II of the GATT 1994 awaited implementation. The Dominican Republic recalled that the Panel and the Appellate Body had concluded that the EC's schedule at this time still committed the EC to an out-of-quota tariff of €680/mt and a TRQ of 2.2 million tonnes at a tariff of €75/mt. As had previously been stated, the ACP countries could live with a faithful and literal implementation of those conclusions. As reflected in its status report, the EC aimed to achieve compliance, and hence implementation, by changing its tariff structure through negotiations with the MFN suppliers, including the complainant. If that led to a reduction of applied duties, it was important to keep in mind that this would happen for reasons other than the bananas dispute, because the DSB's recommendations in this dispute did not require any overall reduction of average tariffs; nor did the negotiations under Article XXVIII of the GATT. Any pressure towards a reduction of the EC's banana tariffs found its rationale exclusively in the DDA. The ACP countries actively supported efforts to move towards an effective solution with regard to the EC bananas tariff regime, and to ensure that the steps eventually agreed upon were taken for the right reasons, anchored and balanced out in the right context.

41. The representative of Panama said that his country took note of the EC's offer in its status report to "re-engage immediately" in negotiations on a "comprehensive agreement" that would establish "among other elements, the level of the new EC bound tariff duty". As Panama had informed the EC on several occasions, Panama was equally prepared to "re-engage immediately", but for the purpose of ratifying the Agreement it had reached with the EC in July 2008. The EC's status report referred to a very different kind of agreement. It envisioned a "comprehensive" package where tariff cuts might or might not be granted depending on contingencies far beyond the scope and involvement of the DSB. Under Article 21 of the DSU, the EC's Bananas III obligation was to lower its bananas tariff to the proper bound rate, and to rid its import arrangement of unfair discrimination. Other more "comprehensive" issues, including those involving products well beyond bananas, had no place under the DSU. Under Article 3 of the DSU, any mutually agreed banana solution should be between the EC and the MFN parties to this long dispute. When the party that had lost 13 WTO proceedings on the same matter began to attach to the issue of compliance "comprehensive" prerequisites that had nothing to do with the DSU, it was fair to ask whether that party truly intended to bring itself into prompt compliance, as required under Article 21 of the DSU. The EC had promised in recent public statements to "lead by example ... to strengthen the rules-based system". Panama applauded that objective and reminded the EC that the rules-based system provided that prompt compliance with the DSB's recommendations and rulings was essential to the effective functioning of the WTO and to the maintenance of a proper balance between the rights and obligations of Members. This was all the more true when the illegal measures demanding compliance continued to harm the interests of developing-country Members. The EC could help reaffirm the importance of effective multilateralism, and its leadership on this front, by promptly and properly redressing its own long legacy of non-compliance in the Bananas III dispute.

42. The representative of Colombia said that his country welcomed the status report submitted by the EC and noted its intention to bring itself into compliance with the DSB's recommendations and rulings by modifying its scheduled tariff commitments on bananas. Colombia hoped that prompt action would be taken in this regard. Although the EC had entered into contact with Latin American MFN banana suppliers, negotiations had not yet begun. The EC's non-compliance with the agreement

concluded in July 2008 continued to be an obstacle to achieving the climate of trust that was needed. Colombia hoped that a way would soon be found to begin good faith negotiations that would lead to a comprehensive solution to the bananas dispute.

43. The representative of Guatemala said that his country regretted that this matter had been brought back on the DSB's Agenda. This was even more regrettable since the EC had, and continued to have, at its disposal, the perfect instrument with which to resolve not only the dispute under consideration, but also other disputes under the WTO with regard to bananas. The instrument in question was the Geneva Agreement on Trade in Bananas of 27 July 2008. Guatemala, therefore, urged the EC, once again, to reflect upon its position and to comply promptly with the recommendations and rulings of the Panel and the Appellate Body. Guatemala also hoped that the EC would provide more specific information on the implementation of the recommendations and rulings contained in the adopted Reports.

44. The representative of Cameroon said that his delegation wished to support the statement made by the Dominican Republic, on behalf of the Group of ACP countries. At the same time, Cameroon was pleased that because there were no negotiations, one could assume that the fact that Cameroon had not been asked to participate in any did not mean that Cameroon was late or that it had been sidelined. His delegation wished to refer to the last point mentioned by the Dominican Republic, concerning efforts to find an effective solution. Cameroon considered that an effective solution to this dispute would have to be balanced and satisfactory to all Members. That, in fact, was why his delegation had raised the issue of participation in the negotiations: if there were no negotiations, all the better, since there would have to be negotiations for all parties to be associated. That, at least, was Cameroon's view, which his delegation had always stated and repeated it again at the present meeting. In short, as Cameroon had already mentioned in other DSB meetings, an effective and satisfactory solution could not be found without the involvement of all interested parties. His delegation was ready to cooperate to that end.

45. The representative of the United States said that, for the most part, his delegation could refer delegations back to the statements that the United States had made at the past two DSB meetings, but would also like to stress a few points at the present meeting. For the third time, the EC had filed a status report that mentioned only Ecuador's proceeding. The EC had stated that there was no longer a compliance issue with respect to the recommendations and rulings that the United States and the other complaining parties obtained because the measure at issue in the recent compliance proceedings had ceased to exist. The DSB had not adopted any panel or Appellate Body report finding that the EC was in compliance with its WTO obligations with respect to the EC bananas import regime. The United States had no specific information on how the EC was in compliance with its obligations under Articles I and XIII of the GATT 1994, although the EC had made references to agreements negotiated or being negotiated with other WTO Members. This was information which the United States would have expected to receive through the status reports in this dispute, but the EC's status report contained no information on this topic. If the EC believed it was in compliance, the United States would greatly appreciate receiving this information so that it could see whether it could join in that belief.

46. With respect to the GATT Article II inconsistency found in the most recent compliance proceeding brought by Ecuador, the EC, in its most recent status report, continued to refer to "concluding promptly a comprehensive agreement on bananas that would establish, among other elements, the level of the new EC bound tariff duty". The United States once again reminded the EC that it was required to reduce its bananas tariff as a dispute settlement compliance matter, independent of whatever other goals it wanted to achieve in a much broader and distinct set of negotiations. The EC's reasonable period of time for compliance expired a long time ago – in fact, more than 10 years ago. What was more, the commercial impact of the EC's non-compliance over this very long period was undeniably large and damaging to a number of WTO Members. The United States looked forward to receiving a comprehensive status report with a comprehensive explanation of how the EC

intended to come into substantive compliance with its obligations, as well as a description of the progress it was making towards that end.

47. The representative of the European Communities said that he wanted to respond to two points. First, in response to Ecuador saying that there was no negotiation underway he said that, to set the record straight, the parties had spent the better part of 13 March 2009 to discuss intensely. The EC would let others decide how this had to be qualified. Thus the EC was in no way just sitting back, but was engaged in intense discussions with the parties concerned. Second, the Appellate Body had confirmed that no recommendation, as opposed to findings, was warranted with respect to the measure at issue in this dispute, since the measure was no longer in existence (paragraph 479 of the AB Report). The Appellate Body had referred generally to the principle that, in Article 21.5 DSU procedures, original DSB recommendations and rulings "remain in effect until the EC brings itself into substantive compliance". However, there was no longer a compliance issue here, since the measure at fault had ceased to exist in 2007. The current tariff treatment of bananas of ACP origin was a completely different measure, based on the negotiation of free trade agreements (FTAs) with the ACP countries concerned. Tariff preferences could equally result from the FTAs negotiations with Latin American suppliers.

48. The representative of Ecuador said that his delegation, once again, reiterated that there was no negotiations under way. When Ecuador had participated in meetings convened by the EC, including the one referred to by the EC, Ecuador had stated in writing that this was not a negotiating exercise. This had been put in writing and, therefore, it could not be disputed. He said that the proposal that the ACP countries could live with had already been condemned by the DSB. Ecuador, once again, stated that the ACP countries could not participate in any negotiation unless they were complainants in this case or unless they had requested compensation under Article XXVIII of the GATT 1994. The MFN suppliers had never been consulted on the tariff level for bananas, which was granted to the ACP countries.

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

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DS332/19)

50. The Chairman drew attention to document WT/DS332/19, which contained the status report by Brazil on progress in the implementation of the DSB's recommendations and rulings in the case concerning Brazil's measures affecting imports of retreaded tyres.

51. The representative of Brazil said that, on 9 March 2009, Brazil had provided the DSB with a status report in the above-mentioned dispute, in accordance with Article 21.6 of the DSU. The report described the actions taken by Brazil regarding the implementation of the DSB's recommendations and rulings following the adoption of the Reports of the Panel and the Appellate Body. Due to recent developments, Brazil wished to provide the DSB Members with an update concerning the judicial action of the Supreme Court mentioned in paragraphs 4 to 7 of the status report (ADPF 101), initiated by the Executive Branch with a view to preventing judges and lower courts from issuing injunctions allowing imports of used tyres in Brazil, as well as to revoke injunctions already granted. As anticipated in paragraph 6 of the status report, the judgment of the Supreme Courts in the tyres case had been initiated on 11 March 2009. The Reporting Judge's vote was widely favourable to the request of the Executive Branch, acknowledging the relevance of the import ban on used tyres to Brazil's comprehensive strategy to deal with waste tyres. Brazil wished to inform the DSB that the video recording of the session of 11 March was publicly available on the Supreme Court's website and that Brazil would naturally be glad to provide the relevant Internet links to anyone interested in seeing, viewing and hearing the whole proceedings. In any event, the proceedings before the

Supreme Court had not been completed that same day due to the request of one of the 11 Justices of the Court to review the record of the case, which was a regular procedure in Brazil's and other countries' judicial systems. The judgment would be resumed as soon as the record was returned to the plenary of the Court. As stated in the status report, Brazil believed that the judgment of ADPF 101 constituted a fundamental step in the strengthening of Brazil's environmental policy concerning tyres, as well as for the implementation of the DSB's recommendations and rulings in this dispute.

52. The representative of the European Communities said that his delegation took note of Brazil's first status report submitted by Brazil and what Brazil considered it had done, in order to work towards WTO compliance, since its import ban on retreaded tyres was found incompatible with the WTO Agreement. The EC noted that Brazil had admitted not having achieved compliance to date, despite the expiry of the reasonable period of time on 17 December 2008. As regards Brazil's efforts towards implementation, the EC maintained its position, expressed at the 15 January 2008 DSB meeting. The EC was neither convinced nor satisfied with Brazil's actions. The fastest and best way to do away with the on-going and WTO-incompatible discrimination would be to lift the import ban on retreaded tyres. That would also ensure that Brazil respected its Mercosur obligations, confirmed by binding arbitral rulings. The EC would be interested to hear what exactly Brazil intended to set up when it had referred to a "common trade regime for tyres with its Mercosur partners". The EC needed to stress again that the DSB's rulings and recommendations in this case did not permit keeping the import ban in place while maintaining the possibility for intra-Mercosur trade in retreads. The EC emphasized again that it was strongly in favour of environmental and public health protection. It would, therefore, by no means want to discourage Brazil from doing more for the protection of its citizens against diseases spread by mosquitoes that breed in abandoned waste tyres. For that purpose, however, much better, more effective measures were available as compared with the selective targeting of certain imported products that did not actually contribute to the problem. The EC deplored the on-going resort, including by Brazilian governmental representatives, to the polemic allegation that the EC intended to export its waste to Brazil. The EC managed, recycled and recovered waste tyres without relying on exportation. Moreover, like the overwhelming majority of WTO Members, the EC did not ban the importation of retreaded tyres. On the contrary, the EC imported retreaded tyres from other countries, including Brazil. The EC, therefore, called upon Brazil to end, without further delay, its arbitrary and discriminatory practices regarding retreaded tyres, and to do so by removing the import ban.

53. The representative of Uruguay said that his country thanked Brazil for its status report. Uruguay stressed its full readiness to agree to a common trade regime for tyres under the Mercosur system. This, without affecting Uruguay's rights, would contribute to a speedy compliance with the DSB's decisions in this dispute.

54. The representative of Paraguay said that his country thanked Brazil for its status report. Paraguay would be willing to continue discussions regarding a common regional policy concerning this matter and urged Brazil to continue in that direction.

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

2. United States – Continued existence and application of zeroing methodology

(a) Implementation of the recommendations of the DSB

56. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In that respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of

adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 19 February 2009, the DSB had adopted the Appellate Body Report pertaining to the dispute on: "United States – Continued Existence and Application of Zeroing Methodology" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

57. The representative of the United States said that on 19 February 2009, the DSB had adopted the Panel and Appellate Body Reports in the dispute: "United States – Continued Existence and Application of Zeroing Methodology". Members would recall that the United States was deeply troubled by the Appellate Body Report in this dispute. The United States did not, however, seek to engage in a further discussion of those concerns at the present meeting, which had been expressed in the US statement to the DSB on 19 February. As provided in the first sentence of Article 21.3 of the DSU, the United States wished to state that it intended to comply in this dispute with its WTO obligations, and would be considering carefully how to do so. The United States would need a reasonable period of time.

58. The representative of the European Communities said that the EC welcomed the US statement that the United States intended to implement the DSB's recommendations and rulings in this dispute. The EC noted that the US implementation in this case involved mainly a recalculation exercise and should be completed very quickly. The EC stood ready to discuss with the United States the appropriate period of time for implementation and hoped that prompt and full compliance would follow.

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

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

(a) Statements by the European Communities and Japan

60. 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.

61. The representative of the European Communities said that, as his delegation had stated many times, illegal distributions of anti-dumping and countervailing duties collected on imports made prior to 1 October 2007 would continue for an undetermined number of years. Therefore, the EC wanted 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 submit status reports in this dispute.

62. The representative of Japan said that the latest distribution for FY2008[2] showed that the CDSOA still remained operational.[3] Japan, once again, called on the United States to stop illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. Pursuant to Article 21.6 of the DSU, the United States was under obligation to

[2] According to the latest CDSOA Annual Report published by US Customs, some US$180 million have been disbursed for FY 2008. See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/

[3] 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.xm1

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.

63. The representative of India said that her delegation thanked the EC and Japan for bringing this issue before the DSB once again. She reiterated that the disbursements made by the United States under the Byrd Amendment continued to be in force affecting the rights of other WTO Members. India was concerned that non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to cease its WTO inconsistent disbursement.

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

65. The representative of China thanked the EC and Japan for, once again, raising this item at the DSB meeting. China shared the concerns expressed by previous speakers, and wished to join them in urging the United States to comply fully with the DSB's rulings.

66. The representative of Brazil said that his country thanked Japan and the EC for bringing this issue before the DSB one more time. Brazil recognized that the Byrd Amendment had been repealed on 1 October 2007. However, Brazil was still of the view that the disbursements by the United States to its domestic industry under the CDSOA, with funds related to duties collected before that date, continued to be made, affecting the rights of other WTO Members. Brazil reiterated the need for the United States to bring this situation to an end and to fully implement the DSB's recommendations and rulings.

67. The representative of Thailand said that his country thanked the EC and Japan for continuing to bring this matter before the DSB. Thailand remained disappointed at the US maintenance of the WTO-inconsistent disbursements. As mentioned at the 19 February 2009 DSB meeting, Thailand regretted that the CDSOA remained fully operational, affecting several million dollars worth of Thai exports to the United States, including a product that would be discussed under the next Agenda item. Once again, Thailand 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.

68. The representative of the United States said that, as the United States had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. He 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 on the Agenda of the present meeting. With respect to comments regarding further DSB surveillance in this matter, as had already been explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States made in the implementation of the DSB's recommendations and rulings.

69. The DSB took note of the statements.

4. United States – Measures concerning the importation, marketing and sale of tuna and tuna products

(a) Request for the establishment of a panel by Mexico (WT/DS381/4)

70. The Chairman drew attention to the communication from Mexico contained in document WT/DS381/4, and invited the representative of Mexico to speak.

71. The representative of Mexico said that, although this was not a new dispute in the context of trade between Mexico and the United States, it was the first time that Mexico had filed a request for the establishment of a panel before the DSB. Although the issue of trade barriers imposed by the United States on Mexican tuna and tuna products dated back to the GATT-era, the measures that were the subject of Mexico's claim, despite having similar effects, were different and related essentially to the US refusal to allow the "dolphin-safe" label to be used for tuna imported from Mexico, which hindered the effective marketing of Mexican tuna in the United States. Mexico and the United States had actively participated in the Inter-American Tropical Tuna Commission and were party to the Agreement on the International Dolphin Conservation Programme (AIDCP), both of which regulated tuna fishing in the Eastern Pacific Ocean. However, despite the provisions established in both of these frameworks, Mexico was not allowed to use the "dolphin-safe" label in the United States because US legislation, on the basis of an interpretation by the US courts, prohibited Mexico from using that label regardless of whether or not any harm was inflicted on the dolphins. The fishing methods used by Mexico not only protected dolphins, but were also entirely sustainable in respect of tuna stocks. In contrast, it had been scientifically established that other tuna fishing methods such as those endorsed by the United States, which involved the use of floating objects and which were considered "dolphin-safe", endangered practically all types of fish and marine species and could cause considerable damage to the ecosystem. Various environmental NGOs: e.g. Greenpeace International and the World Wildlife Fund supported Mexico's fishing methods under the AIDCP, since Mexico's fishing industry was not only one of the most selective and respectful in terms of the marine environment, but it was also regulated by a transparent and participatory system unlike any other in the world. The fishing methods employed by the Mexican fleet clearly complied with international guidelines on sustainable tuna fishing – guidelines which the United States had participated in establishing. The US legal system, however, departed from these guidelines and imposed requirements for which there was no scientific basis. Mexico wished to emphasize that it was not trying to undermine protection of the dolphin population or overall conservation of the marine ecosystem by pursuing dispute settlement proceedings in the WTO. On the contrary, this dispute would help to further improve the environmental outcomes already achieved, within a framework of transparency, responsibility and sustainability. Mexico, therefore, regretted that it had not been possible to find a satisfactory solution to this problem – one which would lead to Mexico losing a third of its tuna fleet – at the consultations held with the United States on 17 December 2008 in Washington (DC). As a result of the violations that the US measures had generated under the WTO Agreements, the GATT 1994 and the Agreement on Technical Barriers to Trade, Mexico felt obliged to request the establishment of a panel in order to resolve this dispute.

72. The representative of the United States said that his country was disappointed that Mexico had chosen to move forward with a request for panel establishment. The United States considered its dolphin-safe labelling regime central to the protection of the dolphin population in the Eastern Tropical Pacific ocean. The United States was confident that, if this dispute were to proceed to a panel, their dolphin-safe labelling measures that Mexico had challenged would be found to be consistent with US WTO obligations. For all of these reasons, the United States strongly urged Mexico to reconsider its decision to pursue a panel in this dispute, and said that the United States was not in a position to agree to the establishment of a panel at the present meeting.

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

5. United States – Anti-dumping measures on polyethylene retail carrier bags from Thailand

(a) Request for the establishment of a panel by Thailand (WT/DS383/2)

74. The Chairman drew attention to the communication from Thailand contained in document WT/DS383/2, and invited the representative of Thailand to speak.

75. The representative of Thailand said that his delegation requested that the DSB establish a panel to examine the matter described by Thailand in its request for the establishment of a panel, dated 9 March 2009, in document WT/DS383/2. This dispute involved a challenge by Thailand on the use by the United States of zeroing in weighted-average to weighted-average price comparisons in an original anti-dumping investigation. The DSB had adopted rulings and recommendations which had found the use of this type of zeroing to be WTO-inconsistent on several occasions, such as "US – Measures Relating to Shrimp from Thailand" (DS343), and most recently "US – Continued Existence and Application of Zeroing Methodology" (DS350). He informed the DSB that Thailand and the United States had reached an agreement regarding accelerated procedures to resolve this dispute. The procedural agreement would be notified to the DSB as soon as possible. Thailand looked forward to working with the Panel, the United States, and any third parties that may be interested in participating in order to achieve a prompt and satisfactory resolution of this dispute.

76. The representative of the United States said that, as noted by Thailand in its statement, the United States and Thailand had reached agreement on a procedural framework that should permit the resolution of this matter on an expedited basis. As mentioned by Thailand, the procedural framework would shortly be notified to the DSB. Pursuant to that agreement, the United States did not object to the establishment of a panel at this time. The United States was pleased to note that it had been working closely and constructively with Thailand with respect to this matter and looked forward to continuing that cooperation as the proceeding moved forward.

77. The representative of Thailand said that his country thanked the United States for agreeing to the establishment of the panel at the present meeting. Thailand appreciated the US constructive and cooperative approach to this dispute settlement proceeding.

78. 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.

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

6. China – Measures affecting the protection and enforcement of intellectual property rights

(a) Report of the Panel (WT/DS362/R)

80. The Chairman recalled that, at its meeting on 25 September 2007, the DSB had established a panel to examine the complaint by the United States pertaining to this matter. The Report of the Panel contained in WT/DS362/R had been circulated on 26 January 2009 as an unrestricted document. The Report of the Panel was now before the DSB for adoption at the request of the United States. The adoption procedure was without prejudice to the right of Members to express their views on the Report.

81. The representative of the United States said that his country thanked the members of the Panel and the Secretariat staff for their hard work during this proceeding. The matters at issue in this

dispute concerned fundamental provisions in the TRIPS Agreement related to the protection and enforcement of intellectual property rights (IPR). The viability of the enforcement tools provided by the TRIPS Agreement was critical to the protection of intellectual property, and to thwarting the efforts of those who would infringe. As had been observed on other occasions, the United States had been concerned for some time that levels of counterfeiting and piracy in China remained unacceptably high. Although the scope of that concern extended beyond the specific measures at issue in this dispute, the United States had brought this dispute because several aspects of China's legal regime were contributing to the larger problem by hindering effective IPR protection and enforcement. The United States was pleased that, in critical respects, the Panel had agreed with its concerns. The Panel's findings also were of great systemic importance and would provide useful guidance to Members. The United States wanted to highlight certain aspects that Members might find of particular interest.

82. The first matter in this dispute concerned the denial of copyright protection under China's Copyright Law to certain works of creative authorship that did not meet content review standards, including movies, music, books, and journals. China's blanket denial of copyright protection deprived the affected copyright owners of vital enforcement tools to prevent unauthorized copies from being produced in China and either distributed there or exported to other markets. The United States was pleased with the Panel's findings on this matter. First, the Panel had found that the denial of protection to these works under China's Copyright Law was impermissible under Article 9.1 of the TRIPS Agreement. That provision incorporated Article 5(1) of the Berne Convention for the Protection of Literary and Artistic Works, which specified that copyright protection, including guaranteed exclusive rights, must be afforded to works that were entitled to such protection. The Panel had also specifically recognized the troublesome commercial uncertainty for authors stemming from the prospect of copyright denial. In this regard, China's statements during the proceeding[4] that "copyright vests at the time a work is created" and that works unreviewed by the content authorities were not denied copyright protection under Chinese law provided new clarity and would be warmly welcomed by Members' right-holders seeking to offer legitimate copies or to enforce their rights against infringing copies of their copyrighted works in China.

83. Second, the Panel had found that China's denial of protection to works that did not meet China's content review standards was incompatible with Article 41.1 of the TRIPS Agreement because, for works denied protection, "enforcement procedures are not available so as to permit effective action" against infringement. This finding underscored the role of Article 41.1 in ensuring that Members' enforcement tools truly allowed effective action against IPR infringement. The second matter at issue in the dispute concerned China's border measures for disposal of infringing goods. These measures included provisions for counterfeit goods to be publicly auctioned after only removing the infringing trademark. The Panel found that these disposal rules were inconsistent with Articles 46 and 59 of the TRIPS Agreement concerning release into the channels of commerce of trademark-infringing imports seized at the border. Indeed, as the Panel had recognized[5], these WTO standards reflected an understanding that returning these goods to the marketplace, with only the infringing mark removed, could confuse consumers and harm the reputation of the legitimate product, facilitating – rather than deterring – further acts of infringement involving these goods. China's border enforcement measures also permitted its authorities to dispose of seized infringing goods by donating them to charitable organizations. In this connection, the United States was pleased to hear China's statement during the proceedings that it had imposed a legal responsibility on its Customs authorities to ensure that any goods donated under China's disposal rules would not return to commerce or otherwise harm the right-holder.

[4] China IPR Panel Report, para. 7.118.
[5] China IPR Panel Report, para. 7.374.

84. With respect to the third matter before the Panel regarding China's legal thresholds for criminal prosecution and conviction, the United States was pleased that the Panel had correctly concluded that China's criminal thresholds were so high as to exclude application of criminal procedures and penalties to some commercial activity and declined to endorse, as requested by China, the levels of China's criminal thresholds. The United States was also very pleased that the Panel found that the term "commercial scale" in Article 61 meant that China could not set its thresholds for prosecution of piracy and counterfeiting in a manner that ignored the realities of the commercial marketplace. Similarly, the Panel had clarified that whether acts of counterfeiting or piracy were "on a commercial scale" would depend on a number of factors such as the product at issue – for instance, whether it was a designer watch, DVD, or a software title – and the particular market in which it was sold. The Panel had also made clear that determining what constituted "commercial scale" must take into account the impact of technological developments, such as digital technology and the Internet, as well as the evolution of commercial marketing practices. In short, the Panel set forth an analytical approach that was in keeping with the dynamic nature of the marketplace, in particular in the digital environment, and should help Members avoid or resolve future disputes concerning obstacles to criminal enforcement against counterfeiting and piracy. The United States was disappointed, however, that the Panel had found it would need more evidence to conclude that the commercial activity under China's thresholds was "on a commercial scale".

85. In sum, while the United States was disappointed with some aspects of the Panel's findings, it was nonetheless pleased to request the adoption of the Panel Report at the present meeting. China had repeatedly affirmed its intention to act consistently with WTO rules and to respond swiftly to any findings of non-compliance. In that spirit, and in light of the pressing problems of IPR infringement, the United States looked forward to China moving promptly to implement the DSB's recommendations to bring its measures into compliance upon adoption of the Report. China had also repeatedly recognized the importance of continuing its work to fight the rampant piracy and counterfeiting in its markets and had taken active steps to improve IPR protection and enforcement. For example, the United States welcomed China's move to drop its criminal copyright threshold from 1,000 to 500 infringing copies. The United States, therefore, also looked forward to China's efforts going forward to substantially improve IPR protection and enforcement, and looked forward to further engagement with China on these matters.

86. The representative of China said that his country wished to thank the members of the Panel for their service and for the evident dedication they had devoted through the process. China also wished to express its gratitude to the WTO Secretariat for its diligence in this complex dispute. China and the United States had had a productive and cooperative dialogue on intellectual property protection; and China, over the years, had been working vigorously to ensure that its intellectual property enforcement regime met its commitments in this area. China did regret that the United States had set aside a more cooperative approach with China on intellectual property protection to pursue litigation without apparent economic benefit. In China's statement to the Panel nearly one year ago, China had acknowledged that, like any other country in the world, it did not have a perfect record on protection and continued to face difficulties and challenges in protecting intellectual property. But China had insisted then, as it did at present, that it had always acted in good faith to implement its legal commitments under the TRIPS Agreement. China noted that, on the predominant points of contention, the Panel had come to share China's conviction. China regarded the Panel's Report as a broad affirmation of China's intellectual property protection regime and, therefore, did not intend to challenge the Report before the Appellate Body. Having said that, China did take note of the following facts. First, with respect to Claim One (Criminal Thresholds) of this dispute, the Panel had found no fault with China's system of criminal enforcement for intellectual property violations. The Panel had concluded that the United States had failed to establish that China's criminal measures, and specifically its use of criminal thresholds, were inconsistent with Article 61 or other provisions of TRIPS.

87. Second, with respect to Claim Two (Customs Measures) of this dispute, the Panel had found that almost all aspects of China's system for disposing of infringing goods seized at the border were consistent with China's TRIPS obligations. The Panel had determined that TRIPS Article 59 applied to goods that were destined for import, not goods that were destined for export, and thus was not applicable at all to well over 99 per cent of goods that Chinese Customs had seized. Indeed, in this respect the Panel found that "China's border measures provide a level of protection higher than the minimum standard required by Section 4 of Part III of the TRIPS Agreement" (Panel Report, para. 7.228). The Panel had further determined that China's challenged measures were also fully consistent with the first sentence of Article 46, as incorporated into Article 59, and had rejected all of the US arguments to the contrary. In reaching this unsurprising determination, the Panel had held that China's steps for disposing of a seized good – donating these goods to social welfare agencies, selling them to the right-holders, or offering them for auction – were all consistent with the TRIPS Agreement. The Panel had also held that Chinese Customs had the appropriate level of authority and discretion required under the TRIPS Agreement with respect to the disposal or destruction of seized goods. The Panel had not shared China's view regarding one aspect of China's measures for the auction of a seized good, holding this aspect inconsistent with the fourth sentence of Article 46, as incorporated into Article 59. While rejecting the US contention that seized goods may not be released into the channels of commerce, other than in exceptional circumstances, the Panel concluded that China's authorities did not take sufficient steps beyond ensuring the removal of the infringing mark before permitting the release of certain goods into the channels of commerce. China noted, however, that this determination by the Panel specifically concerned the possible auction of seized goods destined for import – as the Panel had acknowledged, there did not appear to be even a single instance in which such an auction had occurred in China.

88. Third, with respect to Claim Three (Copyright Law) of this dispute, the Panel had rejected an attempt by the United States to link China's content review processes to an alleged failure to protect copyrights. The United States had contended that Chinese law denied copyright to: (i) works not yet submitted for content review; (ii) works pending content review; and (iii) works edited to pass content review. The Panel had rejected the US argument on all three of these counts and had declined to find that China's content review procedures raised issues under the TRIPS Agreement. The Panel had held that Chinese law violated Article 9 of the TRIPS Agreement in only one instance, namely copyright protection with respect to content that specifically had been found to be prohibited by law. Here again, China noted that the Panel's decision concerned a measure with virtually no economic significance. Chinese law denied copyright protection under this law only to content that had been found to be illegal, such as child pornography. In sum, the Panel had rejected the great majority of the arguments against China's measures concerning criminal enforcement, disposition of goods seized at the border, and copyright enforcement. The Panel had found that Chinese measures were inconsistent with the TRIPS Agreement only in two discrete areas – and in neither instance had the disputed measures actually been applied in WTO-inconsistent manner. China pledged to continue to fulfil its obligations under the TRIPS Agreement and the DSU in good faith and looked forward to working on a cooperative basis with other Members to strengthen the international protection of intellectual property rights in a balanced manner. China would be examining the Report carefully and would inform the DSB of its intention in respect of the implementation, as provided for under Article 21.3 of the DSU. China, once again, thanked the Panel and the Secretariat for their efforts in resolving this dispute.

89. The representative of the European Communities said that the EC had followed this dispute with great interest, and had participated in the proceedings as a third party. Beyond the specific recommendations of the Panel on the claims brought by the United States, the EC welcomed the important clarifications offered by the Panel on some key TRIPS provisions. The additional clarity offered would be essential for the future operation of the TRIPS Agreement. On the specific interpretative questions addressed by the Panel, the EC wished to underline the importance of the interpretations of the terms "commercial scale" in Article 61 of the TRIPS, and also of the expression

"shall have the authority" that appeared not only in Articles 46 and 59 but in several other TRIPS Articles. The EC believed that the interpretations offered ensured adequate and effective IPR enforcement on the basis of the TRIPS obligations. Moreover, the EC wished to commend the Panel's reasoning with regard to the rules of interpretation to be applied in sensitive areas, such as the area of "criminal matters and attendant concerns regarding sovereignty". As the Panel noted in para. 7.501, these concerns found reflection in the text and scope of treaty obligations (which may therefore contain specific limitations and flexibilities), but the treaty obligations themselves had to be interpreted in accordance with the customary rules of interpretation, as codified in the Vienna Convention. On the specific claims brought by the United States, the Panel had recommended that China bring its Copyright law and Customs measures into conformity with its obligations under the TRIPS Agreement. The EC called on China to expeditiously implement the recommendations in order to remove what constituted important shortcomings in China's IPR regime. The EC hoped that the outcome of this dispute would contribute to the further improvement of China's IPR framework. The EC recognized the efforts deployed thus far by the Chinese government to improve IPR protection and enforcement. As the Panel had stated in its concluding remark, its task was not to ascertain the existence or level of counterfeiting and piracy in China. The EC, nonetheless, looked forward to further co-operating with China in order to reduce infringement levels and to ensure a strong and legally certain environment for IPR in China.

90. The representative of Australia said that her country had participated as a third party in this dispute. Australia's participation reflected strong interest in the proper interpretation of the provisions of the TRIPS Agreement at issue in the dispute. Australia welcomed the Panel's findings and hoped that China would move quickly to bring into compliance the measures found by the Panel to be inconsistent with its WTO obligations.

91. The representative of Canada said that her country wished to thank the Panel and the Secretariat for their work in these proceedings. Canada had been a third party in this matter, as it had a systemic interest in the legal interpretations of various provisions of the TRIPS Agreement that had been considered in this case. Therefore, Canada wanted to comment on a couple of the issues the Panel had considered in this case. First, with respect to the Panel's analysis concerning the thresholds for criminal provisions, Canada was disappointed that the Panel had not agreed with the arguments presented by the United States. However, Canada welcomed the guidance provided by the Panel for enforcement efforts in the future. Second, Canada welcomed the Panel's finding, as it related to China's obligation for the disposal of infringing goods as found in Articles 59 and 46 of the TRIPS Agreement. The Panel had concluded that: "in regard to counterfeit trademark goods, China's Customs measures provide that the simple removal of the trademark unlawfully affixed is sufficient to permit release of the goods into the channels of commerce in more than just 'exceptional cases'" and that, on this basis, "the Custom measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporated the principle set out in the fourth sentence of Article 46". Canada agreed with these conclusions of the Panel. Finally, Canada welcomed the Panel's finding that the first sentence of Article 4(1) of China's Copyright Law was inconsistent with China's obligations under Article 41.1 of the TRIPS Agreement. Canada called upon China to comply fully with the DSB's recommendations.

92. The representative of Korea said that, as a third party in this dispute, Korea welcomed the findings of the Panel Report. Korea appreciated that China had accepted the work of the Panel and had decided not to resort to the appeals procedure. Accordingly, Korea expected China to put into copyright law and customs measures in compliance with the DSB's findings in a timely manner. Korea would continue to monitor carefully the situation.

93. The DSB took note of the statements and adopted the Panel Report contained in WT/DS362/R.

7. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/401)

94. The Chairman drew attention to document WT/DSB/W/401, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panellists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/401.

95. The DSB so agreed.

8. Appointment of Appellate Body members

(a) Statement by the Chairman

96. The Chairman, speaking under "Other Business", said that, as he had announced at the outset of the present meeting, he wished to make a statement concerning the process for appointment of Appellate Body members. He said that pursuant to the DSB decision of 22 December 2008, 20 March was the last day for submitting nominations for two positions on the Appellate Body. Thus far, there had been a total of five candidates nominated by the following Members: Argentina, Brazil, Mexico and the EC. Additional nominations could still be submitted on the present day by no later than 6 p.m. He recalled that, at its meeting on 22 December, the DSB had agreed to establish a Selection Committee to review the candidates and to make recommendations to the DSB. This Selection Committee, as provided for in the procedures set out in document WT/DSB/1, was composed of the Director-General and the 2009 Chairs of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB. The DSB Chairman was to chair the Committee. As to the time-table for its work, the Committee would conduct interviews with candidates and hear the views of delegations in April and May and then make its recommendations to the DSB by no later than the end of May. This should enable the DSB to take a decision at its meeting on 19 June. He said that, as Chairman of the Selection Committee, he intended to hold the first organizational meeting of the Committee as soon as the coming Sunday. At that meeting, he expected the Committee to discuss the process and also to agree on tentative dates for conducting interviews and hearing the views of delegations. After the Committee had agreed on these dates, he would ask the Secretariat to make the necessary arrangements to set up appointments with the candidates and interested delegations. As in the past, delegations were also free to make their views known to the Committee in writing. In that regard, any written communications should be sent to the Chairman of the DSB in care of the Council and TNC Division. He further noted that, consistent with past practice, delegations wishing to meet separately with candidates were invited to contact directly the Missions of the respective candidates to make the appropriate arrangements. Finally, he recalled that, pursuant to its decision of 22 December, the DSB also had agreed to ask the DSB Chairman to continue to carry out consultations on the possible reappointment of Mr. David Unterhalter. He recalled that his predecessor, Amb. Mario Matus, had begun informal consultations on this matter and said that he would continue with those consultations.

97. The DSB took note of the statement.