

**Dispute Settlement Body
20 January 2009**

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 January 2009

Chairman: Mr. Mario Matus (Chile)

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1. Surveillance of implementation of recommendations adopted by the DSB

- (a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.74)
- (b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.74)
- (c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.49)
- (d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.12 – WT/DS292/31/Add.12 – WT/DS293/31/Add.12)
- (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)

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 five 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.74)

2. The Chairman drew attention to document WT/DS176/11/Add.74, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 8 January 2009, 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 in the previous US Congress, in both the US Senate and the US House of Representatives. A legislative proposal that would implement the DSB's recommendations and rulings in this dispute had also been introduced in the new Congress, which had convened earlier in January. Finally, the United States noted that a new US administration would take office later in the day.

4. The representative of the European Communities said that, at the present meeting, the United States submitted its seventy-fourth status report on the lack of progress in the implementation of the DSB's rulings in this dispute. In fact, since the condemnation of Section 211 in February 2002, the United States had failed to comply with its obligations. The EC hoped that this pattern would change, and that the United States would take steps to implement the DSB's rulings.

5. The representative of Cuba said that an effective dispute settlement system would benefit all WTO Members, not just the parties to a particular dispute. That was why, out of deep concerns about non-compliance in this case, more and more voices were being raised to urge the defendant to comply with the rulings made by the Appellate Body in 2002. Prompt compliance with the DSB's recommendations and rulings was essential if the dispute settlement mechanism was to function well and be credible. Cuba had previously pointed out that, in this case, one could no longer speak of

prompt compliance. Section 211, which violated the rules of international law, had been in force for more than 10 years and the Appellate Body Report pertaining to this dispute had been adopted more than six years ago. The United States had not modified its status reports which it was submitting every month before the DSB. In the meantime, the United States passed judgements on the intellectual property policies of other Members and lodged new claims alleging violations of intellectual property rights.

6. There was no doubt that the dispute settlement system was ineffective and was becoming increasingly fragile. As long as the United States failed to comply with the fundamental rules of the TRIPS Agreement, it should refrain from filing new complaints in the area of intellectual property. Cuba wondered how one Member could ask another Member to comply with its WTO obligations, if that Member did not respect its own obligations. Cuba pointed out that laws had been passed that prejudiced the registration of Cuban marks, which facilitated the registration and marketing of marks by anti-Cuban companies such as Bacardi. Furthermore, there had been an increase in the registration of trademarks containing terms such as "Cuba". In 2006, for example, cigarette trademarks: i.e. "PRIMO DE CUBA" and "SPIRIT OF CUBA" had been registered with the US Patent and Trademark Office by the right holders in Pennsylvania and Florida, respectively. All knew that the term "Cuba" identified his country's official name. Thus the intention was misleading, and consumers' rights were not respected. It should be noted that one of the functions of trademarks was to indicate the origin of a product. If Cuba's intellectual property office received an application from a Cuban legal or natural person to register trademarks containing the names of places in the United States or the name of that country, such an application would have to be rejected in accordance with Cuba's Decree-Law No. 203 on Marks and Other Distinctive Signs. Cuba respected the international agreements that prohibited this type of fraudulent and misleading registration.

7. Cuba, once again, requested that the United States comply with the rulings of the Appellate Body by repealing, once and for all, Section 211, which harmed not only Cuba's interests. The fact that cases such as the one under consideration were kept indefinitely on the DSB's Agenda had serious systemic implications, which should be of concern not only to the parties to the dispute, but to all Members. The inauguration of a new US president on 20 January generated a great deal of expectation, including in the WTO, given the importance of that Member to the international trading system and to compliance with multilateral rules. One hoped that the new US government would have something new to tell, and that it would take a different attitude towards its WTO obligations and the DSB's decisions.

8. The representative of the Bolivian Republic of Venezuela said that her delegation thanked the United States for its status report and the statement made at the present meeting. Her delegation also thanked Cuba for its statement and wished, once again, to reiterate its systemic concern at the situation of continued non-compliance in this dispute. Venezuela urged the United States to take immediately measures to ensure the implementation of the DSB's recommendations and to repeal Section 211. This would address the concerns of the complainants and would recognize the importance of the DSB as a mechanism able to ensure that Members' rights under the multilateral trading system were respected. The US compliance would have a positive effect on the overall effectiveness of the WTO dispute settlement system.

9. The representative of Uruguay said that his country shared the systemic concerns expressed by previous speakers. Uruguay considered that it was extremely important for Members to comply promptly with the DSB's recommendations. This was essential for ensuring the smooth functioning of the dispute settlement system and its credibility as well as the legal certainty and the effective balance of rights and obligations provided under the multilateral trading system. Uruguay, therefore, again urged the United States to do its utmost to comply with the DSB's recommendations.

10. The representative of China said that his country thanked the United States for its status report and its statement made at the present meeting. In January 2009, a new US Congress, both the House of Representatives and the Senate, had begun their work. On 20 January, the United States would have a new administration. China hoped that those new elements would be translated into concrete implementing actions, which would be in the interest of not only other Members, but also in the interest of the United States. As previous speakers had correctly pointed out, the situation of non-compliance seriously damaged the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. Therefore, China, once again, 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 India said that her country thanked the United States for its status report and its statement concerning the surveillance of implementation in this dispute. As on previous occasions, India urged the United States to implement the DSB's recommendations in this dispute.

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

13. The representative of Viet Nam said that his delegation thanked the United States for its status report. Like other Members, Viet Nam supported Cuba's statement urging the United States to bring its measures into conformity with the DSB's rulings and recommendations. Viet Nam believed that the new US administration to take office on 20 January, and the US Congress, would bring this dispute to an end.

14. The representative of Ecuador said that his country wished to thank the United States for its status report. Ecuador supported the statements made by Cuba and other Members on this matter. All WTO Members were required to comply with the DSB's recommendations and rulings. After the Bananas dispute, the Section 211 dispute was the longest-standing dispute in the WTO. Ecuador urged the United States to comply with its WTO obligations. Ecuador hoped that the new US administration, to be inaugurated on 20 January, and the US Congress, would put an end to this dispute and to the unfair economic blockade imposed on Cuba, which had been condemned by the United Nations.

15. The representative of Brazil said that his country thanked the United States for its status report. As Brazil and other Members had stated at previous DSB meetings, the lack of compliance in this dispute was of concern to the WTO Membership. Brazil was confident that the new US administration would continue to work with the US Congress, in a constructive and transparent manner, with a view to implementing the DSB's recommendations.

16. The representative of Bolivia said that given that no progress had been made in this dispute, Bolivia wished to express its concern about negative implications of the failure to comply with WTO obligations. If the United States wished to maintain the integrity of the dispute settlement system, it must comply with the DSB's recommendations and rulings and remove the restrictions under Section 211. The WTO dispute settlement system was particularly important for the credibility of the WTO multilateral trading system. Bolivia, therefore, hoped that the new US administration would demonstrate the political will to resolve this dispute.

17. The representative of Mexico recalled that Articles 3.3 and 21.1 of the DSU, respectively, stated that the "prompt settlement" of disputes was essential to the effective functioning of the WTO, and that "prompt compliance with recommendations or rulings of the DSB" was essential in order to

ensure the effective resolution of disputes "to the benefit of all Members". Mexico, therefore, urged the parties to the dispute to respect those provisions, and to take the measures required to achieve compliance, to the benefit of both the functioning of the WTO and all its Members.

18. The representative of Argentina said that his country thanked the United States for its status report. Argentina wished, however, to note that the failure to comply with the DSB's recommendations had implications that went beyond the interests of the parties to the dispute. Any improvements to the dispute settlement system would have little impact if Members failed to demonstrate a strong commitment to compliance with the DSB's recommendations. Argentina wished to be associated with the request made by other Members that the parties to the dispute, in particular the United States, take the necessary action to ensure implementation in this dispute.

19. The representative of Nicaragua noted that it was not an encouraging start at the beginning of the year that there were still some outstanding issues such as the DSB's rulings in the Section 211 dispute. Nicaragua expressed systemic concerns about the proper functioning of the multilateral dispute settlement system and called upon the Member concerned to comply with those rulings without further delay. The statements made month after month by numerous delegations had not produced the desired effects. Many doubts had been raised as to the real intentions of the United States regarding its compliance in this dispute. As all were well aware, the DSB's rulings were not like a menu of options from which Members could choose. Section 211 had been found to be in breach of Article 42 of the TRIPS Agreement, given that it limited, in specific circumstances, the right of trademark owners to have recourse to US civil judicial procedures in order to achieve the required compliance. As a result, the door was left open for certain infringements of intellectual property rights in the US territory to go unpunished. Nicaragua would appreciate receiving further information on concrete measures aimed at bringing Section 211 into conformity with WTO rules and principles.

20. The representative of Chile said that his delegation wished to join others in expressing deep systemic concerns at the lack of compliance in this dispute. Chile hoped that the new US administration, together with the US Congress, would bring positive changes to this matter with a prompt adoption of the measures necessary for the United States to fully comply with the DSB's recommendations in this long-standing dispute.

21. The representative of the United States said that, in response to the "systemic" concerns expressed by some Members at the present meeting, as his delegation had stated at many previous DSB meetings, the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where US efforts to do so had not yet been entirely successful, the United States had been working actively towards compliance.

22. The representative of Cuba said that his delegation wished to make a few brief comments. First, Cuba thanked all those delegations who had taken the floor. Cuba believed that the views expressed by a number of Members representing various regions were very clear regarding this matter. Second, delegations were tired of reading the same status reports and hearing the same statements made by the United States. Cuba would have hoped that the United States could have been a bit more creative. As had been stated by one delegation at the present meeting, the DSB's recommendations and rulings were not like a shopping list or a menu of options from which to choose. As stated by another delegation, this was one of the longest-standing disputes in the WTO. Cuba hoped that the new US administration would bring the US legislation into compliance with the US obligations under the TRIPS Agreement and WTO rules.

23. 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.74)

24. The Chairman drew attention to document WT/DS184/15/Add.74, 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.

25. The representative of the United States said that his country had provided a status report in this dispute on 8 January 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, as mentioned in the status report, the new US Congress had convened earlier this month. As mentioned earlier, the new US administration would take office later in the day.

26. The representative of Japan said that his country thanked the United States for its statement and its status report. As had already been reported, the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. Since then, however, there had been little tangible progress with regard to 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". Japan hoped that under the new US administration and the US Congress, the United States would accelerate its work and put an end to this long-standing dispute without further delay.

27. 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.49)

28. The Chairman drew attention to document WT/DS160/24/Add.49, 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.

29. The representative of the United States said that his country had provided a status report in this dispute on 8 January 2009, in accordance with Article 21.6 of the DSU. As mentioned under previous items of the Agenda of the present meeting, a new Congress had convened this month, and the new US administration would take office later in the day.

30. The representative of the European Communities said that the present meeting was the forty-ninth time that the United States had reported on its continued non-compliance without offering any concrete means to bring itself into compliance. Despite the EC's request, "Father Christmas did not have anything in his bag for the EC on this one". So the EC was left with the more "grown-up hope" that the United States would deliver, a hope that had been repeatedly dashed, for the forty-ninth time. The EC hoped that in this year of change, the United States would manage to make this small change, and would bring itself into conformity with its WTO obligations.

31. 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.12 – WT/DS292/31/Add.12 – WT/DS293/31/Add.12)

32. The Chairman drew attention to document WT/DS291/37/Add.12 – WT/DS292/31/Add.12 – WT/DS293/31/Add.12, 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.

33. The representative of the European Communities said that her delegation wished, once again, to bring new evidence contesting arguments of undue delays in the implementation of the EC's regulatory procedures on biotech products. On 19 January, the EC Agriculture Council had voted on two draft authorization decisions on a GM oilseed rape (T-45, of interest to Canada) and a GM carnation. The authorization of these GM products was now expected as early as next month. This would bring the number of authorizations since the establishment of the panel to 21, a figure that strongly contradicted any possible claim of moratorium. And further progress was expected in the weeks to come. Notably, the adoption by the European Commission of draft authorization decisions on cultivation of GM maize 1507 and Bt11. Such decisions would be put through the Comitology procedure shortly thereafter. Draft authorization decisions on two other maize applications had received a positive opinion by EFSA (maize 59122×NK603 and MON89034) should also be adopted soon. With respect to national measures, the European Commission was expected to adopt draft decisions on several measures prohibiting cultivation of GM maize MON810, including the Austrian measure condemned by the Panel. 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.

34. The representative of the United States said that his country thanked the EC for its status report and its statement made at the present meeting. Since the last EC status report in December 2008, the United States had seen no progress in resolving this dispute. In particular, the EC had not authorized any of the approximately 50 pending applications for approval of biotech products. The United States respectfully referred delegations to the prior US statements explaining the serious concerns of the United States with the backlog of pending applications and the EC's lack of progress. As the United States had stated many times before, the commercial impact of this dispute was significant and growing. The United States thanked the DSB for its attention to this matter.

35. The representative of Canada said that her country thanked the EC for its statement. While there had been recent progress in the dossier on Bayer CropScience's T-45, Canada would underline that this event had been in the approval process, in one form or another, since March 2004. Canada noted that the Council of Agriculture Ministers had voted on the Commission Proposal to approve T-45 at its meeting in Brussels on 19 January, and that a qualified majority had not been obtained to either approve or reject this proposal. It was disappointing to Canada that T-45 had not been approved by EU Agriculture Ministers since the European Food Safety Authority adopted a positive opinion of it on 30 January 2008. Since the proposal had neither been approved nor rejected, Canada understood that the proposal now passed to the Commissioner for Health for her approval. Canada expected that that this approval would be accorded promptly. Finally, Canada was also concerned with the continued bans by some EC member States on the importation of certain GM events that had been given EU-wide approval for importation. In these situations Canada would monitor very closely the EC's efforts to have these national bans removed.

36. The representative of Argentina said that his delegation had little to add to what had been stated by the EC other than to thank the EC for its report. As mentioned previously, Argentina hoped that another working session would be held with the Commission and that this would prove useful and would enable the parties to continue along the path of progress and cooperation.

37. 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)

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

39. The representative of the European Communities said that the EC stood ready to implement the recommendations 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 of bananas, 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 requests made to the EC to sign the draft agreement established in the margins of the July Ministerial Meeting in 2008 had 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 stood ready to discuss the possibility of concluding that draft agreement, subject to necessary adjustments to the current situation, and hoped that Latin American suppliers would constructively engage in the necessary discussions.

40. The representative of Ecuador said that his country thanked the EC for its status report. He noted that, as a courtesy, Ecuador would have appreciated receiving that status report in advance. He recalled that, at the December 2008 DSB meeting, the EC had made an inappropriate comment comparing Ecuador's statements to statements made by a baneful person of repugnant memory in European and world history. Ecuador strongly rejected the EC's assertion in this regard. In its status report, the EC gave no indication as to when it expected to comply with the DSB's recommendations and rulings in this case. Furthermore, the EC, once again, disregarded the existence of the Geneva Agreement on Trade in Bananas, which had been reached with the main MFN suppliers on 27 July 2008. Nor did the EC express any willingness to comply with that Agreement, which was regrettable. Ecuador, once again, called upon the EC to sign the Banana Agreement of 27 July 2008 and to put an end to this long-standing dispute. If the EC did so, Ecuador would not need to exercise its retaliation rights or to make new claims on bananas. A unilateral decision by the EC on this matter would have serious repercussions.

41. The representative of the United States said that, first of all, his country was extremely disappointed that the EC had submitted a status report with respect to implementation of the recommendations and rulings in Ecuador's proceeding but had neglected to file a report, as required by Article 21.6 of the DSU, that covered all of the operative recommendations and rulings. In this connection, it appeared that the United States needed to repeat a point that it had made at the December 2008 DSB meeting, namely, that the Appellate Body had found that the "DSB recommendations and rulings from the original proceedings remain in effect until the European Communities brings itself into substantive compliance."¹ The Panel had concluded similarly. Moreover, the United States regretted that in the report that the EC had filed with respect to Ecuador's proceeding, the EC had provided no information as to how its bananas import regime, as of 1 January 2008, was in compliance with its obligations under Articles I and XIII of the GATT 1994. Turning to the finding of inconsistency with Article II of the GATT 1994 made in Ecuador's proceeding, the United States saw that the EC had merely noted its willingness "to explore the possibility of agreeing on the new bound tariff in the context of a broader agreement on bananas".

¹ Appellate Body Report, para. 273; see Panel Report, para. 8.13.

After all those years, the United States would have hoped that the EC would be well beyond "exploring possibilities". The United States would like to recall that while there might well be other legal provisions pursuant to which the EC was obliged to rebind its bananas tariffs, such as Articles XXIV and XXVIII of the GATT 1994, the EC was also required to do so (or to provide the appropriate tariff treatment set out in its Schedule) independently of those provisions, as a dispute settlement compliance matter.

42. As the United States had stated many times before, the United States was very much encouraged by the progress that the EC and the Latin American suppliers had made over the summer in their negotiations on the long-standing bananas issue. The United States was very disappointed when the EC had unilaterally decided to suspend those negotiations. So, the United States hoped that at the next DSB meeting, the United States would receive a status report on the Bananas disputes, and a more comprehensive explanation of how the EC intended to come into substantive compliance with its obligations, and a description of the progress it was making towards that end. Finally, the United States was looking forward to hearing those Members previously speaking under Item 1(a) also express their systemic concerns under this item, including, for example, Venezuela, Uruguay, China, India, Thailand, Viet Nam, Brazil, Bolivia, Mexico, Argentina, and Chile.

43. The representative of Colombia said that his country thanked the EC for its status report in which the EC outlined its intention to bring its bananas import regime into conformity with Article II of the GATT 1994 by modifying its WTO bound tariff. In this regard, Colombia recalled that both the Panel and the Appellate Body had found that the EC bananas tariff of €176/mt exceeded the EC's WTO bound tariff. At the present meeting, the EC had stated that instead of modifying the tariff that was inconsistent with its obligations under Article II of the GATT 1994, the EC was going to modify its obligations under Article II of the GATT 1994. It was not necessary to remind the EC that any change to the bound tariff must improve competition conditions for MFN bananas. The EC had stated that, despite the lack of agreement to date, it was still willing to agree on the new bound tariff in the context of a broader agreement on bananas. In that respect, the EC must make a concrete proposal. Thus far, no such a proposal had been made. This long-running dispute should have ended in July 2008 with the "Geneva Agreement on Trade in Bananas". Unfortunately, more and more WTO bodies had been required to deal with this matter. In any case, Colombia noted the EC's statement concerning its intention to seek a broader agreement on bananas. Colombia regretted, however, the EC's failure to provide a status report on the implementation of the DSB's recommendations and rulings regarding the US proceeding on bananas concerning the way in which the EC would bring itself into conformity with its obligations under Articles I and XIII of the GATT 1994. Once again, Colombia joined persistent calls of the MFN countries urging the EC to bring its bananas import regime into line with WTO rules, and to stop prolonging a dispute that had already attracted a lot of attention at the WTO. This could be achieved by matching words with action. The prompt settlement of this matter was in the EC's hands.

44. The representative of Costa Rica said that, since 1992, the EC bananas import regime had been examined by a number of different WTO bodies, all of which, as in this case, had confirmed the EC's violations under the rules of the multilateral trading system, the GATT and the WTO. Costa Rica continued to hope that the EC would comply with its WTO obligations. The status report submitted by the EC was vague and raised serious questions about the EC's compliance with the recommendations of the Panel and the Appellate Body, which had been adopted by the DSB. The EC did not indicate when it would comply with the DSB's recommendations nor did it provide any details as to how it would do so. Costa Rica awaited further clarification from the EC as to how and when the EC would reduce its tariff of €176/mt, which had been considered to be in breach of the EC's WTO obligations. The EC maintained in its status report that it "has already been seeking an agreement with Latin American banana supplying countries" on this matter. Such a statement appeared to give the impression that no agreement had yet been reached to this effect or that the MFN bananas exporters were preventing an agreement which could enable the EC to remedy its bananas

import regime. Costa Rica recalled that an agreement between Latin American MFN bananas exporters and the EC (the Geneva Agreement on Trade in Bananas) had been reached on 27 July 2008, an agreement which the EC had unilaterally decided to forgo. If the EC implemented that agreement, it would put an end to this dispute as well as to other complaints lodged at the WTO with respect to bananas. Costa Rica urged the EC to submit a clear and detailed status report on the bananas disputes, and on the way in which the EC bananas import regime would be brought into compliance with the DSB's recommendations and rulings.

45. The representative of Honduras said that the statements made by his country at previous DSB meetings concerning bananas should be taken into consideration under this Agenda item since they reflected Honduras' position on this matter. He said that Honduras' interest in this dispute was clear. Honduras was one of the original complainants in the Bananas III dispute and was entitled to be recognized as a substantial supplier of bananas to the EC's market. For many years, however, Honduras' interests had not been recognized. The rights conferred on Honduras by the rulings in the Bananas III dispute had not yet been restored. Honduras had not received any compensation as a result of the EC's enlargement and the violation that had occurred in 2006 had not yet been rectified. Unfortunately, the matter continued to be under the surveillance of the DSB. The EC's last status report pertaining to the Bananas III dispute had been submitted seven years ago, but, in terms of its content, the present status report was not so different. In February 2002, the EC had maintained that it had fully complied with its obligations in the Bananas III dispute and had requested that the matter be removed from the DSB's Agenda. At that time, Honduras and other countries had objected to the EC's request. On that occasion, faced with the possibility that in 2006 the EC would "impose a prohibitive tariff that would make it impossible for Honduran bananas to enter into the EC's market", Honduras had reserved its rights. Honduras, as a developing country, had to bear the cost of the EC's continued non-compliance. As had previously been stated, such prolonged non-compliance could not be considered consistent with the calls for prompt compliance, and that particular attention be paid to matters affecting the interests of developing-country Members, and the effective resolution of disputes, as stipulated in Article 21 of the DSU. Honduras stood ready to insist on the EC's compliance with a view to resolving the bananas dispute under the terms accepted by the EC on 27 July 2008. However, since the July Agreement had not been ratified, Honduras would now take the same position as in February 2002 as well as on many other occasions, and would reserve not only its rights pertaining to the Bananas III dispute, but would also reserve its rights resulting from the EC's rebinding and its enlargement as well as the EC's discrimination.

46. The representative of Panama said that his country supported the call by Ecuador for prompt compliance and regretted that, so many years after the adoption of the original Banana III Report, the EC still maintained a regime contrary to the DSB's rulings and recommendations. In 2009, 17 years after the first bananas dispute had been initiated under the multilateral dispute settlement system, this longest dispute in the history of the multilateral system continued to be discussed and monitored. According to Article 21.6 of the DSU, the EC was required to report again to the Membership on its "progress" in the implementation of the rulings and recommendations contained in the 1997 and 2008 WTO decisions. Panama noted with interest the EC's status report, but found no indication therein that the EC intended to comply promptly, as required by Article 21 of the DSU. One of the three sentences contained in the status report indicated that the EC had been seeking an agreement with Latin American banana supplying countries since 2004. A reference to 2004 did not constitute a sign of progress. It was precisely in 2004 that the EC had an obligation to provide compensation as a result of its enlargement from 15 to 25 members. In 2006, the EC had been required to rebind its tariff appropriately. Latin American countries were still waiting to benefit from those adjustments. The status report also stated that "[d]espite the lack of agreement to date, the EC is still willing to explore the possibility of agreeing on the new bound tariff in the context of a broader agreement on bananas". Latin American countries should not be blamed for the "lack of agreement to date". An agreement had been approved by the EC and by most Latin American banana supplying countries on 27 July 2008. The EC was the only party that had gone back on that agreement. If the

above-mentioned sentence of the EC status report meant that it was still prepared to honour the terms of the agreement in question, the long-standing banana dispute could finally be settled. If, on the other hand, the implication of the EC's statement was that it would be necessary to negotiate a new agreement, that sentence, like the EC's reference to the year of 2004, was the opposite of "progress". Any attempt by the EC to readjust the difficult balance achieved in that agreement would bring the parties back to the point of departure, would give rise to new requests for compliance with the Appellate Body's decisions and would aggravate the dispute. The EC had stated that the world needed "champions of trade" in these uncertain times. Panama agreed and hoped that the EC would demonstrate its leadership by informing Members in the very near future that it had signed the 27 July Agreement and that it had corrected the longest lasting example of non-compliance in the history of the system.

47. The representative of Nicaragua said that her country noted the brief status report submitted by the EC on 8 January 2009. Nicaragua regretted, however, that the report merely repeated the same assertion that the EC had been making since 2004, namely, that the EC intended to modify the tariff commitments on bananas contained in its Schedules of Concessions. Nicaragua had hoped to have more information in this regard. The EC had unilaterally imposed three tariffs on bananas, which had been condemned by the WTO. Nicaragua regretted that the EC had not indicated in its status report how and when it intended to "modify its Schedule" so as to comply, once and for all, with its rebinding obligations. Nicaragua continued to be concerned that ACP suppliers – many of which were in a considerably better economic situation than Nicaragua – were entitled to access the EC's market at zero tariffs, while Nicaragua had effectively been excluded from the EC market due to the imposition of a tariff of US\$4.27 per box. For that reason, Nicaragua also regretted that the EC provided no indication in its status report as to how it intended to bring its regime into conformity with Article I of the GATT, which remained a compliance obligation independent of the rebinding requirements. In its statement at the 22 December 2008 DSB meeting, the EC had maintained that it had no inconsistent preferences in favour of ACP countries, in spite of the fact that those preferences had repeatedly been found to be inconsistent with the GATT and WTO rules and principles. Under those circumstances, Nicaragua requested greater transparency and clarity with regard to how the EC intended to comply – promptly and fully – with the obligations arising from the Bananas III dispute. Finally, Nicaragua noted that the reasonable period of time for the EC to comply with the DSB's rulings had expired a very long time ago.

48. The representative of Guatemala said that his country, as a developing-country Member of the WTO, had faith in the multilateral trading system, the greatest strength of which was, precisely, its dispute settlement mechanism. Guatemala, therefore, urged the EC to comply promptly with the recommendations and rulings of the Panel and Appellate Body in the disputes at issue brought both by Ecuador and the United States. Furthermore, Guatemala was concerned about the statement made by the EC to explore possibilities of settling this issue in the context of a broader agreement on bananas. Like other delegations, Guatemala considered that it would have been desirable for the EC to have gone beyond merely stating its willingness to "explore possibilities". Guatemala believed that such possibilities had already been explored and the delicate balance of the interests of all concerned had been achieved on 27 July 2008. Had the EC not announced its decision to disregard rather than to honour the Geneva Agreement on Trade in Bananas of 27 July 2008, statements such as those made under the present Agenda Item would not have been necessary. Guatemala hoped that the EC would submit more detailed status reports on the implementation of the recommendations and rulings contained in the adopted Reports, and that this matter would remain on the DSB's Agenda until it was resolved.

49. The representative of Brazil said that his delegation noted that the United States had referred to the statements of systemic concerns made by some Members, including by Brazil, under Item 1(a) on the Agenda of the present meeting. Brazil fully realized that the discussion under the present Agenda item concerned a different matter, but could not refrain from reiterating that the lack of

compliance in any dispute was of concern not only for the complainants but for all WTO Members. Moreover, the lack of transparency was also of systemic concern. In that regard, Brazil recalled that it had suggested, at the August 2008 DSB meeting, that Members submitting status reports should inform the DSB of their specific actions concerning compliance in relation to various disputes. Brazil would welcome any further details regarding this dispute.

50. The representative of Uruguay noted that one delegation had urged his country to take the floor under this Agenda Item to state systemic concerns. Uruguay felt obliged to reject implications of any bias recognized by that delegation. The compliance in the Bananas dispute was of importance to Latin American countries, including Uruguay. However, Uruguay would make a statement on any matter if it considered that that was appropriate and when its interests were involved.

51. The representative of Cameroon said that his delegation thanked the EC for its status report. Cameroon referred delegations to its previous statements made on the same matter. Cameroon took note of the EC's apparent intention to come up with a new tariff in the framework of an agreement that would be broader in scope. His delegation hoped that this approach would be as inclusive as possible and that it would take into account the interests of all of the countries concerned.

52. The representative of the European Communities said that the EC had taken good note of all comments made at the present meeting and would convey them to Brussels. However, the EC would refrain from commenting on all the points that had been made previously. The EC had had this debate at previous DSB meetings and in other WTO bodies. The position of the EC on what had happened at the negotiations in July 2008 was well known and the EC could refer delegations to its previous statements made on other occasions. There was, however, one point the EC wished to respond to at the present meeting and that concerned the findings of violations of Articles I and XIII of the GATT 1994 to which several delegations had referred. 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 it was no longer in existence (para. 479 of the AB Report). The Appellate Body had referred generally in that context to the principle that in Article 21.5 of the DSU procedures, original DSB recommendations and rulings – and this was the part that the United States had quoted earlier – "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. That was the reason why the EC had not submitted a status report in the US case, because the United States had only made claims under Articles I and XIII and not under Article II of the GATT 1994. The current tariff treatment of bananas of ACP origin was a completely different measure, based on the negotiations of Free Trade Agreements (FTAs) with the ACP countries concerned. The EC pointed out that tariff preferences could equally result from FTA negotiations with Latin American suppliers. Finally, the EC noted that Brazil had requested further clarification on what had been done thus far. The EC had held explorative talks with Latin American countries before Christmas and intended to take up those talks shortly.

53. The representative of Ecuador said that, as his delegation had previously stated, a decision on compliance with the DSB's rulings could not be interpreted unilaterally by the EC. With regard to the Economic Partnership Agreements (EPAs) between the EC and the ACP countries, he recalled that the agreements negotiated with the ACP countries provided the zero-tariff treatment for bananas. The agreement that had been concluded in July 2008 in Geneva, did not provide a reduction in the tariff rate below €100/mt nor did it provide the zero-tariff treatment. He wished to mention this in order to demonstrate the level of discrimination that was still in effect. Ecuador also wished to respond to the statement made by Cameroon, namely that the MFN Latin American suppliers had never been consulted on the tariff level for the ACP countries, which was finally at zero, nor had they been consulted on subsidies that were granted to European producers, mainly Spain and France. Finally, Ecuador wished to ask a question to Canada. As indicated in 23 December 2008 notification, Canada and the EC had reached a mutually agreed solution in the dispute on Canada's exemptions and tax

reductions on wine and beer. In the annex to that notification, Canada had undertaken to make reductions in its customs duties. Ecuador, therefore, asked the following question: "Does Canada make the implementation in this case contingent upon an agreement on modalities under the Doha Round"?

54. The representative of Cameroon said that his delegation wished to respond to the statement made by Ecuador, namely that the zero-tariff treatment was not free.

55. The representative of Canada said that her delegation suspected that Ecuador's question could have been rhetorical, but would answer it anyway. The notification to which Ecuador had referred stood on its own and it was not contingent on anything.

56. 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

57. 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.

58. The representative of the European Communities said that as the EC 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 wished 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.

59. The representative of Japan said that US Customs and Border Protection had just issued the CDSOA Annual Report for FY 2008², according to which some US\$180 million have been disbursed for FY 2008. These latest distributions showed that the CDSOA still remained operational.³ Japan urged the United States to 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.

60. The representative of India said that her country wished to thank the EC and Japan for bringing this issue before the DSB once again. India wished to reiterate that the disbursements made by the United States under the Byrd Amendment continued to be in force affecting the rights of other WTO Members. It was India's concern 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.

² See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy_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.xml

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

62. The representative of Thailand said that his country thanked the EC and Japan for bringing this item before the DSB. As his delegation had previously stated, Thailand was disappointed at the US maintenance of these WTO-inconsistent disbursements. 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. Thailand also noted and congratulated the United States on its incoming administration. Thailand hoped that the new administration under President Obama's leadership would see the wisdom in immediately and fully repealing the Byrd Amendment, and would not give in to domestic pressure to reverse the current course towards full implementation.

63. The representative of Canada said that her delegation 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.

64. The representative of Brazil said that his country appreciated Japan's and the EC's initiative to keep this item on the DSB's Agenda. As Brazil had pointed out on several occasions, the disbursements made by the United States to its domestic industry under the Byrd Amendment continued to affect the rights of WTO Members. Brazil stressed, once more, the need for the United States to take necessary actions in order to stop payments made under the CDSOA and thus to give real meaning to the DSB's recommendations and rulings.

65. 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 welcomed the EC and Japan's recognition 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 status reports in this matter, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. And so, in this light, the United States failed to see what purpose would be served by providing further status reports in this matter.

66. 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)

67. The Chairman recalled that the DSB had considered this matter at its meeting on 22 December 2008 and had agreed to revert to it. He drew attention to the communication from China contained in document WT/DS379/2, and invited the representative of China to speak.

68. The representative of China said that, at 22 December 2008 DSB meeting, China had briefly described its concerns over the measures identified in its request for the establishment of a panel which had been circulated on 12 December 2008. As explained at that meeting, China was greatly concerned by the various substantive and procedural problems found in the US anti-dumping and

countervailing duty investigations and measures against Chinese products at issue. China did not intend to repeat those concerns since they had been clearly set forth in the said request for the establishment of a panel. Since the last DSB meeting, the United States had failed to address China's concerns. Therefore, given its immediate and systemic concerns, China had no choice but to request, for the second time, that the DSB establish a panel to resolve this dispute.

69. The representative of the United States said that his country was disappointed that China had chosen to pursue its request for a panel in this matter. The United States understood that a panel would be established at the present meeting. Nonetheless, the United States continued to believe that the anti-dumping and countervailing duty determinations identified by China, and the anti-dumping and countervailing duty measures imposed pursuant to those determinations, were consistent with US WTO obligations. As the United States had previously noted in the DSB, in the investigations at issue in this dispute, the US investigating authorities had made the necessary findings, supported by evidence, prior to imposing anti-dumping and countervailing measures on imports of the Chinese products in question. China's complaint appeared to be an effort to hinder the effectiveness of these two remedies permitted under the WTO Agreements for these two injurious practices. The United States was also disappointed that China continued to request a panel to examine a so-called "absence" of "legal authority for the Department of Commerce". As the United States had observed in December 2008, whatever this phrase in the panel request might be referring to, it was clear that China's consultation request made no mention of this as a purported measure that was a subject of consultations under Article 4 of the DSU. The United States had drawn attention to this issue at the December 2008 DSB meeting and hoped that China would take the appropriate steps, rather than simply renewing its panel request. The United States regretted that China had not done so.

70. 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.

71. The representatives of Argentina, Australia, Bahrain, Canada, the European Communities, Kuwait, Saudi Arabia and Turkey reserved their third-party rights to participate in the Panel's proceedings.

4. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/396)

72. The Chairman drew attention to document WT/DSB/W/396, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/396.

73. The DSB so agreed.

5. Appointment of Appellate Body members

(a) Statement by the Chairman

74. 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 regarding the process for selecting new Appellate Body members. He recalled that at its meeting on 22 December 2008, the DSB had agreed to the Chairman's proposal on the procedures for selecting new Appellate Body members. To this effect, the DSB had agreed to the following elements: "(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 the 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 finally, (vi) to ask the DSB Chairman to continue to carry out consultations on the possible reappointment of Mr. Unterhalter". The Chairman further stated that following the 22 December 2008 DSB meeting, Argentina and Brazil had submitted their nominations of candidates, which had been circulated as Job documents to all WTO Members. He reminded delegations that, in accordance with past practice, the nominations along with curricula vitae of the nominees should be sent to the Chairman of the DSB in care of the Council and TNC Division.

75. The DSB took note of the statement.
