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Dispute Settlement Body
14 November 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 14 November 2008

Chairman: Mr. Mario Matus (Chile)

Subjects discussed: Page

1. United States – Continued suspension of obligations in the EC - Hormones dispute

(a) Report of the Appellate Body (WT/DS320/AB/R) and Report of the Panel (WT/DS320/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS320/15 transmitting the Appellate Body Report on: "United States – Continued Suspension of Obligations in the EC - Hormones Dispute", which had been circulated on 16 October 2008 in document WT/DS320/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

2. The representative of the European Communities said that, first of all, the EC wished to thank the Appellate Body and its Secretariat for their work on this dispute. The decision in this dispute was among the most important rulings that the Appellate Body had handed down thus far. The EC wished to commend the members of the Appellate Body for their readiness and courage to engage in the difficult and complex questions raised by this case, which mattered not only to the EC but, the EC believed, to a great number of WTO Members. If one considered where the parties now stood and the

fact that the EC had launched this dispute four years ago, the situation might be considered not entirely satisfactory: US and Canadian sanctions continued to hit EC exports during this entire period, even though the EC had been claiming that it had achieved WTO compliance, a claim the validity of which had been strengthened considerably through the Appellate Body Reports. It was in this sense that the EC was quite satisfied with some of what this dispute had achieved. The Appellate Body had rectified many serious legal errors which the Panel had committed in the interpretation and application of the SPS Agreement. This was an important improvement for all WTO Members and their ability to protect the health of their citizens also in situations of scientific uncertainty or controversy. The Panels' highly troubling approach to these questions, both in terms of procedure and substance, could not stand from the EC's point of view as well as from the point of view of the credibility of the WTO system. The Appellate Body had provided very useful clarifications regarding what panels were and were not entitled to do.

3. First, they must not, as they had done in this case, appoint scientists whose independence and impartiality was likely to be affected. Indeed, as special as the circumstances of this case might be, the EC believed that it was important for all WTO Members to know that they might disagree with the scientific assessment underlying an international standard and not have to face the very same scientists who had provided that assessment as the Panel's advisors in a subsequent dispute over their own assessment. Furthermore, panels must not, as they had done in this dispute, conduct a *de novo* review nor decide what they considered to be the best science. Rather, they must determine whether a risk assessment was supported by coherent reasoning and respectable scientific evidence and in that sense objectively justifiable. It did not matter whether that scientific evidence was reflecting only a minority view nor did it matter if the experts advising the panel were of a different personal opinion. A further clarification was that panels must not, as they had done in this case, adopt too narrow a concept of risk assessment in the SPS Agreement and, therefore, summarily dismiss evidence that was relevant, like in this case on misuse or abuse. Furthermore, panels must not interpret Article 5.7 of the SPS Agreement in such a way as to ignore genuine situations of scientific uncertainty, namely, where there was new evidence that called into question the results of previous risk assessments. Indeed, panels must not develop high and inflexible thresholds for the application of Article 5.7 of the SPS Agreement, merely because at some point in the past, an international standard had been formulated based on the then available information.

4. Finally, panels must not wrongly allocate the burden of proof under the SPS Agreement on the party having adopted an SPS measure, when this burden should be on the party asserting an SPS breach. Several of these legal errors of the panels were similar to those which the Appellate Body had corrected in its Report in the " EC - Hormones " dispute in 1998. The EC, therefore, hoped that future disputes would not force parties to repeat that kind of experience, but rather that the important and pertinent clarifications of the Appellate Body would be followed in order to resolve this long-running dispute in a legally sound way. In contrast to the Appellate Body's findings regarding the SPS-compatibility of the EC's hormones ban, the EC was less somewhat satisfied and convinced by the Appellate Body's reversal of the Panels' ruling that the continued US and Canadian sanctions were illegal. The EC found convincing the Panels' explanation that the US and Canada had determined that the EC's new hormones ban was WTO-incompatible and that, in reality, they were seeking redress on that basis. The EC also had doubts about the Appellate Body's finding that Article 22.8 of the DSU permitted sanctions to continue not only until WTO-compliance was actually achieved, but also beyond this point, namely, until that compliance was established in a WTO dispute. From a policy point of view the EC, however, could accept this, as was evidenced by the proposals under discussion in the DSU negotiations, including the EC's proposal.

5. The procedures which the Appellate Body had set out for a post-retaliation compliance review promised to be workable for the future. In contrast to the past uncertainty in this relation, the Appellate Body's ruling could be expected to ensure that a retaliating Member could not remain passive. It could not refuse to participate when the implementing Member initiated a compliance

review after adopting a compliance measure. When the EC had launched this dispute, it had done so with the intention of resolving it once and for all. The EC accordingly was ready to put everything on the table, including if necessary the question of the SPS-compliance of its new hormones directive. It was unfortunate that no final resolution could be achieved thus far, although the Appellate Body's ruling was a big step forward for the parties. The EC hoped that the resolution of this long-standing dispute was now in sight.

6. The representative of the United States said that his country would like to begin by thanking the Panel, the Appellate Body and the Secretariat for their hard work on this complex dispute. The United States would like in particular to recognize that the hearings in these proceedings were historic: they were the first ever of their kind to be open to all WTO Members and the public. The United States thanked the Panel and the Appellate Body for agreeing to open the hearings. Members would know that, as of now, there had been 15 hearings that had been partially or completely open in 10 disputes. Those open meetings were a valuable opportunity for all WTO Members, as well as those outside the WTO, to understand better the WTO dispute settlement system. It was the decisions taken in this dispute that paved the way for this record of success, and the United States wished to express its appreciation to this Panel and to the Appellate Body for their willingness to take these first steps. The United States would also like to express its thanks to all the various members of the Secretariat who had contributed to making sure that the open meetings ran smoothly.

7. Turning to the substance of the Reports, the United States was pleased that the Appellate Body had corrected the Panel's findings on Article 23 of the DSU. The Appellate Body's analysis on this matter was sound. The United States particularly welcomed the Appellate Body's finding that the United States was not seeking redress of a violation by continuing its suspension of concessions after the EC had claimed to have come into compliance. Furthermore, the United States believed that – from a WTO institutional perspective – Members should take great comfort that the Appellate Body had concluded that statements made by the United States and Canada at meetings of the DSB did not constitute "determinations" under Article 23.2(a) of the DSU. The United States was, however, disappointed that the Appellate Body had found that it was unable to complete the analysis on the consistency of the EC's revised hormones ban with the requirements of the SPS Agreement. The Panel and the parties had invested over three years of diligent effort in examining the scientific underpinnings of the EC's revised ban, and the United States continued to believe that the Panel's conclusions were sound.

8. The United States also wished to take this opportunity to bring to Members' attention certain aspects of the Appellate Body's Report that were deeply troubling from a systemic standpoint. In its Report, unfortunately, the Appellate Body had undertaken unnecessary analyses of provisions of the DSU and invented rules, procedures, and even obligations that were simply not present in the DSU. The United States referred Members to the communication that it had circulated that explained the US concerns in more detail.[1] At the present meeting, the United States would summarize concerns on four issues: (i) the process for resolving post-suspension disputes, (ii) the standard for experts' "independence and impartiality", (iii) the approach to certain SPS claims, and (iv) the "recommendation" in the report.

9. First, on the process for resolving post-suspension disputes, it was widely acknowledged by Members that the DSU lacked specificity on the process by which an implementing Member subject to the DSB-authorized suspension of concessions that claimed it had achieved compliance might obtain relief from that suspension. Members had spent several years negotiating a process for such a situation, but had not yet achieved consensus. In its Report, however, the Appellate Body had made a number of statements that were to be found nowhere in the DSU. For example, the Appellate Body

[1] WT/DS320/16.

had stated that Article 21.5 compliance panel proceedings were the only procedure to be followed[2] for resolving post-suspension disputes – ignoring the fact that this very appeal was from a regular panel proceeding considering a claim under Article 22.8 of the DSU. In addition, the Appellate Body had said that either an original respondent or an original complainant must initiate compliance panel proceedings without delay[3] once a claim of compliance was made, which should be of tremendous concern to any Member that might consider its resources could be limited at any point in the future. As a further example, the Appellate Body had also said that an original responding party and an original complainant might each bring its own, separate compliance panel proceedings and the two proceedings could be harmonized and would somehow result in a review of all the issues. The Appellate Body had also set forth fairly intricate rules on how the burden of proof would be allocated and shifted in such a situation. None of this could be found anywhere in what Members negotiated during the Uruguay Round. Nor, for that matter, had any Member proposed that approach during the negotiations over clarifying and improving the DSU. It was difficult to understand the Appellate Body's findings on this matter to be anything other than rule-making. That role, however, belonged to Members – not to panels or the Appellate Body. Even aside from the lack of authority for these findings, the Appellate Body's rules posed numerous problems. The Appellate Body's thinking would have benefited from an opportunity to review its ideas with the parties to the dispute before enshrining them in its Report.

10. The US second point was on standards for experts' "independence and impartiality". The United States was concerned with the Appellate Body's approach to the selection of experts who advised dispute settlement panels. The US concerns had been expressed at some length in its written communication. At the present meeting, the United States would simply note that panels that were aware of experts' prior involvement in related matters should be able to take that into account in evaluating the weight to assign the advice provided by the experts. Indeed, most if not all of the facts in a dispute were presented by one or the other of the parties to the dispute, and each party clearly had a stake in the outcome of the dispute. However, the fact that a panel or the Appellate Body had relied on a fact provided by one of the parties did not mean that the panel's or the Appellate Body's independence and impartiality was compromised. Nor had the Appellate Body explained why a "likely" doubt as to the independence and impartiality of an expert meant that the independence and impartiality of the Panel was necessarily compromised.

11. Third, on the approach to certain SPS claims, the United States said that with respect to the Appellate Body's findings and conclusions related to the Panel's standard of review and interpretation of the requirements of Articles 5.1 and 5.7 of the SPS Agreement, the United States also had some concerns that the Appellate Body's Report could be misconstrued as loosening the disciplines of the SPS Agreement that were aimed at ensuring that SPS measures adopted by Members were scientifically justified and not disguised restrictions on trade.

12. Finally, on the "recommendation" in the Report, the United States said that another troubling aspect of the Appellate Body Report was the fact that the Appellate Body had concluded its Report by apparently making a recommendation that was addressed to both the United States and the EC. Members had authorized panels and the Appellate Body to make recommendations in only one place: Article 19.1 of the DSU. That Article provided that a panel or the Appellate Body was authorized to issue a recommendation in one circumstance: where it had concluded that a measure within the terms of reference of the proceeding was inconsistent with a covered agreement. In this appeal, the Appellate Body had not concluded that there was any measure that was inconsistent with a covered agreement. The Appellate Body had no authority, therefore, to make any Article 19.1 recommendation in this appeal. A further difficulty with reading the Appellate Body's "recommendation" as intending to have the legal status of a recommendation under Article 19.1 was

[2] WT/DS320/AB/R, para. 345.
[3] WT/DS320/AB/R, para. 737.

that it was addressed not only to the responding party, but also to the EC, the complaining party. There was no basis in the DSU for addressing a recommendation to a complaining party. The use of the term "recommend" by the Appellate Body[4] must, therefore, be interpreted as an ill-considered word choice, as any other reading would be contrary to the DSU. In fact, were Members to believe the Appellate Body attempted to make an Article 19.1 recommendation in this dispute, Members would have no choice but to consider that the Appellate Body had ignored and acted outside its authority under the DSU.

13. In conclusion, some parts of the Appellate Body Report were solid and well-reasoned, such as its approach to the request by the parties to open hearings and its rejection of the argument that a unilateral claim of compliance could have legal consequences for a DSB authorization to suspend concessions. Other parts of the Report, however, raised significant concerns, not only in the context of this dispute, but in terms of whether the dispute settlement system would function as agreed by Members. The United States encouraged all to consider the concerns raised in this statement, and in the US written communication, and would be pleased to discuss them further with Members.

14. The representative of Canada said that under the next Agenda item, his country would express views on the parallel dispute in DS321. For now, Canada would like to simply thank the Appellate Body, the Panel and Secretariat for their work and noted that Canada shared many of the concerns raised by the United States.

15. The representative of Ecuador said that his country's statement to be made under this Agenda item also referred to the next Agenda item. Ecuador wished to express its serious systemic and practical concerns regarding the Appellate Body's recommendation contained in paragraph 737 of the two Reports, that the DSB should request the parties to initiate proceedings under Article 21.5 of the DSU without delay in order to resolve their disagreement as to whether the EC had removed the measure found to be inconsistent in the " EC - Hormones " dispute and whether the application of the suspension of concessions by the United States and Canada remained legally valid. First of all, it would appear that there was no legal basis for a recommendation under Article 19 of the DSU, nor one could see how a complaining party whose measure had not been complained against could be the subject of a final recommendation in a dispute. Second, Ecuador agreed with the Appellate Body's conclusion that a Member could not unilaterally declare that a measure, that had been brought into force, complied with the DSB's recommendations without first being subjected to the dispute settlement mechanism test. However, Ecuador was concerned that the Appellate Body's recommendation might give rise to new delaying tactics by the Member that was obliged to withdraw the inconsistent measure. This was a particularly sensitive point in disputes between a developed country Member and a developing country Member, where the authorization to suspend concessions or other obligations did not have the desired effects when applied by a developing country Member.

16. The representative of Brazil said his country considered that the Reports to be adopted at the present meeting had significantly contributed to the enhancement of the WTO dispute settlement system. First and foremost, in its findings about Article 22.8 of the DSU, the Appellate Body had succeeded in undertaking a work of legal interpretation that was able both to provide a positive solution to the dispute before it and to bring more clarity to systemically important WTO rules. As a third party to this dispute, Brazil had argued that the issue of the so-called "post-retaliation" could be resolved within the framework of the text of the DSU provided that the relevant rules, particularly Articles 21.5 and 22.8, were construed correctly. Therefore, Brazil was glad to recognize that the reasoning and the findings of the Appellate Body concerning "post-retaliation" were, by and large, guided by an approach similar to the one supported by Brazil in the proceedings and elsewhere. Specifically, Brazil welcomed the clear findings of the Appellate Body on the need for a multilateral determination of compliance for measures taken when a suspension of concessions was in place, on

[4] WT/DS320/AB/R, para. 737.

the legality of the continuation of this suspension until the authorization based on which it had been imposed was multilaterally revoked, on the possibility of access to Article 21.5 proceedings by either party in a dispute, on the burden of proof in this stage of a dispute and on the proper way to structure the request for the establishment of a panel under the Article 21.5 of the DSU. In conclusion, Brazil wished to point out that the Appellate Body's findings on Articles 5.1 and 5.7 of the SPS Agreement should not be regarded as lowering the standards that SPS measures must meet to be WTO-consistent. The standard clarified by the Appellate Body was one that allowed Members to pursue legitimate policy objectives while preventing the adoption of measures that lacked scientific grounds.

17. The representative of Mexico said that his delegation wished to make a few comments concerning the recommendation of the Appellate Body contained in paragraph 737 of its Report. Mexico considered that that recommendation was not a typical recommendation under Article 19 of the DSU and its application should be restricted to specific facts of disputes DS320 and DS321. However, Mexico also considered that while this was not a typical recommendation if it were adopted by the DSB it would be consistent with Article 3.4 of the DSU, which stated that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and under the covered agreements". Thus, if one were to take the Appellate Body's suggestion, the fairest way of settling the dispute between Canada, the United States on the one hand and the EC on the other would be to submit the matter before an Article 21.5 panel. Therefore, such a recommendation should be considered in light of the specific facts of those disputes and, in Mexico's view, should not set a precedent for future cases.

18. The representative of Japan said that the Appellate Body Report had addressed, and had made findings on, a number of issues raised in this dispute regarding the operation of the DSU that were of great systemic interests to all Members including Japan. Although Japan was not a third party in this dispute, it wished to offer a couple of very preliminary observations. First, after the thorough analysis of the text, context and the object and purpose of the DSU, the Appellate Body had properly concluded that the resolutive conditions for the termination of the suspension of concessions under Article 22.8 required "substantive compliance" or "a final and substantive resolution of the dispute"[5] and in the case of disagreement "the fulfillment of the [condition] cannot be confirmed unless the disagreement is resolved through multilateral dispute settlement".[6] As found by the Appellate Body, "the mere existence of an implementing measure adopted in good faith doesn't require the termination of the authorized suspensions of concessions under Article 22.8".[7]

19. Second, Japan agreed with the Appellate Body that recourse to Article 21.5 was "a proper course of action"[8] for resolving disagreement as to whether "substantive compliance" was achieved and, consequently, whether the resolutive condition for the termination of suspension under Article 22.8 was fulfilled. As the Appellate Body had explained, the recourse to Article 21.5 of the DSU "keeps the successive proceedings relating to the same dispute within a 'continuum of events'"[9] and "a more efficient use of the dispute settlement system".[10] However, the Appellate Body also appeared to find that the types of disputes specified in Article 21.5 of the DSU must be resolved through recourse to the proceedings envisaged in that provision.[11] Did this mean that, in the Appellate Body's view, Article 21.5 proceedings were the exclusive procedural avenue available to resolve the disagreement over the issue of compliance? The Appellate Body had elsewhere ruled that the Panel

[5] See e.g. Appellate Body Report, paras. 304-309.
[6] Appellate Body Report, para. 306.
[7] Appellate Body Report, para. 318.
[8] See e.g. Appellate Body Report, paras. 338 and 345.
[9] Appellate Body Report, para. 342.
[10] Appellate Body Report, para. 343.
[11] Appellate Body Report, paras. 336 and 341.

in this dispute, not initiated under Article 21.5 of the DSU, had jurisdiction to decide on the consistency of the implementing measure with the SPS Agreement, indicating that the ordinary dispute settlement proceedings were also available as a proper procedural avenue. Japan wished to know how to reconcile these two conflicting findings.

20. Third, the Appellate Body had found that the responding party in the original dispute was not precluded from initiating Article 21.5 proceedings. That finding would beg further practical questions. As an initial matter, although in this part of the Report the Appellate Body had focused its analysis on the post-suspension stage, many of rationales developed by the Appellate Body appeared to be applicable to the pre-suspension stage. The question would thus arise as to whether the original respondent was entitled to initiate Article 21.5 proceedings and, if so, what would be the practical implication for such reading of Article 21.5 of the DSU. Japan also wondered whether the scope of an Article 21.5 panel initiated by the original respondent would always be sufficiently broad enough to decide as to whether substantive compliance had been achieved. The Appellate Body had recognized that the original respondent could not speculate every possible violation. The Appellate Body had further explained that the original complainant "may file its own request" for an Article 21.5 panel, identifying the provisions that it had considered to be breached, as soon as possible and these proceedings initiated both by the respondent and complainant would be eventually merged.[12] The Appellate Body had further found elsewhere, in analyzing the scope of the terms of reference of the Panel in this dispute, that although the EC, the original respondent, did not list Articles 5.1 and 5.7 of the SPS Agreement in its panel request, these provisions were within the mandate of the Panel.[13] The Appellate Body had reached this conclusion because: (i) Article 5.1was covered by the original DSB recommendations[14]; (ii) the nature of the implementing measure, i.e. provisional import ban and justification provided by the EC "implicates Article 5.7"[15]; and (iii) the EC's claim of the inconsistency of the suspension by the original complainant(s) with Article 22.8 of the DSU were necessarily linked to the implementing measure's compliance with the original recommendations and rulings. Then the question would arise as to whether the original complainant would be allowed, in the Article 21.5 proceedings initiated by the original respondent, to claim the inconsistency of the provisions that were neither covered by the original DSB recommendations nor implicated by the nature of the implementing measure and justification, therefore, put forward by the original respondent in the absence of the claim by the original respondent of the inconsistency of suspension with Article 22.8[16]; and in the absence of the initiation by the original complainant of Article 21.5 proceedings for certain legitimate reasons such as a resource constraint.

21. Fourth, the Appellate Body had found that the Panel had infringed the EC's due process rights by appointing and consulting with certain experts whose institutional affiliation was likely to affect or give rise to justifiable doubt as to their independence and impartiality which "compromised the Panel's ability to act as an independent adjudicator" and "accordingly" failed to make an objective assessment of the matter under Article 11 of the DSU.[17] Japan did not disagree with the Appellate Body's general statements that due process requirement was "inherent in the WTO dispute settlement system" and was "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[18] The principle of due process may inform the procedural rules of the DSU. However, "due process" was not a treaty language and nowhere in the DSU was defined the content and scope of this "inherent" right. Thus any claim in the dispute settlement under the DSU must stem from, or be based on, the rights and obligations best recognized and be reflected in the text of the covered

[12] Appellate Body Report, para. 354.
[13] Appellate Body Report, paras. 329 and 332.
[14] Appellate Body Report, para. 327.
[15] Appellate Body Report, para. 330.
[16] See footnote 14 *supra*.
[17] Appellate Body Report, paras. 481-482.
[18] Appellate Body Report, para. 433.

agreement. In other words, the ultimate question to be answered here was not whether the Panel had infringed due process rights inherent in the system, but whether and how the substantive provision of the DSU, in this case Article 11, had been breached by the Panel. In this respect, the Appellate Body had found that because the consultations with certain experts compromised the Panel's ability to be an independent adjudicator, the Panel had failed to abide by the requirement of Article 11. However, in doing so, the Appellate Body had only referred to its brief statement made in the previous case[19], without explaining how such Panel's conduct had resulted in the failure to "make an objective assessment of the matter". In other words, the Appellate Body had appeared to assume that infringing due process would necessarily lead to the violation of Article 11. The Appellate Body should have explained how the breach of inherent due process rights, which had been found by the Appellate Body, constituted the Panel's failure to "make an objective assessment of the matter", as required by Article 11 of the DSU.

22. The Appellate Body had also been confronted with the possible consequence of its finding that the Panel had infringed the EC's due process rights where the Panel's certain conduct compromised its ability to perform its duty as an independent adjudicator.[20] Although the Appellate Body had indicated that the breach of due process rights in this case might be serious enough to render the Panel's entire findings on the issue of the implementing measure's WTO consistency unsustainable, it continued its analysis regarding the other part of the Panel's finding under Articles 5.1 and 5.7 of the SPS Agreement. Assuming that, as a result of such analysis, the Appellate Body had found that the Panel's separate and distinguishable finding would, by itself, sustain the Panel's ultimate conclusion that the EC's implementing measure was inconsistent with Articles 5.1 and 5.7 of the SPS Agreement, would that cure the deficiency of the Panel's finding under Article 11 of the DSU? In more general terms, was there any category of due process rights that was so fundamental[21] under the DSU that its breach "could, by itself, lead to the invalidation of" the entire findings of a panel, irrespective of the validity of other part of the findings? Or would the breach of due process rights under the DSU be cured depending on the nature or degree of seriousness of the prejudice as well as the overall reasoning and evidentially basis of findings by a panel?

23. Finally, at the very end of the Report, the Appellate Body had recommended, "[i]n the light of the obligations arising under Article 22.8 of the DSU", that the DSB request both parties to this dispute to initiate dispute settlement proceedings under Article 21.5 "without delay".[22] A couple of points were worth mentioning. As expressed by previous speakers, Japan was not certain as to whether the Appellate Body had the authority to make "recommendations", i.e. to direct Members to take a certain course of action, let alone with a specific temporal limit, other than to recommend that the Member concerned bring the measure found to be WTO-inconsistent into conformity with that WTO Agreement[23], as provided for in Article 19.1 of the DSU. More fundamentally, as a matter of Members' rights and obligations under the DSU, on what legal or textual basis were the parties to the dispute compelled to take certain action in this case to have recourse to the dispute settlement procedures, within a specified time period? Japan understood that, in the view of the Appellate Body, a "temporary" or "abnormal" nature of the suspension of concessions under Article 22.8 as the last resort in the DSU somehow implied the existence of obligations on both parties to the dispute to ensure that normal state of affairs be restored as soon as possible, and these obligations

[19] Appellate Body Report, para. 482.

[20] Appellate Body Report, paras. 483-484.

[21] The Appellate Body previously found that due process requires that procedural claim must be brought before a panel at the earliest stage of the proceedings, but a certain issue of a fundamental nature, such as the jurisdiction of a panel may be considered at any time. Appellate Body Report, "US - Carbon Steel", para. 123.

[22] Appellate Body Report, para. 737.

[23] In a case of non-violation, nullification or impairment, "the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment". Article 26.1(b) of the DSU.

further entailed immediate actions on both sides to initiate costly litigation processes. However, Article 21.5 did not set forth any time limit as to when the parties must initiate compliance proceedings under that provision. Article 21.5 was simply silent on that point. Moreover, where Members or parties were required under the DSU to take certain actions within a specific time period, the DSU explicitly provided to that effect, with certain consequences in the event of failure to act as required. In contrast, the shared obligations the Appellate Body had identified as arising from Article 22.8 were far from being explicit in the text of the DSU. Japan further noted that Article 3.7 of the DSU provided that "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful". Referring to this provision, the Appellate Body had observed on the previous occasion that: "A Member has *broad discretion* in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely *self-regulating* in deciding whether any such action would be 'fruitful'."[24] Given the "self-regulating" nature of initiating dispute settlement procedures as well as the Appellate Body's finding here that the original respondent[25] was not precluded in the post-suspension stage from initiating Article 21.5 proceedings, Japan wondered why it was necessary for the Appellate Body in this dispute to read into or identify in Article 22.8 the shared responsibilities on the part of both parties to initiate Article 21.5 proceedings "without delay". The Appellate Body's "recommendation" would raise further practical questions. Assuming that this recommendation had the same legal status as the one under Article 19.1 of the DSU, were the parties to which that recommendation was directed required to implement that recommendation? Was such implementation subject to surveillance under Article 21 of the DSU and remedy under Article 22 of the DSU?

24. To conclude, the Appellate Body had clarified the existing provisions of the DSU regarding the post-suspension stage of a dispute, but had also given rise to, or reminded WTO Members of, a number of questions of a systemic nature, which should be better addressed by Members in their legislative capacity, i.e. through negotiations. The difficulties encountered by the parties, the Panel and the Appellate Body in this dispute illustrated the lack of textual clarity as well as specific procedures to be followed in the post-suspension situation in the DSU, which was, by the way, one of the issues that had been discussed in the context of the DSU negotiations. A number of questions raised by the Appellate Body testified the urgency and practical reasons for expediting the negotiation process.

25. The representative of Argentina said that the statement to be made by his country under this Agenda item should be considered as also referring to the next Agenda item. Argentina had not participated as a third party in these proceedings. However, it wished to make some comments in view of the systemic interest of all Members in the correct interpretation of the DSU provisions. In this regard, Argentina wished to underline two issues. First issue related to the last paragraph contained in the Appellate Body Report in which the Appellate Body had referred to a "recommendation". The way that paragraph was worded raised more doubts than certainty. The use of the term "recommendation" in spite of the fact that the legal provisions of Article 19.1 of the DSU were not met could not be neutral or without consequences. Did the Appellate Body intend to make a recommendation as to how to settle the case, or was it merely a suggestion in keeping with the analysis made, particularly in Section IV of the Report? The distinction was not trivial – it had its importance. Article 19.1 of the DSU used both expressions: "recommendation" and "suggestion", each with its own distinct meaning, but not one without the other. The authority to make recommendations in Article 19.1 was contingent on the prior conclusion that a measure was

[24] Appellate Body Report, " EC - Banana III", para. 135 (emphasis added).

[25] The original respondent ordinarily has a strong incentive to secure the multilateral findings by the DSB on substantive compliance, which would "by operation of law (*ipso jure*)" "render the suspension of concessions without legal basis". Appellate Body Report, paras. 355 and 367.

inconsistent with a covered agreement. The possibility to "suggest" ways to implement the DSB's recommendations was, in its turn, contingent on the existence of such recommendations. In the case at issue, there was no finding of inconsistency, so on what grounds could the Appellate Body recommend, let alone suggest, to the parties what action they should take with respect to their dispute?

26. The second issue had to do with the Appellate Body's stated preference for Article 21.5 procedures to the detriment of the other procedures provided for in the DSU. The DSU represented a balance between the rights and obligations of WTO Members based on a range of possible remedies for solving their disputes. The degree of flexibility available to Members under the DSU in choosing among these different remedies formed part of this balance between the rights and obligations. The only primacy among these options in the DSU was accorded to mutually agreed solutions. While it was understandable that in the framework of this specific dispute between the parties, the Appellate Body might point out to the possibility of recourse to Article 21.5 procedures, it was difficult to understand why the DSB should be instructed to request the parties to initiate Article 21.5 proceedings, without taking into consideration options provided under the DSU. The evaluation of the appropriateness of the different options offered by the DSU was not only the responsibility of Members, but required the type of analysis which, in particular circumstances, nobody could perform better than Members.

27. The representative of Australia said that her country was making this statement under the present Agenda item and under the following Agenda item. Australia welcomed the Reports of the Appellate Body in these disputes in which it had participated as a third party. Australia considered that the Appellate Body's findings gave practical effect to the DSU provisions whose interactions were less than clear. At the same time, those findings respected the fundamental principles that shaped the dispute settlement system, in particular, that non-compliance with WTO obligations should be determined multilaterally and that the party asserting non-compliance with WTO obligations bore the burden of establishing a *prima facie* case. Australia agreed with the Appellate Body's observation that the parties should have recourse to an Article 21.5 panel proceeding to resolve their disagreement as to whether the EC had removed the measure found to be inconsistent in the " EC - Hormones " dispute. However, Australia was also mindful of the provisions of Articles 3.2 and 19.2 of the DSU that the recommendations and rulings of panels, the Appellate Body and the DSB could not add to or diminish the rights and obligations provided in the covered agreements. In the absence of a finding of inconsistency with a provision of a covered agreement, Australia did not consider the Appellate Body's observation, in para. 737, to be a "recommendation" within the meaning of Article 19.1 of the DSU. That said, Australia urged the parties to work together to resolve their disagreement, having in mind particularly the provisions of Article 3.7 of the DSU. In respect of the issues addressed under the SPS Agreement, Australia endorsed the Appellate Body's recognition of the need for panels to respect due process in the appointment and consultation with experts, as well as their duty to apply the appropriate standard of review when reviewing a Member's risk assessment. It was incumbent on panels to observe what the Appellate Body had described as "the delicate and carefully negotiated balance" of rights and obligations established in the SPS Agreement.[26] In Australia's view, the proper application of due process and standard of review by a panel was essential if this balance was to be maintained.

28. The representative of Korea said that, first, he wished to express his country's appreciation to the Appellate Body for its hard work in preparing the Report, which had dealt with several complicated legal issues. Although Korea had not been a third party to this dispute, it would like to comment on the systemic issue raised by the United States and previous speakers, in particular with regard to the recommendation, which was contained in the last paragraph of the Appellate Body Report. What Members had agreed upon in the DSU was that the Appellate Body, as the highest

[26] Appellate Body Report, "EC - Hormones", para. 177.

judiciary body in the WTO, would decide on the legal nature of the measure at issue, would recommend to Members to modify it, if there existed any wrongness, and could make suggestions, if it deemed necessary, on the way to implement its recommendation. Members then decided what course of action to take based on such recommendations and possible suggestions. If there were ensuing disputes, Members may either initiate other legal fora or continue consultations/negotiations, according to what they believed was most appropriate. Now, Korea was wondering what would be the legal status and effects of the concerned recommendation within such agreed procedure. Therefore, Korea believed that it was worth noting in the DSB the point raised by the United States and other Members on this matter.

29. The representative of Chile said that the statement to be made under the present Agenda item should also be considered as referring to the next Agenda item. He said that his country wished to express its appreciation for the Appellate Body Report and that, in general, Chile supported the conclusions of the Report. Although Chile had not been a third party to this dispute, it had followed it closely on account of systemic implications both as regards the correct interpretation of the SPS Agreement and the application of the DSU disciplines with regard to compliance. In this connection, Chile wished to emphasize that this dispute was unique, since in the absence of specific rules in the DSU, and in view of the failure of the parties to reach an agreement, the respondent in the original proceedings had to submit a new application with the consequences which that entailed and which were reflected in the two Reports to be adopted at the present meeting. The Appellate Body had correctly and repeatedly pointed out that "both the suspending Member and the implementing Member share the responsibility to ensure that the suspension of concessions is not applied indefinitely" (paragraph 348 of the AB Report) or "to ensure that the suspension of concessions is not applied beyond the time foreseen in Article 22.8" (paragraph 384 of the AB Report) and that "both Members have an obligation to engage in a cooperative manner in WTO dispute settlement to establish whether the suspension of concessions could continue or must be discontinued pursuant to Article 22.8" (paragraph 355 of the AB Report). Chile could not agree more. However, despite those assertions, the Appellate Body had arrived at conclusions that would appear, to say the least, to contradict those statements.

30. Chile also considered that the procedures set forth in Article 21.5 were the most appropriate for determining the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. Furthermore, Chile, like the Appellate Body, took the view that such procedures were also available for the respondent in the initial proceedings. Accordingly, Chile welcomed the analysis provided by the Appellate Body in response to the objections raised by the EC against such a possibility. However, the Appellate Body should have concluded its analysis at that point. The post-retaliation procedures had been the subject of discussions and negotiations for several years since there was no express rule on the subject. In the DSU negotiations, various proposals had been discussed with a view to establishing an effective mechanism for determining the existence or consistency of compliance measures following retaliation against the Member in question. Those discussions had touched on a great number of different aspects, both technical and practical, and had impinged on political sensitivities. With its analysis and the conclusions it had reached, the Appellate Body had expanded its mandate in a manner which Chile regretted. Moreover, the Appellate Body was imposing its own authority over and above the work which was being carried out by Members, and which was solely their responsibility, and by determining which procedures should, in its opinion, be followed in such circumstances, the Appellate Body was creating new rights and obligations for all the WTO Members. Furthermore, in setting out a new procedure, it had established new courses of action with practical application or implications that had not yet been evaluated, as was the case when each party initiated its own proceedings. In the case at hand, the course of action followed by the co-claimants had given rise to a number of new issues with regard to which neither panels nor the Appellate Body had arrived at a harmonious conclusion. What would happen if there were counterclaims between the complainants and respondents?

31. A second comment arising from the Appellate Body Report related to the recommendation contained in paragraph 737. In this connection, Chile agreed with the arguments put forward by the United States in its written communication, but the question was at what point had the Appellate Body come to the conclusion that the joint recourse to the procedures under Article 21.5 was the only way of settling the dispute, to the extent that the DSB had to request the parties to initiate such proceedings without delay, if in paragraph 340 of its Report the Appellate Body had stated that parties to a dispute were not precluded from pursuing consensual or alternative means of dispute settlement foreseen in the DSU, and then going on to draw attention to the provisions of Article 3.7 of the DSU? Chile regretted the inclusion of that recommendation, which in Chile's view did not help to settle this dispute. It was Chile's understanding that the recommendation was not binding on the parties, although it did reiterate the obligation that the parties had to participate in the dispute settlement procedures in a spirit of cooperation, and with a view to achieving an objective determination as to whether there had been substantive compliance in the present case, and whether the resolutive condition foreseen in Article 22.8 of the DSU had been fulfilled. Chile echoed that exhortation and urged Canada, the United States and the EC to seek a harmonious approach consistent with the DSU and to bring an end to this dispute. In conclusion, Chile welcomed the analysis by the Appellate Body regarding the nature of statements in the DSB. As was pointed out in paragraph 398, such statements were opinions of a diplomatic or political nature that generally had no legal effect or status in and of themselves, and that could not prejudice that Member's position in the context of a dispute. Without that clarification, Chile would probably not be making its statement.

32. The representative of Norway said that the statement to be made under the present Agenda item also referred the next Agenda item. Norway welcomed the adoption of the Appellate Body Reports at the present meeting. Norway had participated in this dispute as a third party because of the systemic importance it attached to the issue of post-retaliation. Key to this issue was how to ensure an orderly process, once retaliatory measures were in place, and the original defendant thereafter made changes to the contested measure. In this particular case, the parties had disagreed not just on whether there was compliance, but also on which process to use to resolve such a dispute. The Appellate Body had resolved this issue by requiring all the parties to the dispute to make use of a compliance panel as provided for in Article 21.5 of the DSU. Norway fully agreed with the Appellate Body's reasoning. Putting the obligation to start an Article 21.5 panel on all parties to a dispute, created appropriate incentives to solve such disputes within the structures of the DSU. As Norway had stated before the Appellate Body, this was fully consistent with the language of Article 21.5 of the DSU – as well as the object and purpose of the DSU. And it did not create procedural problems or dead-locks. The issue of "post-retaliation" had been debated for many years, and proposals had been made in the DSU negotiations to address this issue. She assumed that all Members would have to examine the implications of the Appellate Body ruling for the proposals made in the context of the DSU negotiations in respect of "post-retaliation".

33. The representative of Costa Rica said that the statement to be made by his country under the present Agenda item also referred to the next Agenda item. Although Costa Rica had not participated as a third party in this dispute, it wished to highlight some systemic matters involved in this case. In particular, Costa Rica wished to refer to the assertion that a unilateral determination of compliance by the respondent was not sufficient to determine compliance with the DSB's recommendations. This was a welcome conclusion for the future of the multilateral dispute settlement system. As others had stated, nevertheless, the recommendation contained in paragraph 737 of both Reports raised several important systemic concerns. Article 19 of the DSU did not seem to contemplate such recommendations and, therefore, Costa Rica did not see, as others had stated, how a complainant whose measure had not been considered to be inconsistent with the covered agreement could then be subject to a recommendation at the end of a dispute.

34. The representative of the European Communities said that her delegation wished to react to a number of points that had been made at the present meeting. First, regarding the issue of the

recommendation in the Reports. The United States had made it clear that it did not consider itself bound by that recommendation because it did not consider it to be a recommendation. The United States called it an ill-considered word choice. Thus, the United States had chosen to ignore the explicit term used by the Appellate Body. Others had echoed concerns about the legal status of the recommendation. But the EC wished to focus on the United States as an addressee of that recommendation. The EC found this approach to be highly problematic. It would be irreconcilable with an effective multilateral dispute settlement system to allow individual parties to a dispute to decide unilaterally if a recommendation was valid or not, or whether it had been made with or without jurisdiction, or whether it was binding for the purposes of implementation, or not. Questions of legal basis and jurisdiction were obviously among what the Appellate Body had considered before rendering a ruling. If the Appellate Body had made a recommendation then it had considered to have the required jurisdiction to do so. Parties could not appeal the Appellate Body reports like they could appeal panel reports. Unless there was negative consensus, the reports must be accepted unconditionally according to Article 17.14 of the DSU, as had been stated by the Chairman at the present meeting. This applied to the entirety of an Appellate Body report, and no party was allowed to pick and choose, and certainly not the party to whom a recommendation was addressed.

35. Second, her delegation wished to comment on certain other points made by the United States at the present meeting and in the US communication that had been circulated in advance of the present meeting, through which the United States had exercised its uncontested right under Article 17.14 of the DSU to express its views on the Report. The EC would indeed like to comment on a couple of arguments the United States had made in addition to the point on the recommendation to which her delegation had already reacted. By way of a general comment, perhaps, one could not help but have the impression that the overall objective of the US statement and its communication seemed to prove that the Appellate Body was right, wherever it had agreed with the United States, and utterly and scandalously wrong wherever the Appellate Body had chosen not to follow the US view. The EC was also surprised to find in the US communication the mistaken argument that the Appellate Body was barred from interpreting the DSU as referred to in paragraph 3 of the US communication. Thus far, the EC thought that this was a misunderstanding of the early days of the WTO and since then had appropriately relegated to the waste paper bin. Of course, the Appellate Body was empowered and even required to interpret the covered agreements. How else could it clarify them – and she quoted Article 3.2 of the DSU – "in accordance with customary rules of interpretation"? How else could an appeal address – and she quoted Article 17.6 of the DSU – "legal interpretations developed by the Panel"? While the United States resented the fact that the Appellate Body had not espoused its understanding of Article 21.5 of the DSU, the EC considered it useful that the Appellate Body had clarified the interpretation of the rules that were applicable to the post-retaliation phase of a dispute. Compared with the past uncertainty in that regard, which had forced the EC to bring the present dispute, Members now knew what they could and must do in the future, as well as the consequences if they did not.

36. Entirely unconvincing were also the arguments with which the United States had tried to criticize the Appellate Body's decision regarding the Panel's selection of experts. The United States had entirely missed the point if it portrayed the issue as being whether experts could be persons with prior work experience in the area concerned. The EC had already explained at the present meeting in its opening remarks that the situation at stake in this case was quite different. Turning from the substance to the form of the circulated document of the United States, the EC needed to record its objection to the designation of this document with symbol WT/DS320/16. Members would recall the debate that had taken place in the DSB at its meeting on 1 August 2008 and the reasons which the EC had set out, and which need not all be repeated at the present meeting in the interest of brevity. To be clear, it was not the expression of views, but the document's designation, with which the EC took issue. On 1 August 2008, the United States had inaccurately asserted that all written statements of the type had thus far been recorded as WT/DS documents. In reality, no such documents had been circulated under WT/DS symbols for 10 years of DSB practice – a period in which some such

statements had been recorded under the designation WT/DSB/COM. On 1 August 2008, the United States had also referred to the DSB's Rules of Procedure, according to which statements made in DSB meetings were to be "reflected in the record of the DSB". This confirmed the EC's position: DSB minutes or other documents with a WT/DSB designation belonged to the DSB record, but a WT/DS symbols related to a particular dispute, and precisely not to the work of the DSB. On this basis, the EC fully stood by its position and could not agree with the circulation of the document in question in the series of the dispute in question, that was symbol WT/DS320/16. Such circulation had occurred a number of times in the recent past, based on a consensus decision in the DSB, for the first time in the "Japan - Apples" dispute. Since 1 August 2008, there was no longer a consensus in the DSB regarding such circulation, and the EC would ask other Members and the WTO Secretariat to kindly take note of that fact. The designation of such documents fell in the first place within the competence of the DSB, and not of an individual Member or the WTO Secretariat. Since the US document had already been circulated with a WT/DS symbol, and unless that designation was withdrawn and changed, the EC would be compelled to ensure that there be put on the same record as the US communication a document setting out the arguments as to why the designation of such communications as DS documents was inappropriate.

37. The representative of the United States said that, for the reasons already discussed, it would not make sense to read the word "recommends" at the end of the Appellate Body Report as being intended to be a recommendation within the meaning of Article 19.1. As a number of other Members had also noted at the present meeting, that would be a departure from the Appellate Body's authority. The Appellate Body only existed pursuant to the agreement of Members, and Members should not presume that the Appellate Body intended to depart from the authority granted to it by Members. Accordingly, this was about accepting the Appellate Body's report on the basis of an understanding that comported with the DSU. The United States did not understand why the EC would want to claim that the Appellate Body was free to depart from the rules of the DSU. If the EC wanted to amend the DSU, it was free to propose such an amendment. But neither the EC nor the Appellate Body could unilaterally do so. Furthermore, Members had only agreed to "unconditionally accept" an Appellate Body report within the rules prescribed in the DSU. Those rules included the role and authority assigned to the Appellate Body.

38. On the issue of document circulation, the EC's concerns were completely unfounded. Circulation of documents submitted by a Member, and the assignment of document symbols to such documents, was entrusted to the Secretariat. The DSB had never taken a decision on the document symbol to be given to any of the many documents that were circulated to Members relating to the WTO dispute settlement. The EC's suggestion that consensus was required for any document to be circulated with a particular symbol was simply wrong. If, however, the EC wished the DSB to begin making document distribution decisions, it certainly was entitled to make a proposal to that effect and seek to achieve a consensus for it. The United States, for one, would have some questions about whether the DSB's limited resources should be devoted to this work. The United States also wondered if Members would truly want to see circulation of every document delayed pending achieving consensus by the DSB on the series in which to circulate it. In that light, the EC's suggestion that the Secretariat abandon its current practice of issuing communications such as the US communication in the relevant WT/DS series – that is, the document series created for the specific dispute – made very little sense to the United States. The only function it could serve would be to make it more difficult for Members and the public to locate documents relevant to a particular dispute.

39. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS320/AB/R and the Panel Report contained in WT/DS320/R, as modified by the Appellate Body Report.

2. Canada – Continued suspension of obligations in the EC - Hormones dispute

(a) Report of the Appellate Body (WT/DS321/AB/R) and Report of the Panel (WT/DS321/R)

40. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS321/15 transmitting the Appellate Body Report on: "Canada – Continued Suspension of Obligations in the EC - Hormones Dispute", which had been circulated on 16 October 2008 in document WT/DS321/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

41. The representative of the European Communities said that her delegation would not repeat the statement made under the previous Agenda item and would refer delegations to the EC's statements made under Item 1 of the Agenda of the present meeting.

42. The representative of Canada said that his country again thanked the Appellate Body, the Panel and the WTO Secretariat for their work in this case. This was a case that addressed important issues of interpretation regarding the DSU and important SPS issues. Turning first to the issues relating to the DSU, Canada was pleased that in this case, and in the parallel case between the EC and the United States, both the Panel and the Appellate Body had responded favourably to the requests from the three parties to open the hearings to the public, subject to certain procedural safeguards for third parties that had not wished to make their statements in public. Canada believed that the transparency provided by the open hearings contributed significantly to demystifying the dispute settlement process and strengthened its legitimacy. Canada was also pleased that the Appellate Body had reversed the Panel's findings that Canada had acted inconsistently with Article 23.1 and 23.2(a) of the DSU. Canada welcomed the confirmation by the Appellate Body that Canada's DSB authorized suspension of concessions vis-à-vis the EC remained consistent with Canada's WTO obligations until one of the conditions of Article 22.8 of the DSU had been met.

43. Canada welcomed the confirmation by the Appellate Body that in the post-retaliation phase, both the original complaining Member and the Member whose concessions had been suspended could initiate proceedings pursuant to Article 21.5 of the DSU. This confirmation would enhance the effective functioning of the dispute settlement system and was important for the WTO dispute settlement system as a whole. Canada was concerned about the systemic implications of the conflict of interest found by the Appellate Body with regard to two of the scientific experts consulted by the Panel. The Appellate Body had found a conflict on the basis of Article 11 of the DSU simply because these two scientists had participated as scientific experts in meetings of the Joint FAO/WHO Expert Committee on Food Additives (JECFA) where the hormones at issue in this case had been discussed. Canada was concerned that this finding by the Appellate Body would seriously limit the number of internationally recognized scientists who were available for consultations by WTO panels in cases of this kind and thus would have adverse systemic consequences. Canada must now take a moment to register its concern regarding the final sentence in the Appellate Body Report. Canada was pleased that the Appellate Body had confirmed that the EC had access to the Article 21.5 procedure. This was not the only thing that the Appellate Body had to say. In this sentence, the Appellate Body had recommended that both Canada and the EC initiate proceedings under Article 21.5 of the DSU without delay. However, the Appellate Body's role was limited to the powers conferred on it through the DSU. In particular, the power to make recommendations was governed by Article 19.1 of the DSU. This provision allowed a panel or the Appellate Body to recommend that a Member bring its measure into conformity where it had concluded that the measure was inconsistent with a covered

agreement. In this case, the Appellate Body had made no such finding of inconsistency and had reversed the findings of inconsistency that had been made in error by the Panel. Without a finding of inconsistency, there could be nothing to render consistent, there could be nothing to implement. Since no finding of inconsistency existed, the Appellate Body's recommendation that Canada and the EC "initiate Article 21.5 proceedings without delay in order to resolve their disagreement" could not constitute a recommendation within the meaning of Article 19.1 of the DSU and was, therefore, without legal consequence.

44. Turning now to the SPS-related findings in this case, he said that as a first point, Canada would like to emphasize that the Appellate Body had made no findings on the consistency or inconsistency of the EC's hormones ban. In fact, the Appellate Body had expressly confirmed that the original recommendations and rulings of the DSB in the " EC - Hormones " dispute remained operational and thus the EC's compliance remained to be demonstrated. The Appellate Body had also confirmed that until that time, Canada was entitled to continue to suspend concessions vis-à-vis the EC. Canada noted the Appellate Body's clarification of the standard of review of Article 5.1 of the SPS Agreement. The purpose of Article 5.1 was to ensure that SPS measures were based on a scientifically sound risk assessment. In this regard, the Appellate Body had confirmed that the role of a WTO panel was to determine whether a risk assessment was supported by coherent reasoning and respectable scientific evidence that rendered it objectively justifiable. The Appellate Body had also clarified the analytical steps that a panel's inquiry had to take and, in so doing, the Appellate Body had affirmed that panels were not absolved of the duty to ensure the scientific integrity of the risk assessment methodology. Canada had concerns about the Appellate Body's finding that the appropriate level of protection established by a Member could be a factor in how a risk assessment would be conducted. However, Canada noted that the Appellate Body had stated that the scientific rigour and objective nature of the risk assessment should not be undermined. Nevertheless, Canada was concerned that, in practice, the risk assessment process might be unduly influenced by the policy decision of a WTO Member as to the appropriate level of protection and that this might have consequences for the effectiveness of the SPS Agreement. Canada was also concerned about the implications of the Appellate Body's findings on Article 5.7 of the SPS Agreement, particularly with regard to the relationship between a Member's appropriate level of protection and the insufficiency of the scientific evidence to conduct a risk assessment in the face of relevant international standards. The Appellate Body's findings could undermine the delicate balance between a Member's qualified right to adopt and maintain provisional SPS measures and the obligation not to maintain these measures without sufficient scientific evidence. However, Canada noted that the Appellate Body had emphasized that, whatever the level of protection a WTO Member chose, the determination whether the available scientific evidence was sufficient to conduct a risk assessment remained "a rigorous and objective process".

45. The representative of the United States said that his country shared the serious concerns expressed by Canada with respect to these Reports, which were in substance identical to those considered under Item 1 on the Agenda of the present meeting. The United States referred Members to the US statement made under Item 1 for a detailed elaboration of its views.

46. The representative of India said that her country wished to make a short statement on the issue of public hearings mentioned by Canada. India had participated in this dispute as a third party on the limited issue of opening the hearings to the public. India had maintained throughout that, both during the Panel and the Appellate Body proceedings, the confidentiality of the Panel and the Appellate Body proceedings provided under the DSU was a matter of substantial issue for India. It was for WTO Members to decide by consensus on this issue and any decision by the Panel and the Appellate Body to open the proceedings to the public observation, necessarily involved consultations and decisions with WTO Members at large, and not just the parties and third parties. The Panel, however, had gone ahead and had decided to act on the parties' joint request to open the Panel hearings to public by interpreting Article 14.1 of the DSU stating that the Panel deliberations shall be

confidential and that this did not cover the exchange of arguments by the parties. India was very much concerned with this narrow interpretation adopted by the Panel in those proceedings. Notwithstanding the fact that Article 17.10 of the DSU stated that the proceedings of the Appellate Body shall be confidential, the Appellate Body had interpreted those DSU provisions and had found that derogations to those provisions were possible for the parties to the dispute provided that this did not affect third participants. India understood that the Appellate Body spoke of separate relationships between the parties to the dispute, which could be altered as long as others were not affected. The Appellate Body's interpretation and its treatment of DSU provisions raised systemic concerns and the legal concerns should be an issue for all WTO Members. In India's view, in the multilateral system this trend might lead to serious concerns. Notwithstanding this fact, India appreciated the Appellate Body's clarifications on many of the critical issues involved in this dispute, which would significantly contribute to further clear interpretations of the DSU provisions.

47. The representative of Brazil said that his delegation wished to refer to the statement made by Brazil under Item 1 of the Agenda of the present meeting and requested that Brazil's statement made under that Item should also be considered as being made under Agenda Item 2.

48. The representative of the European Communities said that, first, her delegation wished to refer to its second intervention under the previous Agenda item regarding the issue of recommendation. What she had stated with regard to the US position also applied to Canada's position regarding the legal nature of this recommendation so she did not need to repeat it here. Second, in its remarks about the Appellate Body Reports and the Panel Reports in these disputes, the EC had not commented on the decisions of these Panels and the Appellate Body to allow public observation of their hearings. The comments made on this subject by India made it necessary for the EC to take the floor again. The EC did not agree with India that panels and/or the Appellate Body had stepped outside the bounds of their competence by permitting public observation. The EC, as one of the parties having requested the opening, had welcomed those decisions and considered them to be entirely in line with the DSU. It was recalled that precisely this question of the legality of open hearings under the DSU was the subject of an intensive exchange between the parties and the third parties before both the Panels and the Appellate Body. The EC considered the decisions of the Panels and the Appellate Body to be well-supported by the text of the DSU. They were also authoritative rulings on this question of interpretation under the WTO Agreement. Obviously, as Members knew it from many other questions of interpretation under the WTO Agreement, there could be disagreement among WTO Members on the correctness of such decisions. Therefore, the debate taking place at the present meeting about this subject was nothing unusual. Nor did it detract from the fact that, whether individual WTO Members agree or disagree with the decision or the reasoning, they ultimately had to accept them. The EC hoped that WTO Members could on this basis overcome their past disagreement on this subject. In the EC's view, transparency in the WTO dispute settlement was highly useful and desirable, and this from the perspective of all WTO Members. It was also to be applauded that more and more WTO Members were opting for this form of transparency in their disputes.

49. The representative of Mexico said that his delegation wished to refer to the issue of public hearings. As Members were aware, Mexico had a contrary position to this practice since it did not find any language in the text which would permit open hearings. The Panel had discussed this issue with third parties before taking its decision. In addition to the fact that Mexico did not find any language to this effect in the text, Mexico did not find anything on this in the negotiating history of dispute settlement. Mexico noted that there was an agreement of the parties to the dispute which had prevailed and this was favoured over what the DSU stated. Mexico wished to make this point clear. In this case, on the one hand there had been an excessive interpretation of the rules of the DSU by the Appellate Body and the same Members had agreed that the Appellate Body should interpret with a degree of flexibility the rules of the DSU when this was in line with their interests.

50. The representative of Japan said that his delegation wished to request that the statement made by Japan under the previous Agenda Item be also considered as being made under the present Agenda Item.

51. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS321/AB/R and the Panel Report contained in WT/DS321/R, as modified by the Appellate Body Report.

3. Statement by the Chairman regarding some matters related to the Appellate Body

52. The Chairman, speaking under "Other Business", said that, as he had announced at the outset of the meeting, he wished to make a statement under "Other Business" regarding some matters related to the Appellate Body. In this regard, he wished to inform delegations that on 12 November 2008, he had received a letter of resignation from the Chairman of the Appellate Body, Mr. Luiz Olavo Baptista. In his letter, Mr. Baptista had informed him that, owing to health reasons, he had been compelled to resign from the Appellate Body. The Chairman said that he was sure that he spoke for all Members in expressing regret that Mr. Baptista had been obliged to cut short his distinguished tenure on the Appellate Body, and in wishing him well. Pursuant to Rule 14 of the Working Procedures for Appellate Review, Mr. Baptista's resignation would take effect 90 days from the date of his letter of resignation, which would mean that effectively as of 11 February 2009, there would be a vacancy in the Appellate Body which would have to be filled. He recalled that originally, the second and final term of office of Mr. Baptista was to expire on 11 December 2009. In addition, the second and final term of office of another member, Mr. Giorgio Sacerdoti, would expire on 11 December 2009 as well, and the first term of office of Mr. David Unterhalter would also expire on 11 December 2009. Mr. Unterhalter was eligible for reappointment for a second term. In light of Mr. Baptista's resignation, he intended to consult informally with delegations in the coming days as to what would be the best and most efficient way of proceeding under the circumstances. He would report back to delegations on the results of his consultations as soon as possible.

53. The DSB took note of the statement.