

Statements by the United States at the December 11, 2008 Meeting of the Dispute Settlement Body

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)

- We would like to begin by thanking the members of the Appellate Body, the members of the Panel, and the Secretariat for their work in this proceeding. We appreciate their consistent dedication in returning once again to a dispute that they have seen so many times before.
- Mr. Chairman, the United States participated as an interested third party in this proceeding. We would therefore like to thank the Appellate Body for its handling of the two reports that were circulated simultaneously – the report in the proceeding initiated by Ecuador that we are considering today, and the separate report in the separate proceeding initiated by the United States. We would like to commend the approach that the Appellate Body took to ensure that the two reports' findings and conclusions were clearly distinct, and we appreciate the work of those in the Secretariat who helped make that approach possible.
- We also appreciate that both the Panel and the Appellate Body agreed to make the hearings in this dispute open to public observation for those Members who chose 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 we were particularly pleased that none of the Members that appeared before the Appellate Body – three participants and sixteen third participants – chose to request that their statements be kept confidential.
- Turning to the substance of the reports before us today, the Panel and the Appellate Body thoroughly and properly rejected this most recent attempt by the EC to avoid its WTO obligations with respect to bananas. We therefore welcome the panel and Appellate Body reports, and we support their adoption.
- We do wish to comment today on two points that we think are unique to the reports in the Ecuador proceeding.

- First, we were somewhat surprised to read the comment in the Appellate Body report that an interpretation under Article IX:2 of the Marrakesh Agreement can be likened to a subsequent agreement of the type contemplated by Article 31(3)(a) of the Vienna Convention.¹ 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, we do not agree: as Article 3.9 of the DSU makes clear, when such interpretations are adopted by the Ministerial Conference or the General Council, they are authoritative.
- Second, we were 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, we have considerable sympathy with the proposition that the WTO's objectives are served through the exchange of concessions and that those concessions must in turn be properly read. As we have noted on previous occasions, the WTO dispute settlement system provides security and predictability to the multilateral trading system when, and only when, it properly reads the agreement that Members have negotiated.
- In addition, the participants in these appeals will know that we have requested that the Appellate Body correct certain apparent typographical errors in its reports. We hope that a corrigendum can be circulated soon.
- Mr. Chairman, a few moments ago, I alluded to the fact that this dispute has been before the DSB many times before.
- The United States was very much encouraged by the progress that the EC and the Latin American suppliers made a few months ago in their negotiations on the long-standing bananas issue.
- Unfortunately, however, the EC unilaterally decided to suspend those negotiations.
- We continue to encourage those discussions. We hope the EC will have good news to report at the December 22 DSB meeting.
- And in this vein, we look forward to receiving the EC's status report later today for the December 22 meeting.

[Second intervention:]

- Mr. Chairman, regarding the EC's point on the requested corrigendum, the EC asserts that there is no basis for the Appellate Body to issue a corrigendum if the EC disagrees with the content of that corrigendum.

¹ Appellate Body report, para. 383.

- The Appellate Body evidently disagrees that it cannot issue a corrigendum if it considers there to be an error in its report. The United States is 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, we suggest that Members can continue to reflect on this issue after this meeting.

[Third intervention:]

- Mr. Chairman, as stated before, the United States is happy to continue this conversation after this DSB meeting, but we do wish to correct a factual error in the EC's last statement. We would draw the EC's attention to WT/DS336/AB/R/Corr.1. This corrigendum was issued by the Appellate Body at the request of the United States to correct a U.S. argument incorrectly reflected in the report.

3. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

A. UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC - HORMONES DISPUTE

- Let me also begin this statement by expressing my appreciation, but this time to the Members of the DSB for their patience and dedication in returning once again to a dispute that they have seen so many times over so many years. At today's meeting, it is not just item 1 that has a long and distinguished history.
- Mr. Chairman, with respect to the statement made by the EC a few moments ago, as we explained at the DSB meeting of November 14, the Appellate Body could not have intended to make a "recommendation" within the meaning of DSU Article 19.1 in its report in this dispute. Therefore we disagree that this issue and the EC's statement are subject to DSU Article 21.3.
- We recall that under Article 19.1, a panel or the Appellate Body is authorized to issue a recommendation only where it has concluded that a measure within the terms of reference of the proceeding is inconsistent with a covered agreement. In this appeal, the Appellate Body did not conclude 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 DSU Article 19 and therefore cannot, as a matter of law, give rise to legal consequences.
- We would note that this is not just the view of the United States and Canada but that of several other WTO Members who spoke on November 14 when the DSB was considering adoption of the Appellate Body report.
- We recognize that the EC has the right to make further statements to the DSB concerning its implementation of the recommendations or rulings in any dispute. Indeed, we have hoped for a very long time to hear a statement in which the EC announces its intentions to eliminate its import ban on U.S. beef. It is regrettable that the EC continues to refuse to do so.
- Furthermore, we also recognize that the EC may initiate further proceedings in this matter, and that if they choose to do so we could choose to participate. Similarly, we would have the right to initiate dispute settlement proceedings of our own.
- We consider, however, that any such any 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 DSU Article 19.1.

[Second intervention:]

- With respect to the EC's last statement, we reject the EC's accusations. The U.S. statements to the DSB are 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 U.S. implementation, we have already explained that there are no recommendations of the DSB to implement.
- If the EC truly believes that the Appellate Body made a recommendation under DSU Article 19 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 was 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"?
- Mr. Chairman, in any case, it is obvious that the *Hormones Sanctions* dispute did not resolve the question of whether the EC has come into compliance with the rulings and recommendations that the DSB addressed to the EC in February of 1998. We remain, as we have always been, keenly interested in a resolution to that long-standing dispute.
- Despite the amount of time that has passed since the United States first brought that dispute, we continue to hope that a successful resolution is possible. It may be that the tools of WTO dispute settlement will offer a path to a successful resolution. As stated already, however, the United States considers that any possible employment by the United States or the EC of such tools, derives from the rights of Members to avail themselves of such tools and cannot be considered the "implementation" of DSB "recommendations."
- Finally, with respect to the EC's statement that it intends to initiate an Article 21.5 compliance panel proceeding without delay, the United States stands ready, as it always has, to review any requests by the EC for furthering proceedings.