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Dispute Settlement Body
11 December 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 December 2008

Chairman: Mr. Mario Matus (Chile)

Prior to the adoption of the Agenda[1]

Subjects discussed: Page

[1] See page 2.

Prior to the Adoption of the Agenda

The Chairman said that, in relation to the content of the proposed Agenda, he wished to inform delegations that on 9 December 2008 the United States had requested, by letter addressed to the Secretariat, that Item 2 of the proposed Agenda concerning the adoption of the Appellate Body Report and the Panel Report pertaining to the dispute: "EC – Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5 of the DSU by the United States" be withdrawn from the Agenda and that the same item be inscribed on the Agenda of the DSB meeting to be held on 22 December 2008. He said that, in light of the US request, Item 2 was withdrawn from the Agenda of the present meeting.

The representative of the European Communities said that the US request was rather unusual and unorthodox and the EC, as well as other Members of the DSB, would welcome an explanation from the United States on the motivation and the basis for this withdrawal request.

The representative of the United States said that, as correctly noted in the Chairman's introductory remarks, on 9 December, the United States had submitted a letter to the Secretariat inscribing the adoption of the Reports that had been referred to by the Chairman on the Agenda of the 22 December DSB meeting, and had withdrawn that item from the Agenda of the present meeting. In this regard, United States had followed past DSB practice and the precedents set in other disputes in taking this step. The United States looked forward to adoption of those Reports at the 22 December DSB meeting, which was within the 30-day period for adoption of the Reports by negative consensus.

The representative of the European Communities said that the EC regretted the lack of any substantive explanation from the United States and its lack of openness on this issue, and hoped that the United States would give a more substantive explanation on this as soon as possible. The EC, however, took note and welcomed the remark by the United States that the Appellate Body Report had to be adopted within 30 days.

The DSB took note of the statements.

1. European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador

(a) Report of the Appellate Body (WT/DS27/AB/RW2/ECU) and Report of the Panel (WT/DS27/RW2/ECU)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS27/93 transmitting the Appellate Body Report on: "European Communities – Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador", which had been circulated on 26 November 2008 in document WT/DS27/AB/RW2/ECU, 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 Ecuador said that, first, his country wished to express its appreciation to the members of the Appellate Body, the Appellate Body Secretariat, the members of the Panel and the WTO Legal Affairs Division for their work and the support they had provided to Ecuador throughout this dispute. Ecuador also wished to thank those third parties that had supported Ecuador in the

proceedings, and to thank the United States for initiating its own claim on this matter. The WTO, once again, had upheld Ecuador's claims regarding the EC's failure to comply with its obligations with respect to its bananas import regime. He noted that one had lost count as to how may times the EC bananas import regime had been found to be inconsistent with WTO rules. In spite of repeated rulings under the GATT/WTO panels and decades of discrimination, in particular against Latin American developing countries, the EC continued to maintain its bananas import regime, which violated its WTO obligations. For a developing country, such as Ecuador, the legal proceedings had involved million of dollars in sales losses, payments of excessive tariffs and litigation costs. Those resources could have been used to alleviate poverty and to promote the country's development. In the most recent Appellate Body Report, which had upheld, with some modifications the Panel Report, all the EC's arguments had been rejected. Working on the basis of conclusive precedents and a detailed and correct reading of the Agreements, the Appellate Body had upheld all Ecuador's claims. The Appellate Body had found that the tariff of €176/mt applied by the EC was contrary to its tariff bindings and, therefore, in breach of Article II:1(b) of the GATT 1994. The €176/mt tariff applied by the EC to MFN suppliers was still in effect. The Appellate Body and the Panel had also confirmed that the preferences granted by the EC to the ACP countries were inconsistent with Articles I and XIII of the GATT 1994. The EC continued to grant those preferences. Ecuador reserved its legal rights as to the WTO-consistency of those preferences. Ecuador hoped that this matter could be now resolved through the signing by the EC of the Geneva Agreement on Trade in Bananas, which had been reached on 27 July 2008. This could put an end to this longest-standing legal dispute in the history of the WTO, so that it would not be necessary for Ecuador to exercise its cross-retaliation rights under Article 22 of the DSU. The EC, once again, held the key to this solution. Ecuador would request that this matter remain on the DSB's Agenda until the EC fully complied with its WTO obligations.

3. The representative of the European Communities said that the EC, like Ecuador, wished to thank the Appellate Body for its work in this complex case. The EC was working to implement the recommendation made in Ecuador's Report to bring its regime into compliance with Article II of the GATT 1994 by means of modifying its bound duty. The EC wished to reassure Ecuador that the EC too hoped that this rebinding could be made in agreement with Latin American suppliers: that was an approach the EC had been seeking, 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 definitive solution to this long-standing "banana issue". And the EC hoped to negotiate and conclude an agreement with the MFN countries based on the July 2008 Agreement. An agreement the EC hoped to see in the days ahead. In terms of the more systemic claims made by the EC in its appeal, the EC welcomed, first of all, that the Appellate Body had reversed some dangerous legal interpretations made by the Panel, in particular concerning the interpretation of the purpose and effects of a waiver. However, the EC regretted that some other interpretations of systemic concerns had been confirmed by the Appellate Body. First, the EC welcomed the clarification of the interpretation of the DSU provisions as regards mutually agreed solutions. However, the EC regretted that the Appellate Body had not found that the explicit statement in an agreement between the parties to a dispute to the effect that such agreement constituted a mutually agreed solution was sufficient to preclude Article 21.5 action, and that the Appellate Body required explicit relinquishment of DSU rights for a mutually agreed solution to have such effect. This interpretation would certainly not facilitate the negotiation of mutually agreed solutions in the future. But all knew what the law was. The EC also regretted the confirmation by the Appellate Body of the far-reaching interpretation of Article XIII of the GATT 1994 made by the Panel, which had resulted in an outright prohibition of preferential tariff-rate-quotas (TRQs), even when they benefited from an exemption from the MFN principle under Article I:1 of the GATT 1994. In the EC's view, the Appellate Body had disregarded the specific nature of "preferential" TRQs, which were essentially a tariff discrimination under Article I:1 of the GATT 1994, which was limited quantitatively. This would have serious implications for WTO practice, notably in terms of concessions covered by the Enabling Clause.

4. The representative of the United States said that his country wished to begin by thanking the members of the Appellate Body, the members of the Panel, and the Secretariat for their work in this

proceeding. The United States appreciated their consistent dedication in returning, once again, to a dispute that they had seen so many times before. The United States had participated as an interested third party in this proceeding. The United States would, therefore, like to thank the Appellate Body for its handling of the two Reports that had been circulated simultaneously – the Report in the proceeding initiated by Ecuador that was being considered at the present meeting, and the separate Report in the separate proceeding initiated by the United States. The United States wished to commend the approach that the Appellate Body had taken to ensure that the two Reports' findings and conclusions were clearly distinct, and the United States appreciated the work of those in the Secretariat who had helped make that approach possible. The United States also appreciated that both the Panel and the Appellate Body had agreed to make the hearings in this dispute open to public observation for those Members who had chosen to make their statements openly, thus continuing the record of success of open hearings at the WTO. The open panel hearing was a fitting way to help mark the 60th anniversary of the GATT. And the United States was particularly pleased that none of the Members that had appeared before the Appellate Body – three participants and 16 third participants – had chosen to request that their statements be kept confidential.

5. Turning to the substance of the Reports before the DSB at the present meeting, the Panel and the Appellate Body had thoroughly and properly rejected this most recent attempt by the EC to avoid its WTO obligations with respect to bananas. The United States, therefore, welcomed the Panel and the Appellate Body Reports, and supported their adoption. The United States wished to comment at the present meeting on two points that it thought were unique to the Reports in the Ecuador proceeding. First, the United States was somewhat surprised to read the comment in the Appellate Body Report that an interpretation under Article IX:2 of the Marrakesh Agreement could be likened to a subsequent agreement of the type contemplated by Article 31(3)(a) of the Vienna Convention.[2] To the extent that the Appellate Body's phrasing could suggest that such interpretations should merely be "taken into account" during the interpretation of the WTO Agreement, the United States did not agree: as Article 3.9 of the DSU made clear, when such interpretations were adopted by the Ministerial Conference or the General Council, they were authoritative. Second, the United States was interested to see the Appellate Body's discussion in paragraph 433 of its Report relating to reading the concessions set out in Members' Schedules. In particular, the United States had considerable sympathy with the proposition that the WTO's objectives were served through the exchange of concessions and that those concessions must in turn be properly read. As the United States had noted on previous occasions, the WTO dispute settlement system provided security and predictability to the multilateral trading system when, and only when, it properly read the agreement that Members had negotiated. In addition, the participants in these appeals would know that the United States had requested that the Appellate Body correct certain apparent typographical errors in its Reports. The United States hoped that a corrigendum could be circulated soon.

6. The United States said that, a few moments ago, it had alluded to the fact that this dispute had been before the DSB many times. The United States was very much encouraged by the progress that the EC and the Latin American suppliers had made a few months ago in their negotiations on the long-standing bananas issue. Unfortunately, however, the EC had unilaterally decided to suspend those negotiations. The United States continued to encourage those discussions. The United States hoped that the EC would have good news to report at the 22 December DSB meeting. And in that vein, the United States looked forward to receiving the EC's status report later in the course of the day for the 22 December DSB meeting.

7. The representative of the Dominican Republic, speaking on behalf of the ACP countries, said that the countries in question wished to thank the Appellate Body, the Panel and the Secretariat for their work on this dispute. It was no secret that the ACP countries disagreed with several conclusions of the Appellate Body Report. However, the ACP countries fully respected the role and authority of the Appellate Body, and would constructively contribute to the resolution of the dispute under

[2] Appellate Body Report, para. 383.

consideration and, hopefully, of all past and potential disputes relating to the EC bananas import regime. The ACP countries remained disappointed with the treatment of third parties in this dispute. The effective participation of third parties remained a challenge for the WTO dispute settlement mechanism. It was obvious that the ACP countries, beneficiaries of the EC's preferences, had an interest in this dispute. Yet, despite efforts by both the Panel and the Appellate Body to provide extended opportunities for their participation, the ACP countries had felt virtually excluded from the "real action". The ACP countries believed that it was important for the dispute settlement system to find ways to better accommodate third parties in cases involving third parties which were direct beneficiaries of challenged trade measures. The ACP countries recognized that the difficulties faced by the DSU process were the same as those faced in tariff negotiations dealing with preferences and preference erosion. Therefore, due to their trade and economic importance, ways should be sought to deal with such problems. The sense of exclusion felt by the ACP countries in this dispute manifested itself not least in the treatment of ACP concerns and arguments in the Appellate Body proceedings. While the ACP countries recognized the legal nature of the process, it was unfortunate – and in this case almost absurd – that that process, which directly concerned real trade issues, had difficulties to find a proper way to take full account of economic reality. It was a plain and irrefutable fact that the MFN producers were enjoying unprecedented access to, and success on, the EC's market under the current bananas tariff regime. This access and success went well beyond any legitimate expectations vis-à-vis the EC's WTO obligations.

8. It was further unfortunate that neither the Panel nor the Appellate Body had found ways to consider, and reflect on potential impacts of their conclusions on ACP bananas industries and, in some cases, their entire economies. While the ACP countries recognized the legal nature of the process, they considered that its function was to assist in settling – that meant: actually resolving – trade disputes and the underlying conflicts. Reports that did not address fully such conflicts could not actually provide much of assistance. The ACP countries recognized the legal logic of the Appellate Body's final conclusions as to the legality of the EC current tariff regime, once it had reached its earlier conclusion that the EC tariff quota concession had not expired despite the expiry clause in the Bananas Framework Agreement. The ACP countries continued to disagree with that conclusion. But given the finality of the Appellate Body's ruling, the ACP countries could resign itself to live with a faithful and literal implementation of these conclusions, namely, the application of an out-of-quota tariff of €680/mt and a TRQ of 2.2 million mt at a tariff rate of €75/mt. Such literal implementation would seem to be the only sensible option left, unless a satisfactory agreement emerged between the parties concerned in the DDA or elsewhere. The conclusions as to what the current EC bindings were should further provide the main reference for determining what, if any, changes to the EC's tariff were required, as part of rebinding processes under way. It was clear that those bindings did not suggest any overall lowering of the current tariffs, which, as it had been indicated, provided access well beyond what the EC's Uruguay Round concessions would lead MFN suppliers to expect. The ACP countries respected, but continued to consider unfortunate, the Appellate Body's conclusions on Article XIII of the GATT 1994. A quantitatively restricted duty-free access was less than an unrestricted duty-free access. That meant that wherever such unrestricted access would be legal, the restricted access should be legal, too. That logic should extend to the interpretation of waivers, too. The interpretation and application of WTO law should never lose sight of the need for pragmatism. The ACP countries considered that the conclusions reached in this case did not fully serve that purpose.

9. The representative of Honduras said that his country welcomed the Appellate Body Report and commended the Appellate Body for its careful analysis of the case. Now, the EC could no longer claim that its tariff of €176/mt constituted an appropriate level. That tariff violated both the bound duty and MFN treatment. As his delegation had stated at the meeting of the General Council, the EC also violated its obligations resulting from its enlargement. Since Honduras was one of the original complainants in the Bananas III case, it expected the EC to implement the DSB's rulings and recommendations in that case, and considered that it was entitled to adjustments resulting from the EC's enlargement. In July 2008, when the EC had negotiated a deal with certain countries, Honduras

had announced its decision to accept the July Agreement in order to put an end to this long-standing dispute. The EC had then backtracked, and had made that Agreement contingent upon the agreement on modalities in the Doha Round. When the regime of a particular Member was found to be inconsistent with earlier rulings of the DSB, that Member did not have a right under the DSU provisions to make compliance with its obligations contingent on the success of trade negotiations. The EC had an obligation to comply "promptly", something which according to the DSU provisions "is essential in order to ensure effective resolution of disputes to the benefit of all Members". After 13 rulings on bananas against the EC and more than a decade of non-compliance by the EC, the EC had yet to confirm that it intended to bring its bananas import regime into conformity with its WTO obligations without further delay, with or without a Doha agreement. Honduras urged the EC to provide confirmation of its intention to do so. At a moment so crucial to the strengthening of confidence in the rules-based system, Honduras hoped that the EC would remove its illegal tariffs without delay, honour its WTO commitments and bind tariff cuts for developing countries, which would be no less significant than what had already been agreed under the July Agreement. Finally, Honduras supported the request made by the United States regarding the correction of typographical errors in the Appellate Body Report. His delegation considered that that correction must be taken into account since this was important from the point of view of the system.

10. The representative of Panama said that, as his country had previously stated before the DSB, Panama had a large stake in this dispute. Like Ecuador, Panama was the main supplier of bananas to the EC's market, and was entitled to the EC's tariff and enlargement adjustments. Although the Appellate Body had undertaken a careful and impressive review of the issues before it, Panama regretted that such a review had been necessary in the first place. Before the Appellate Body had undertaken its review, there had already been 11 GATT and WTO rulings against the EC's bananas policies. The interests of Latin American developing countries, and the system, would have been much better served had the EC signed the July 2008 Agreement, as it had promised to do so. Instead, the EC had chosen to appeal the Panel Report and had now been told by the Appellate Body that its regime was out of compliance: (i) the EC's tariff of €176/mt had been in excess of its bindings since 1 January 2006, making it illegal under Article II of the GATT 1994; and (ii) the EC's tariff discrimination had lost its waiver on 1 January 2006, making it illegal under Article I of the GATT 1994. Pursuant to its obligations under the Bananas III case, the EC had owed the Latin American banana-supplying countries a much lower and non-discriminatory tariff rate for three years. It had owed them enlargement adjustments for even longer than that. The countries in question were, therefore, concerned to hear the EC say that it "considers the Doha Round to be the right forum to find a resolution" and was "ready to take up the negotiations on a deal on bananas with all suppliers where they were left in July". The EC had an obligation to redress its tariff illegalities irrespective of the Doha Round outcome. Moreover, when the EC had stated that it was ready to "take up negotiations where they were left in July", it had forgotten that a banana agreement had already been closed in July 2008. That settlement had taken months to negotiate. The so-called Geneva Agreement on Trade in Bananas contained seven carefully negotiated paragraphs. Under the terms of the Agreement, the EC had agreed to a schedule of bound tariff reductions from €148/mt on 1 January 2009 to €114/mt by 1 January 2016 in order to settle all WTO pending proceedings and claims. Since the 27 July Agreement was not linked to an agreement on modalities, the EC should not have walked away from that negotiated solution when the Doha talks had collapsed in July 2008. Panama noted that when the Agreement was being negotiated, the EC bananas import regime had not yet been legally condemned by the Appellate Body. Now the final outcome was known. Panama was still willing to consider the 27 July Agreement as a final settlement in order to bring this long-standing dispute to an amicable end, but would not accept any weaker solution. This was an especially important time for the EC to rise above protectionism, and to put an end to this negative cycle of non-compliance. On behalf of its 8,000 producers, Panama again called on the EC to settle this dispute without further delay under the terms and conditions of the 27 July Agreement.

11. The representative of Colombia said that his country had participated as third party in the appeal proceedings against the findings in Ecuador's Panel Report and the US Panel Report regarding

the EC bananas import regime. Colombia thanked the Appellate Body and the Secretariat for their excellent work. The Bananas dispute was the longest-standing trade dispute in the GATT/WTO history. It had started in 1992 when the Latin American banana exporters had challenged both the quantitative restrictions imposed by various members of the then European Economic Community, and the tariff preferences granted by the EC to the ACP countries. This was the Bananas I case in which claims of the Latin American exporters had prevailed. EEC Regulation 404/93 establishing the common market organization had been challenged in 1993. Under that Regulation, the EC had introduced a complex import bananas regime which, *inter alia*, had unilaterally altered the bound 20 per cent *ad valorem* tariff on bananas and replaced it with a tariff quota of ECU 100/tonne for 2 million tonnes and ECU 680/tonne for out-of-quota volumes. The preferential tariff enjoyed by the ACP countries had also been disputed since the EC had argued that it was justified under the provisions of Part IV of the General Agreement. This was the Banana II case, in which the claims of the Latin American exporters had again prevailed.

12. The Bananas III case was better known to all since it had been brought under the WTO Agreement. It was nevertheless worthwhile to recall it. In September 1997, the DSB had requested the EC to bring Regulation No. 404/93 into conformity with the WTO rules as it was inconsistent with the GATT 1994, the Agreement on Services and the Agreement on Import Licensing. Subsequently, the compliance Panel of 1999 had found that the measures taken to comply set out in EC Regulations Nos. 1637/98 and 2362/98 were also not in conformity with the GATT 1994 and the Agreement on Services. In 2005, the Latin American exporters had requested two arbitration proceedings when the EC had notified its intention to modify its bound banana tariff in its schedule of concessions, beginning with a tariff of €230/tonne, and then with a tariff of €187/tonne. Both Arbitration Awards had determined that neither tariff was equivalent to market access conditions prevailing at that time; €75/tonne for a volume of 3,113, 000 tonnes. However, this equivalency was the condition upon which the Latin American exporters had agreed to the Article I waiver during the Doha Ministerial Meeting.

13. The Panel and the Appellate Body Reports to be adopted at the present meeting contained findings of the same kind as those in the Bananas II Panel in 1993, namely, that the preferences granted to bananas from the ACP countries were not justified under the WTO rules and the current applied tariff on banana imports was not in conformity with the commitments undertaken by the EC in its Schedule of Concessions. In other words, 15 years later and many legal proceedings, Members were faced with a ruling of the same kind as the Bananas II case in 1993. At the most recent appeal hearing, the EC had stated in its final conclusions that if its arguments did not prevail, then the bananas exporters would have two alternatives: either to initiate new proceedings under the DSU, since the measures in force were different from the measures challenged in the most recent proceedings, or to reach a mutually satisfactory solution.

14. As far as a mutually agreed solution was concerned, he recalled that there existed the Bananas IV case. The Bananas IV case was a proceeding under the DSU, initiated by Colombia in March 2007 whereby Colombia had requested the Director-General's Good Offices. Between December 2007 and July 2008 the Director-General had chaired thirty-eight negotiating meetings. The outcome of the process was what was known as the Geneva Agreement on Trade in Bananas of 27 July 2008. That Agreement provided for a gradual reduction of the banana tariff to €114/mt by 2016. This encompassed the following: the Doha Round tariff cuts, compensation for the EC's enlargement and the settlement of all disputes relating to bananas. The final specific tariff of €114/mt was equivalent to a 19 per cent *ad valorem* duty, meaning that one would be reverting to the situation that had existed at the time of the Bananas II case, when the bound tariff was 20 per cent; i.e. as it had been bound by the then EEC in 1962. Despite this, the EC maintained that it could not put the 27 July Agreement into effect. The Bananas case was an example of the reasons whereby some developing countries had put forward, in the context of the DSB Special Session, proposals aimed at promoting effective compliance by strengthening the remedies available under Article 22 of the DSU.

Colombia looked forward to the EC's statement as how it intended to implement the recommendations and rulings to be adopted at the present meeting.

15. The representative of Nicaragua said that her country wished to express its appreciation at the hard work carried out by the members of the Appellate Body and the Secretariat in relation to this dispute. Nicaragua also wished to congratulate Ecuador on the important victory obtained and joined the banana-producing countries of Latin America in calling on the EC to put an end to 15 years of its illegal protectionism. In the course of those 15 years, Nicaragua had fought for fair access to the EC's market since bananas were one of Nicaragua's main agricultural crops and enabled the country to promote growth and to alleviate poverty. For the past three years, since January 2006, Nicaragua had listened to the assertions put forward by the EC before the DSB that its MFN tariff – a duty of over US$4.20 a box – was "legal" and constituted a "correct balance" for the parties involved. As a third party in those proceedings, Nicaragua had repeatedly expressed its disagreement. The EC's tariff, over twice the tariff imposed on Nicaragua's bananas for a decade, was an obvious infringement of the binding. A tariff which conferred an advantage of US$4.20 per box to suppliers with the higher GDP than Nicaragua's GDP was discriminatory. Consequently, Nicaragua was pleased that the WTO had confirmed, beyond any legal doubt, that the EC's tariff of €176/mt was illegally high and discriminatory. There was no justification for the EC to continue to postpone the solution even further. To link the July 2008 Agreement to an agreement on modalities in the Doha Round was not an answer. Better MFN access was required irrespective of whether or not there was progress in the Doha Round. To delay the solution would only prolong even further the EC's record of non-compliance, which was unprecedented. By virtue of the fact that the GATT and the WTO had delivered 13 rulings condemning the EC's bananas policies, the EC must resolve this dispute once and for all. Nicaragua's producers had the right to fair and non-discriminatory access, which would provide them with the opportunity to eliminate poverty through trade.

16. The representative of Cote d'Ivoire said that his delegation wished to be associated with the statement made by the Dominican Republic, on behalf of the ACP countries, and thanked the members of the Appellate Body and the Secretariat for their work. As mentioned by the Chairman in his introductory remarks, the Appellate Body and the Panel Reports were before the DSB for adoption. In accordance with the procedure laid down in Article 17.14 of the DSU, the Chairman had invited delegations to express their views on the Reports. His delegation wished to make a few comments on the major issue raised in the Reports, an issue which was of considerable importance to his country, namely, the conditions for the importation of ACP bananas into the EC's market, and more generally, the place of bananas in world trade. As a third party, Côte d'Ivoire had participated fully and to the best of its abilities in the work of the Panels and the Appellate Body. It had closely examined both the findings contained in the Reports and the conclusions and recommendations of the members of the Appellate Body. Côte d'Ivoire was extremely disappointed mainly on two counts. First, it was disappointed by the work of the Appellate Body. The Panels, which had been appealed, had failed to properly and objectively fulfil their mission. Côte d'Ivoire, as well as Cameroon and Ghana, had made this clear in their written submission, recalling the provisions of Article 11 of the DSU: "The function of panels is to assist the DSB in discharging its responsibilities … Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements … ". The fact was that this assessment of the facts had not been made by the Panels, in particular an evaluation of bananas imports from all origins since the entry into force of the disputed importation regulations on 1 January 2006. Côte d'Ivoire had asked the Appellate Body to condemn this failure to respect the panelists' mandate. The Appellate Body had not done so, since it had not seemed fit to respond to the concerns expressed both orally and in writing by his country. Nor had the Appellate Body, in its Report, made the slightest mention of this request and the reasons why it had not acted on it. In short, Côte d'Ivoire regretted that the Appellate Body had also failed to abide by the general mandate pursuant to Article 11 of the DSU. This was a matter of principle, which his country was submitting at the present meeting. If Members wanted the WTO to fulfil its missions given to it by Ministers, if they wanted its institutions or bodies to function in the best possible

manner, all Members had to respect the rules fully. If the Appellate Body disregarded those rules, then confidence in the WTO would be seriously undermined. This matter would have to be examined by the General Council, the DSB and the WTO Director-General. The least that could be done for a country directly involved in a dispute was to hear and respond to that country's concerns.

17. Second, Côte d'Ivoire was also disappointed that the Appellate Body, without any comment or explanation in the entire Part XI of Ecuador's Report regarding Article II of the GATT (paragraphs 363 to 465), had come to the following conclusion on this matter (paragraph 478(c)(iii)): "The Appellate Body … upholds, albeit for different reasons, the Panel's findings, in paragraph 7.504 of the Ecuador Panel Report, that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota-tariff rate of 75€/mt, was an ordinary customs duty in excess of that provided for in the EC's Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994". Apart from the fact that there was no explanation of this conclusion in the 30 to 35 pages devoted to Article II – which was not at all normal – the Appellate Body should have explained: (i) why, in the comparison made between the applied tariff of €176/mt and the bound tariffs (680 and €75/mt limited to 2.2 million mt), there was no need to take account of €75 although, as stated, €176 was higher than €75; and (ii) why the Appellate Body, when reversing the Panel's finding, stated in the same paragraph (478) that the tariff quota of 2.2 million mt at €75/mt was still valid. The fact was that the Appellate Body had failed to follow its reasoning through. It should have stated that the tariff of €176/mt was comparable to the tariff of €75/mt, but was limited to 2.2 million mt and €680/mt for the remaining balance of imports; in other words, 1.8 million mt, which would give a weighted average tariff of €347/mt. This was considerably higher than €176. In view of this lack of objectivity and faced with this attitude regarding the rights of the defence, Côte d'Ivoire requested that the Appellate Body Report not be adopted.

18. The representative of Cameroon said that his delegation wished to thank the Appellate Body, the Panel, and the Secretariat for their work. Cameroon supported the statements made by Côte d'Ivoire and the Dominican Republic, speaking on behalf of the ACP countries. As far as the substance of the argument was concerned, his country would not reiterate their arguments. His country had taken into account what had been stated and endorsed the points and arguments put forward by the above-mentioned speakers, and wished to be fully associated with them. He noted that disappointment and frustration continued to be expressed regarding the EC bananas import regime. His delegation was concerned about the marginalization of third parties in legal proceedings, and wondered what was the third parties' role in those proceedings. It was true that one was accustomed to seeing essentially only two parties in the proceedings, and not third parties, but the time had now come to question the role of third parties in legal proceedings. It was understandable for a number of arguments raised by third parties not to be taken into consideration where the body, or at least the Appellate Body, chose to dismiss them on the grounds that they were, in its opinion, unfounded, but when those arguments were simply ignored then there was a problem. Such arguments should be formally addressed and refuted. Cameroon wondered whether the Appellate Body had chosen to disregard the right of defence. Cameroon was concerned by the Appellate Body's legalistic approach. As Côte d'Ivoire so rightly stated, with regard to the binding presented by the EC and examined by the Appellate Body, the latter had chosen to question only the lower and upper levels. It was not correct to consider only the interests of the opposing party and not to take into account all that was at stake. It was not just the tariff of €75/mt for 2.2 million mt that had to be taken into account. One should also consider the fact that 1.8 million mt was not so different from 2.2 million mt. And yet, there was a clear difference between €75/mt and €680/mt. Cameroon felt that the silence on the facts of the case was a serious problem that must be examined. There was also a need to clarify the relationship between Articles I and XIII if the waiver was truly to play its role, as had already been pointed out by the EC. Cameroon felt that the rebinding called for by those who had expressed their views on this matter should be taken for what it was. In Cameroon's view, rebinding did not mean downward adjustments of tariffs. Rebinding meant the return to compliance and not downward adjustments

insofar as this was not a negotiating process. Finally, his delegation believed that the Reports, before the DSB at the present meeting, should not be adopted.

19. The representative of Costa Rica said that his delegation supported the views expressed by Ecuador, Panama and Nicaragua. He recalled that since 1992 the EC bananas import regime had been examined by 16 different GATT/WTO panels. He said that he had participated in the first Panel, which had considered this matter, and noted that after all these years the EC had been condemned, once again, for the same reasons. The Panel and the Appellate Body had, once again, found in favour of Ecuador. The Appellate Body had, once again, recognized that the EC's discriminatory regime had no legal basis in the WTO. The EC's failure to comply with its obligations damaged its credibility as well as the credibility of the dispute settlement mechanism. However, one should not lose hope in the functioning of the multilateral dispute settlement system. He recalled that 16 years ago, it had not been possible to adopt the Panel Report on bananas because the EC and the ACP countries had blocked its adoption. In 1994, the EC bananas import regime had, once again, been condemned. However, the adoption of the Panel Report had been blocked again and the parties had had to await the entry into force of the Uruguay Round Agreement for the Report to be adopted by negative consensus. He recalled that Ecuador had won that case in 1997 and had had to wait all these years until now. Costa Rica trusted that the adoption of the Reports of the Appellate Body and of the Panel, which had confirmed the illegality of the EC's regime, would enable the EC to meet its obligations. Those Reports must be adopted at the present meeting and thus the request made by Côte d'Ivoire not to adopt the Reports could not be granted.

20. For several months, Costa Rica had participated in the negotiations with the EC under the auspices of the initiative by Colombia, which had requested the Director-General to exercise his good offices. That process had been concluded on 27 July 2008 with the Geneva Agreement on Trade in Bananas. Costa Rica remained ready to carry out that Agreement. The Latin American banana-exporting countries had agreed to trust the EC not only during the current round of negotiations, but also during the next round in the event of failure of the current Round. The July 2008 Agreement constituted a text where all different views found their convergence. This was something that had not occurred after decades of litigation. An equilibrium had been found and was contained in that Agreement. The EC would cause a great deal of harm by rejecting it now. In a surprising turn of events, the EC had decided to link compliance with that Agreement, which could put an end to years of disputes, to an agreement on modalities under the Doha Round negotiations. Costa Rica rejected and regretted the unilateral position of the EC, which had no support in the Agreement reached. Furthermore, it was not acceptable that when Reports had been adopted by the DSB, the party condemned had decided whether or not to comply depending on progress in the Round. This not only deprived the Member acting in this way of all credibility, but weakened the dispute settlement mechanism. This was a very important moment in the Round. However, the unilateral rejection by the EC had had negative consequences in other areas. The chance had been missed to reach an agreement in agricultural negotiations on sensitive products such as sugar, rum or tobacco, including a list of 42 products that could have been settled in July 2008. However, when the EC had decided not to comply with the July Agreement, that list of 42 products had been opened up again and those products continued to be on the table as unresolved issues, which was clear from the most recent text of the Chairman of the agricultural negotiations. Costa Rica reiterated its call on the EC to respect the rights and obligations, which existed independently of the size of the countries against which it had lost under the dispute settlement mechanism, and urged the EC to allow good sense, good faith and the letter of what had been agreed to prevail.

21. The representative of Ecuador said that his delegation wished, once again, to express its gratitude to the Appellate Body for the way it had dealt with third parties in this dispute. Ecuador disagreed with the argument that there was any discriminatory treatment of third parties in the proceedings. Since the imposition of the illegal tariff by the EC, Ecuador had paid US$101 million, which was an absolutely excessive duty for a country such as Ecuador. His delegation wished to ask the ACP countries how much they had paid in terms of tariffs to have access to the EC's market. The

answer, he said, would be zero. Finally, Ecuador underlined that the Reports, before the DSB at the present meeting, would have to be adopted.

22. The representative of the European Communities said that his delegation would briefly like to deal with one institutional point and then respond to some other interventions on substance. The institutional point arose from the statement made by the United States in which reference had been made to its own request to suspend considerations of the Appellate Body Report and had also referred to one or two provisions, or paragraphs, in Ecuador's Appellate Body Report which contained typographical errors. The EC would have no problems with the Appellate Body correcting clear typographical errors but, from what the EC had seen in the US letter, those references were anything but typographical errors. The DSU did not provide for any provision to amend such Reports after circulation or after the 90 days deadline. Therefore, the EC would wish to be consulted by the Appellate Body on any clerical errors being corrected. Any rectification would need agreement by all parties. On the substantive remarks, his delegation wished to reiterate its opening statement that the EC was working to implement the recommendation made in Ecuador's Report to bring its regime into compliance with Article II of the GATT 1994 by means of modifying its bound duty. It was the EC's intention to bring its tariff regime into compliance. The EC would rebind its bananas tariff. In any case the EC would rebind, with or without the Doha Round. The Panel Report, not questioned by the Appellate Report, and as provided for by the DSU, did allow the EC discretion in which way the EC might implement the recommendations and rulings. The EC's Latin American partners had made comments on how, and at what level, the EC would rebind. The EC was heartened by all MFN countries expressing their expectation and hoped on doing so through reaching an agreement with them. That would be the EC's wish as well.

23. The EC recalled that Colombia had provided a very useful summary history of this dispute. His delegation might also complement it by recalling the most recent history of the Banana negotiations. Now it was said that the EC had an obligation to implement the 27 July Agreement as a standalone agreement irrespective of a successful Doha deal. This had not been agreed. A standalone Agreement had indeed been reached – but on 16 July – and this had been rejected by all, but the EC and one MFN country. The EC plus that one MFN country had been ready to initial it, but this had never happened. From that point onward the EC had worked on an agreement which would become part of Agricultural modalities, tied to the successful completion of such modalities. This draft agreement comprised several elements: as noted by Colombia in its statement, one of those elements was tariff cuts belonging to the Doha Round. That tariff cut component was linked to the Doha modalities. This was why his delegation had stated in its opening statement that "we hope to negotiate and conclude an agreement with the MFN countries based on the July Agreement, in the framework of the agricultural modalities we hope to conclude in the next days". If one could conclude successful Agricultural modalities, the EC's intention would be to implement the 27 July Agreement if others were also willing to do so. That was still the EC's intention. If, however, Members were collectively unable to adopt the Agricultural modalities then the EC recognized that it would, in any case, have to rebind. As of now, his delegation could not guarantee that the terms of this settlement would be identical to the 27 July Agreement. The 27 July Agreement was specifically linked to Doha. He reiterated that the EC intended to implement the recommendations and rulings of the Panel and of the Appellate Body.

24. The representative of Costa Rica said that things were not exactly as the EC had presented them. All parties, except for the EC, had one interpretation. The EC was alone with its own interpretation. Of course the EC was stronger than the other parties. With regard to bananas, the EC had demonstrated that for two decades, and ever since, it had done what it wanted. The EC was proving that it was ready to continue doing that. That was a fact. The negotiations carried out under the Good Offices of the Director-General were very complex and all remembered the roller coaster between optimism and pessimism, and whether there would be modalities in February, March, April, June, July, November or December 2008. From December 2007, and during the first semester of 2008, negotiations on bananas had been carried out with the EC and five Latin American countries.

Members had failed to reach agreement on modalities a number of times. Therefore, from the very beginning of the negotiations, it was very clear that Latin American countries wanted to be sure that this dispute was going to be solved with or without modalities under the Doha Round. Solving this dispute with or without modalities was considered to be option two in those negotiations. Solving it in the context of modalities was considered to be option one. For a while, the EC advocated option one by stating that "we are not ready to a solution if there are no modalities". Costa Rica's position was the opposite, namely, that there would have to be a solution with or without modalities; i.e. option two. After many months of negotiations, the Director-General had made a proposal. And the EC had accepted a standalone agreement in the sense that it would be an agreement on bananas that would have its own life, with or without modalities. Only one Latin American country had accepted the Director-General's proposal. Others had accepted the substance, but not the numbers because the numbers had changed substantially in the last week. The question was why the numbers had changed in the final week. The explanation was that the ACP countries had been consulted and they had only decided on this two weeks later in the Ministerial Meeting in July 2008. The numbers had not been accepted by the ACP countries and, therefore, those numbers had been substantially reduced. The linkage to modalities had not been made by Latin American countries. This had been made during the negotiations carried out under the Good Offices of the Director-General. Latin American countries had stated that they could accept the text, the modalities and option two, but that they would continue to negotiate the numbers. On 27 July 2008, a different set of numbers had been agreed: instead of a reduction of €150 in the first year, it would be €148, and instead of €116, it would be €114. That was a difference in the Agreement to which the EC had referred. Furthermore, paragraph 4 of the Agreement, which was fundamental, assured that this Agreement was valid with or without modalities. That paragraph had been proposed by the EC, and had defined the standalone nature of the Agreement. This was also in part what the Director-General had proposed. So if the Agreement of 16 July was a standalone Agreement then the Agreement of 27 July was also a standalone agreement. Costa Rica had sought explanation from the EC as to what had made the agreement proposed by the Director-General to be different from the 27 July Agreement. However, the EC had not been able to respond. The EC had said that: "well the difference is that the negotiations continued and we finished during the week in which the Ministers were here". However, the text had been agreed before the negotiations had collapsed.

25. It was understandable from the political point of view that it was much more difficult for the EC to report to its member States that it had not had any results in NAMA or Agriculture but that the only agreement it had was the agreement on bananas. That, however, was the EC's domestic problem. This was not linked to the good faith nor to the seriousness of the negotiations or to the obligation that one had to comply when concluding an agreement and that agreement had been concluded. It had been concluded on 27 July 2008, and the parties had been ready to sign it. There had been some formalities to finish, but the agreement had already been concluded. Following the conclusion of the banana negotiations, Ecuador's Vice Minister had decided to go back to capital, but before that, he had signed the agreement. However, two days later, he had learned that that agreement had never existed. This was no longer an agreement, it was, according to the EC, a paper. When Members had agreed on the DSU provisions, they had done this because they had believed that they could rely on it. However, in order to rely on it, it was necessary to ensure that all Members respected it, but this was not always the case. Costa Rica expected the EC to comply with the Agreement it had been committed to with or without modalities.

26. The representative of the United States said that regarding the EC's point on the requested corrigendum, the EC had asserted that there was no basis for the Appellate Body to issue a corrigendum if the EC disagreed with the content of that corrigendum. The Appellate Body evidently disagreed that it could not issue a corrigendum if it considered there to be an error in its report. The United States was aware of at least eight examples of the Appellate Body issuing corrigenda to its reports, and many more examples of panels doing so as well. Indeed, from an institutional perspective, the dispute settlement system would not be well-served if the Appellate Body or a panel were to consider there to be an obvious error in its own report, but were not able to correct it. As a

practical matter, the United States suggested that Members could continue to reflect on this issue after this meeting.

27. The representative of Honduras said that his delegation wished to be associated with the statement made by Costa Rica and wished to state for the record that the 27 July Agreement was a standalone Agreement. The EC had stated that it did intend to comply with different rulings of the Panels concerning the EC bananas regime. Honduras asked how the EC would comply on 1 January 2009, if there was no agreement on modalities.

28. The representative of the European Communities said that the EC wished to remind the DSB that the item of the Agenda was the adoption of the Panel and the Appellate Body Reports. There was no Agenda item on the adoption of the 27 July Agreement so one should try to distinguish between the two. The EC had listened with great care of course to the interventions made by Costa Rica. Yes, there were two different interpretations and views on what was understood and what or not had happened. Basically, the parties had agreed to disagree, whether the July Agreement was conditional upon modalities. He could, and was tempted to answer all points made one by one, because he thought the EC had answers to all, but he was conscious of the time. Also the rules of the DSB provided that repeated points should not be raised. Those points had been made by the EC in the General Council as well as in previous DSB meetings. So rather than to provoke another round of interventions, the EC would stop here and would not repeat arguments made already. The EC's obligation was to comply with the recommendations and rulings. The EC would comply and rebind. With respect to the last US intervention on the institutional matter, the EC wished to provide a quick clarification on the issue of clerical errors. First of all, the eight examples that the United States was referring to were examples of the Appellate Body correcting clerical errors "proprio motu"; i.e. out of its own motion. This was very different from the situation here where the correction was requested by a party. This, to the EC's knowledge, was unprecedented. In that context the EC's point was one of procedure. In analogy to Rule 18.5 of the AB Working Procedures, the EC thought that in such a situation the parties needed to be consulted on the request. Rule 18.5 applied to requests for correction of clerical errors made in a party's submission. A fortiori such a rule should apply in the context of a request to correct an Appellate Body Report. Therefore, if the Appellate Body was to adhere to the request made by the United States it should devise a procedure whereby the EC would be consulted on this request.

29. The representative of the United States said that, as stated before, the United States was happy to continue this discussion after the DSB meeting, but it wished to correct a factual error in the EC's last statement. The United States would draw the EC's attention to WT/DS336/AB/R/Corr.1. This corrigendum had been issued by the Appellate Body at the request of the United States to correct a US argument incorrectly reflected in the Report.

30. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS27/AB/RW2/ECU and the Panel Report contained in WT/DS27/RW2/ECU, as modified by the Appellate Body Report.

2. Implementation of the recommendations of the DSB

(a) United States – Continued suspension of obligations in the EC - Hormones dispute

(b) Canada – Continued suspension of obligations in the EC - Hormones dispute

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

recommendations and rulings of the DSB. He recalled that at its meeting on 14 November 2008, the DSB had adopted the Appellate Body Report in the case on "United States – Continued Suspension of Obligations in the EC - Hormones Dispute" and the Panel Report on the same mater, as modified by the Appellate Body Report. He further recalled that also at its meeting on 14 November 2008, the DSB had adopted the Appellate Body Report in the case on "Canada – Continued Suspension of Obligations in the EC - Hormones Dispute" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited the European Communities to make a statement.

32. The representative of the European Communities recalled that on 14 November 2008, the DSB had adopted the Appellate Body Reports and the Panel Reports in the two disputes: "United States – Continued Suspension of Obligations" and "Canada – Continued Suspension of Obligations". The Appellate Body Reports contained the recommendations that the United States, Canada and the EC initiate Article 21.5 proceedings 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 remained legally valid. Through the adoption of the Reports in the DSB, those had become recommendations and rulings of the DSB. As one of the addressees of the recommendation, and pursuant to Article 21.3 of the DSU, the EC hereby informed the DSB of its intention to comply with the recommendations and rulings of the DSB. In other words, the EC intended to initiate Article 21.5 proceedings without delay.

33. The representative of Canada said that, at the DSB meeting of 14 November 2008, her country had expressed its reservations regarding the final sentence in the Appellate Body Report in this case. In that sentence, the Appellate Body had recommended that Canada and the EC initiate proceedings under Article 21.5 of the DSU without delay. The Appellate Body's role was limited to the powers conferred on it through the DSU. Article 19.1 of the DSU governed the Appellate Body's authority to make recommendations to Members in the context of a dispute. That authority was dependent on a finding of inconsistency with a covered agreement. Since the Appellate Body Report had found no inconsistency with a covered agreement, 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 have any legal effect. Canada noted, in this context, that the Appellate Body Report had clarified that the EC had the option of initiating a proceeding under Article 21.5 of the DSU. Canada also noted that the Appellate Body Report had made it clear that the recommendations and rulings of the DSB in the "EC - Hormones" dispute continued to apply to the dispute under consideration. Although the Appellate Body Report had become part of the recommendations and rulings of the DSB, this did not give the sentence concerned any greater effect than that of a suggestion. Therefore, in Canada's view, the procedural steps outlined in Article 21.3 of the DSU did not apply in respect of that sentence. As a consequence, there was nothing to discuss at the present meeting under the Agenda item: "Implementation of the Recommendations of the DSB" in respect of the "Canada – Continued Suspension of Obligations in the EC - Hormones" dispute. This was simply because there was no recommendation to comply with.

34. The representative of the United States said that his delegation wished to begin its statement by expressing its appreciation, but this time to the Members of the DSB, for their patience and dedication in returning, once again, to a dispute that they had seen so many times over so many years. At the present meeting, it was not just Item 1 that had a long and distinguished history. With respect to the statement made by the EC a few moments ago, as the United States had explained at the 14 November DSB meeting, the Appellate Body could not have intended to make a "recommendation" within the meaning of Article 19.1 of the DSU in its Report in this dispute. Therefore, the United States disagreed that this issue and the EC's statement were subject to Article 21.3 of the DSU. He recalled that under Article 19.1, a panel or the Appellate Body was authorized to issue a recommendation only 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.

Making any such "recommendation", therefore, would be outside the authority granted to the Appellate Body under Article 19 of the DSU and, therefore, could not, as a matter of law, give rise to legal consequences. The United States noted that this was not just the view of the United States and Canada but that of several other WTO Members who had spoken on 14 November when the DSB had been considering the adoption of the Appellate Body Report. The United States recognized that the EC had the right to make further statements to the DSB concerning its implementation of the recommendations or rulings in any dispute. Indeed, the United States had hoped, for a very long time, to hear a statement in which the EC would announce its intentions to eliminate its import ban on US beef. It was regrettable that the EC continued to refuse to do so. Furthermore, the United States also recognized that the EC might initiate further proceedings in this matter, and that if the EC chose to do so the United States could choose to participate. Similarly, the United States would have the right to initiate dispute settlement proceedings of its own. The United States considered, however, that any such initiation of, or participation in, further proceedings would not constitute "implementation" of, or "compliance" with, a "recommendation" of the DSB, because no recommendation was made by the Appellate Body under the authority of Article 19.1 of the DSU.

35. The representative of the European Communities said that the EC was highly concerned by the attitude of the United States and Canada. Both were explicit addressees of the Appellate Body's recommendation. The EC did not find it acceptable that a party asserted the right to consider itself not bound by a recommendation. It was irreconcilable with the WTO's dispute settlement system to allow individual parties to a dispute to decide unilaterally whether or not a recommendation was valid, whether or not it had been made within the Appellate Body's mandate, and whether or not it was binding for the purposes of implementation. In the absence of negative consensus in the DSB meeting of 14 November 2008, the Reports of the Appellate Body had been adopted and must be accepted unconditionally according to Article 17.14 of the DSU. This applied to the entirety of an Appellate Body report, no party was allowed to pick and choose which parts of a report it considered correct, and certainly not a party to whom a recommendation was addressed. The EC noted with disagreement the United States' and Canada's failure to state at the present meeting their intentions in respect of implementation, as was their obligation under Article 21.3 of the DSU. However, through the EC's implementation of the DSB's recommendations and rulings of 14 November, it was hoped that this issue would soon become moot. Nevertheless, the EC, however, found it necessary to voice its deep concern about this instance of non-compliance with the DSU by the United States and Canada. In this context, the EC wished to add a comment in relation to the tone and content of criticism of the Appellate Body, which was recently being voiced by the United States. There seemed to be a close connection because that criticism had reached a new level of intensity since and because of the Appellate Body Report in the "Continued Sanctions" cases. If the reporting was correct, those voices accused the Appellate Body of overreaching and of inventing new obligations not reflected in the WTO Agreement. A quote reproduced in the media suggested that the Appellate Body "write[s] decisions that have no foundation in the WTO agreements and indeed look like they were written on the back of a napkin". Such polemic most of all suggested that the party voicing the criticism had run out of substantive arguments. Nevertheless, the EC considered such polemic inappropriate. It was not only insufficiently respectful of the Appellate Body of the WTO. It was also highly inappropriate if representatives of a WTO Member attempted to affect the outcome of future disputes by intimidating panelists and the Appellate Body members. In this respect, the EC would like to make crystal clear that it trusted – but also expected – that future decisions would continue to be made in accordance with the WTO Agreement, and that they would not be influenced by this type of criticism.

36. The representative of the United States said that with respect to the statement that had been made by the EC, the United States rejected the EC's accusations. The US statements to the DSB were consistent in tone and content with those of other Members discussing Appellate Body reports in general, and in particular statements concerning the issue of the Appellate Body's non-recommendation in this dispute. In relation to the EC's assertion about the US implementation, the United States had already explained that there were no recommendations of the DSB to implement. If the EC truly believed that the Appellate Body had made a recommendation under Article 19 of the

DSU in this dispute, perhaps the EC could identify for Members the paragraph in the Appellate Body Report in which the Appellate Body, in the words of Article 19, "concludes that a measure is inconsistent with a covered agreement"? Could the EC explain to Members what measure had been found WTO-inconsistent? And, continuing on with the terms of Article 19, could the EC identify for Members where the Appellate Body in its Report "recommend[s] that the Member ... bring the measure into conformity with that agreement"?

37. In any case, it was obvious that the "Hormones Sanctions" dispute had not resolved the question of whether the EC had come into compliance with the rulings and recommendations that the DSB had addressed to the EC in February of 1998. The United States remained, as it had always been, keenly interested in a resolution to that long-standing dispute. Despite the amount of time that had passed since the United States first brought that dispute, the United States continued to hope that a successful resolution was possible. It may be that the tools of WTO dispute settlement would offer a path to a successful resolution. As stated already, however, the United States considered that any possible employment by the United States or the EC of such tools, derived from the rights of Members to avail themselves of such tools and could not be considered the "implementation" of the DSB "recommendations". Finally, with respect to the EC's statement that it intended to initiate an Article 21.5 compliance panel proceeding without delay, the United States stood ready, as it always had, to review any requests by the EC for furthering proceedings.

38. The representative of Australia said that she just wished to make a brief comment in relation to the exchange between the United States and the EC. Australia would call on all Members, including both the United States and the EC, to ensure that their comments in the DSB remained respectful with regards to panels, the Appellate Body, and other Members. Australia considered that the DSB had a long tradition in this direction, and would consider it a great disservice to the DSB and to the dispute settlement system more generally if the DSB was to fall short of the very high standards that Members had set in the past on this measure.

39. The representative of Mexico said that, due to systemic importance of the issue discussed, his delegation wished to make a statement. In Mexico's view, Members could not be forced to comply with recommendations and, therefore, it was up to the complainant to challenge such non-compliance. However, it was inappropriate to state unilaterally what was, or what was not, a recommendation of the DSB after the adoption of the Appellate Body Reports.

40. The representative of Canada said that her country accepted the Appellate Body Report unconditionally. In light of the last intervention of the EC and the heated tone of the last exchange, Canada reaffirmed its continued and constant respect for the Appellate Body. Canada simply must insist that, in the absence of a violation of a covered agreement, logic as well as the text of Article 19.1 of the DSU dictated that there was nothing to implement. In any event, Article 17.14 of the DSU could not override the rules set out in Article 19.1 and 19.2 of the DSU.

41. The DSB took note of the statements.

3. Mexico – Definitive countervailing measures on olive oil from the European Communities

(a) Statement by Mexico

42. The representative of Mexico, speaking under Other Business, said that in accordance with the provisions of Article 21.6 of the DSU, his country wished to raise, at the present meeting, the issue of the implementation of the recommendations and rulings relating to the dispute: "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities" (WT/DS341). He recalled that on 21 October 2008, the DSB had adopted the recommendations and rulings contained in the Panel Report, which had examined the above-mentioned dispute. On 22 January 2008, a domestic

court had ordered the Mexican investigating authority to remove the countervailing duties imposed on olive oil from the EC. Consequently, on 18 November 2008, Mexico had published in the Official Journal of the Federation a resolution[3] for the elimination of the countervailing duties that had been the subject of this dispute, thereby complying with the recommendations and rulings adopted by the DSB.

43. The representative of the European Communities said that, at the outset, the EC thanked Mexico for its statement. The EC was very pleased to see the introduction of this measure and shared the view that through its action Mexico brought itself into compliance with the DSB's recommendations.

44. The DSB took note of the statements.

[3] Resolution to give effect to the decision of 22 January 2008 delivered by the Second Division of the Upper Federal Tax and Administrative Court in the Administrative Dispute 8558/06-17-01-3/483/07-S2-06-01 brought by Distribuidora Ybarra, S.A. de C.V.