WORLD TRADE ORGANIZATION

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Dispute Settlement Body
15 December 1998

MINUTES OF MEETING

Held in the Centre William Rappard
on 15 December 1998

Chairman: Mr. Kamel Morjane (Tunisia)

Addendum

1. European Communities - Regime for the importation, sale and distribution of bananas

(a) Recourse to Article 21.5 of the DSU

The Chairman recalled that at its meeting on 25 November 1998, the DSB had agreed to include this item in the agenda and to suspend consideration of this matter until a later date. At the request of the EC, he was reconvening the meeting adjourned on 25 November to consider this matter. He drew attention to the communication from the EC in document WT/DS27/40.

The representative of the United States raised a point of order and in doing so recalled the basis for reconvening this meeting. First, the United States had been trying to reach an agreement on the terms and conditions under which the original panel would be reconvened to examine the WTO-consistency of the EC's revised banana regime. Since consultations had not been completed, both parties had agreed to preserve the opportunity to reach an agreement and to reconvene the original panel as soon as possible. At the DSB meeting on 25 November, the Chairman had stated that "the parties concerned need more time before this item can be considered" and that this agreement "will enable the DSB to meet on short notice when the respective matter will be ready for consideration." The requirement that the meeting could only be reconvened after the parties had reached an agreement had also been referred to by the Chairman in his statement at the informal meeting of the DSB on 3 December to the effect that: "if a mutually agreed approach to this matter can be reached in time, it would be my intention to reconvene the DSB."

At present, there was no agreement to proceed on the basis proposed by the EC. The EC was not willing to reconvene the original panel to examine the WTO-consistency of its revised banana regime. Therefore, there was no basis for the Chairman to reconvene the meeting and to consider this item. When the EC had requested the Chairman to reconvene the meeting, the United States had believed that the EC sought recourse to Article 21.5 of the DSU and that it wished to request the original panel to examine the WTO-consistency of its banana import regime. This had also been suggested by the EC Trade Commissioner in his letter of 14 December 1998 to the US Trade Representative. Only after receipt of the EC purported Article 21.5 request, had the United States realized that this request had not been made pursuant to Article 21.5 and that the EC did not seek an examination of the WTO-consistency of its banana regime. Therefore, there was no basis for the DSB to be reconvened nor to consider the EC's purported Article 21.5 request. She clarified that the United

States had no objections to the EC requesting a panel under Article 21.5, provided that this request was a true Article 21.5 request. In other words, that a panel could make a finding as to whether or not the EC's revised banana regime was WTO-consistent. The United States was prepared to consult with the EC on its request to reconvene the original panel to examine the WTO-consistency of the EC banana regime. However, the terms of reference of this panel would have to include the examination of the WTO-consistency of all the EC's measures concerning its revised banana regime.

The Chairman said that his decision to reconvene the meeting was based on the EC's communication requesting him to do so and confirming the EC's intention to request a panel pursuant to Article 21.5. Although there was no agreement on the substance, this meeting could be held in order to further discuss this matter. He had taken this decision in consultations with Members.

The representative of the European Communities said that the United States had raised a point of order of whether or not the meeting had been properly convened. At the time this item was included on the agenda of the November meeting, the two parties had hoped to reach an agreement. In the light of this, the item had been placed on the agenda and the DSB had adjourned its proceedings without consideration of this item in order to be able to revert to it rapidly. The Chairman had made a statement that the parties needed more time before this agenda item could be considered and had proposed to include this matter as the last item on the agenda. Subsequently, the meeting had been adjourned with a view to be reconvened at a later date. He noted that in the Chairman's statement there was no reference to the suggestion that the meeting could only be reconvened on the basis of an agreement between the parties. At that time it was clear that the parties hoped to reach an agreement. He regretted that thus far it had not been possible to reach such an agreement. The EC's understanding was that either of the parties was entitled to request the DSB to reconvene its meeting. He was aware that at the informal DSB meeting on 3 December 1998 the Chairman had made a statement, but that an informal meeting. The statement made by the Chairman at the DSB meeting on 25 November did not contain any reference that reconvening of the DSB meeting would be subject to a mutual agreement. In the light of this, he requested the Chairman to rule on whether or not the present meeting had been correctly reconvened.

The representative of the Philippines raised a point of order on the basis of the EC's request. The EC had requested the establishment of a panel pursuant to Article 21.5. However, in the last paragraph of its request (WT/DS27/40), it did not seek the panel's ruling on whether the implementing measures were in conformity with the WTO Agreement, but rather asked it to determine that the implementing measures "must be presumed to conform to WTO rules". In his view, this was a request for an authoritative interpretation under Article IX:2 of the WTO Agreement and as such should be referred to the General Council for consideration.

The representative of the European Communities said that he had asked the Chairman to make a ruling on the point of order. He considered that at this stage other delegations should not comment on the EC's request since this would imply that the meeting had begun before the Chairman had made his ruling. The Chairman should first rule on whether or not the meeting had been properly convened, and then the EC would present its request. Delegations could then comment on this request.

The Chairman said that the proceedings of the meeting had not yet begun and that he still had to rule on the point of order.

The representative of the United States said that the point of order was two-fold. First, the meeting should not have been reconvened. Second, the EC's request was not a proper request under the agenda item. Furthermore, the EC was not correct in trying to distinguish between the Chairman's statement on 25 November and his statement on 3 December.

The Chairman recalled that at the November meeting the agenda had been adopted on the understanding that this item would not be considered at that meeting but that the DSB would meet on short notice when the respective matter was ready for consideration. He proposed that the DSB hold the present meeting in order to enable the parties to present their views on this matter. He would then adjourn the meeting and reconvene it at a later date. In his view this meeting had been convened properly and in good faith.

The representative of Norway asked whether the present meeting was an informal meeting.

The Chairman confirmed that this was a formal meeting but the DSB would not take any decision on the matter before it.

The representative of the European Communities said that it was his understanding that this was a formal meeting of the DSB. His delegation wished to present its panel request under Article 21.5 (WT/DS27/40). He emphasized that the DSB was faced with an exceptional and serious situation. This was a critical juncture in the banana dispute. If the DSB did not decide to bring this matter back to a multilateral forum under Article 21.5 it would be faced with serious negative implications.

The Chairman recalled that no decision would be taken by the DSB at the present meeting. The purpose of the meeting was to give the parties as well as other interested delegations the opportunity to present their views.

The representative of the European Communities repeated that it was his understanding that this was a formal meeting. If it was not, he would not make his statement. It should not be prejudged whether or not a decision would be taken at the present meeting. This was up to the DSB to decide.

The Chairman reiterated that in the light of the present circumstances no decision would be taken at the present meeting, and that following an exchange of views, the meeting would be adjourned and reconvened at a later date.

The representative of the European Communities said that he did not know whether the Chairman had the authority to adjourn this meeting. In order to do this one had to follow certain procedures. If this was an informal meeting, the Chairman would have to rule on the point of order that this meeting had not been properly convened due to the fact that there was no agreement between the parties. In accordance with the Chairman's statement at the November meeting there was no requirement to have an agreement between the parties. This was also in line with advice from the legal experts. Therefore, the EC's request to reconvene the meeting was correct, and the Chairman, in accepting this request, had been as well. There was a need to clarify that either this was a formal meeting and the Chairman had ruled on the point of order, or that there was no need to proceed.

The Chairman again confirmed that this was a formal meeting.

The representative of Ecuador said that in the light of the Chairman's confirmation it would be appropriate to rule on the point of order raised by the United States. Ecuador considered that this meeting should have been convened not only after the two parties had reached an agreement but also after an agreement with all the parties to the dispute had been reached. Prior to this meeting, a round of consultations had been held in which his delegation and other complaining parties had not participated. Therefore, the countries concerned had not been aware of the EC's intentions. The EC's request had been circulated only that morning, and due to time differences, had not yet been examined by the respective capitals.

The Chairman said that he had not accepted the point of order raised by the United States because in his view the meeting had been convened pursuant to the procedures outlined by the Chairman at the November meeting. He therefore believed that the DSB could open the proceedings of this meeting. His intention was to invite the parties as well as other delegations to present their views on this matter. However, consideration of this matter would not be concluded at the present meeting. He reiterated that he considered this to be a formal meeting which had been reconvened in accordance with normal procedures despite some reservations and the point of order raised by the United States.

The representative of the United States said that her delegation supported the Chairman's statement. The United States was in a position to agree to the Chairman's proposal to open the proceeding of the meeting on the understanding that the DSB would not take any decision. Her country continued to believe that this was a very sensitive issue and that delegations should be able to express their views.

The representative of the European Communities said that Members were at a critical juncture in this dispute and warned that the situation could become more critical. Either the DSB would decide to place this matter back on the correct multilateral track under the Article 21.5 procedure or it would face a highly political dispute in January 1999 if, and when, one of the parties sought authorization from the DSB to suspend concessions. It was the first time that recourse to Article 21 or 22 procedures was being considered by the DSB. In other cases, implementation of recommendations had not been challenged. In the context of this case, the DSU provisions and their interpretations were being carefully examined. This process had revealed that the DSU contained a number of ambiguities which had to be clarified. However, it was necessary to decide now on how to proceed in this case. In other words, at present there was no correct interpretation of these provisions. Although some aspects of the EC's request might seem unusual, Members should bear in mind the background of this case. Since 25 November when this meeting had been suspended, efforts had been made by some Members to reach an agreement on how to deal with the next stages in this dispute. For the sake of transparency, he wished to inform Members of new developments during this period. The EC and the United States had held lengthy bilateral discussions to explore in detail how the Article 21.5 procedure might be launched on an accelerated basis, and what this would mean in terms of a panel timetable as well as the possibility to appeal if one party so wished. These efforts had failed on 2 December. The United States had expressed its preference for the panel to complete its work within an extremely short time. This implied that the panel report would have to be issued, at the latest, on 21 January 1999. In the EC's view this was not possible, even without taking into consideration the end-of-year holidays. Other matters of disagreement were also involved. Further efforts had been made by the Director-General to bring both parties together. The idea had been to identify how much time, at a minimum, this work would require. This proposal had been acceptable to the EC but not to all the parties. The two parties had sought in good faith to find a solution on a bilateral basis. However, thus far it had not been possible to bring an agreed proposal back to the DSB. In the absence of an agreement, the EC had to make a proposal and to consider all the remaining courses available under the DSU to deal with this case. In the EC's view, Article 21.5 was the best way to deal with this disagreement.

Regarding the EC's request in WT/DS27/40, the first page contained the background of the case in order to put the matter in its context and to introduce the implementation measure taken by the EC. This information was relevant for the terms of reference of a panel. There was a disagreement between the parties, and Article 21.5 contained the word "disagreement". The first sentence of this Article stated that "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply… such dispute shall be decided through recourse to these dispute settlement procedures". It appeared that there was a disagreement, as noted in the fifth paragraph in document WT/DS27/40: "they [the complainants] emphasized that there was no doubt with regard to the existence of such a disagreement between the Community and the complaining

parties". It was equally clear that the complainants either had decided not to pursue the possibility provided under Article 21.5 or had not decided whether to pursue this option. In September 1998, they had held consultations with the EC and there had recently been consultations on the basis for a panel request. However, no request had yet formally been made. Article 21.5 of the DSU was an obligatory procedure. Since the complainants had not invoked this Article, the EC had no option but to do so. This action was further justified by the fact that one party had announced its intention to pursue a different unilateral track. The only way this matter could be brought back to a correct multilateral forum was for the EC to invoke this procedure To avoid any doubt, reference had been made to the alternative track which one party seemed to wish to pursue and which the EC would challenge separately, and then the terms of the request had been specified. The EC was requesting a panel to review the situation in relation to its implementation measures, and hoped that other parties would present their claims that the EC was not in conformity so that the EC could respond to such arguments. He noted that in accordance with the above terms, the EC's position was different from that of the United States. The latter had requested the EC to agree to reconvene the original panel. The original panel would review all aspects of the EC's banana regime. The EC did not wish to exclude any of those aspects on an expedited basis -- the 90 days was an expedited basis without preconditions -- and therefore it seemed that the EC was in agreement with the United States concerning the objective of this exercise.

The representative of Guatemala, speaking also on behalf of Ecuador, Honduras, Mexico and the United States, recalled that at its November meeting, the DSB had decided to adjourn its proceedings in order to be able, if the parties reached agreement on how to proceed, to establish a panel under Article 21.5 to review the EC's changes to its banana regime. On 14 December 1998, the EC had sent a letter to the United States in which it had requested a panel to determine whether its banana regime was WTO consistent. However, a letter sent by the EC to the Chairman suggested the contrary. Most delegations had just received a copy of that letter. The letter clearly stated that the EC did not seek the establishment of a panel to review the legality of its measures, but to conform with its legal position concerning Article 21.5. Moreover, it had asked the panel to create a presumption in favour of the party whose regime had been considered to be in violation of WTO obligations. By doing so, the EC was using the exceptional option created by the November meeting to achieve a purpose that had not been intended. There were no grounds for the DSB to agree to the establishment of a panel for that purpose. Therefore, unless the EC was ready, at the present meeting, to accept the reconvening of the original panel under Article 21.5 to review, expeditiously and without conditions, all aspects of its banana regime, the parties to the dispute would request the Chairman to close the meeting. The exceptional procedure invoked by the Chairman in order to suspend the meeting until, as stated on 3 December, a mutually satisfactory solution could be reached, should not be abused. On different occasions, the parties to the dispute and Panama had pointed out that the EC's revised banana regime contained many elements which were not consistent with the WTO. Since the approval by the EC Council of the basic structure of the regime at the end of June 1998, the respective Governments had continued to ask the EC to enter into consultations on procedures requiring its legislation to be submitted promptly and expeditiously for review by a panel under Article 21.5. In the view of the complaining parties, the EC measures violated the WTO Agreement.

The EC had continued to refuse to cooperate on this matter. In September 1998, it had threatened to block the adoption of the DSB agenda unless the complaining parties agreed not to request the establishment of a panel. If the EC could make an assurance that it would be ready to reach agreement to reconvene the panel, the parties would ask the Chairman to keep this meeting open in the hope of reaching such an agreement as soon as possible. The complaining parties were ready to work immediately with the EC on procedural details concerning the re-establishment of the original panel to review the WTO-compatibility of the EC's measures. They were not prepared to consider the establishment of a panel if subjected to the EC's procedural conditions. Nor were they ready to consider the establishment of a panel with terms of reference designed to follow the EC's legal interpretations of the DSU. He stressed that the discussion at the present meeting did not deal with

the question of what constituted a request for a panel under Article 21.5. His statement was without prejudice to the rights of any party to request that the original panel be reconvened under Article 21.5 at a future date.

The representative of Panama supported the statement by Guatemala. The EC's request did not constitute a request to review the WTO-consistency of its banana regime. It was merely an attempt to eliminate another procedural obstacle raised by the complainants. Panama was not in a position to support this request, which was not aimed at a review of the banana regime, but rather sought an interpretation of the DSU in this particular case. His delegation appealed to the EC to agree to reconvene, in an expeditious manner, the original panel pursuant to Article 21.5 to review all the aspects of the regime without any preconditions. The text of the current request did not constitute such a request.

The representative of Ecuador said that at the November meeting, his country had reiterated its arguments concerning the illegal aspects of the EC's banana import regime as well as its conviction that the current dispute had to be resolved in accordance with Article 21.5. He had stated that in an effort to reach a settlement with the EC, the parties to the dispute had held consultations on 17 September and 23 November 1998, reserving their rights under Article 21.5, as well as two further meetings under the auspices of the Chairman. The consultations requested by Ecuador on 13 November had been delayed until 23 November. All possible avenues for resolving this case, in which one of the most important Members had failed to comply with its obligation, had been exhausted. Throughout this process, Ecuador had clearly expressed its views concerning the need for the EC to respect the relevant provisions. Ecuador believed that it would be possible to resolve the dispute under the current legal system without resort to manipulations and biased interpretations of the DSU procedures, which had caused considerable damage to the dispute settlement mechanism. He added that unfortunately now Members knew that it was possible not to comply with the panel findings that condemned WTO incompatible measures and which normally would have to be amended. The EC's request was another attempt to postpone a settlement of this long-standing dispute. It had used delaying tactics based on its interpretation which was not in accordance with the spirit of the drafters of the relevant provisions, in particular Article 21.5. The EC's request was an attempt to create confusion. He emphasized Ecuador's firm position concerning the reconvening of the original panel. Consultations with the EC aimed at finding a way leading to the application of Article 21.5 had continued until 10 December and then had failed, because the EC had been unable to provide Ecuador with a guarantee that this dispute would be resolved with the implementation of legal regulations within a given time-period if the panel so required. On this basis and in the light of the EC's statement at the November meeting that it would not request an additional reasonable period of time if the panel were to reject the new banana regime, Ecuador could only presume that the EC had intended to impose a *de facto* reasonable period of time which would allow it to adapt any future approval of new amendments to its banana regime to its domestic time-frame. At the November meeting, the EC had stated that with the adoption of its second Regulation - No. 2362/98 of 28 October 1998 - the implementation of the DSB's recommendations had been completed, when in fact on 8 December the European Commission had enacted new regulations related to the trade of bananas. Ecuador, he said, was studying these regulations. The EC's request was not in line with the DSU procedures. Its terms of reference provided for an *ad hoc* procedure to divert the activities of the original panel and to serve the EC's interests. The terms of reference should provide for the panel to examine whether its recommendations and rulings, as well as the Appellate Body's ruling, adopted by the DSB on 25 September 1997, condemning the incompatibilities with the GATT 1994, the GATS and the Agreement on Import Licensing Procedures, had been effectively implemented by the EC. If not, they should provide for the immediate revision of those regulations. For these reasons, the present meeting should be suspended until the pending procedural matters could be resolved with the EC, which could prompt Ecuador to invoke its rights under Article 21.5.

The representative of the United States said that a letter sent to the EC Trade Commissioner in July 1998 contained a request to explore the procedures of Article 21.5 of the DSU. Had the EC accepted this proposal at that time, a panel report would have been ready by the present time. The EC request had no procedural basis under the DSU. It was not surprising that the EC continued its assertions that an Article 21.5 review was an absolute precondition for a complaining party to resort to Article 22 procedures. However, the United States was surprised that the EC had requested that a panel should rule on this question. Any clarification or possible amendment to Article 21.5 of the DSU could be taken up in the context of the DSU review which would continue until July 1999. Until then the existing DSU provisions had to be followed and there was no basis for establishing a panel with the mandate requested by the EC. In response to the statement by the EC that this was the first time the DSB had had to consider recourse to Article 21.5, she noted that this was the first time that the EC had had to implement the DSB's recommendations. The EC had been granted 15 months to comply with these recommendations. However, during this time, it had never been willing to discuss changes to its regime outside its unilateral determination of what was consistent with the WTO. She regretted that the EC was thus the first Member to use its reasonable period of time to make WTO-inconsistent changes. The United States considered that its rights had already been infringed for a long period of time. It would therefore exercise its right under Article 22 of the DSU and seek authorization from the DSB, in the period between 21 and 31 January 1999, to suspend concessions. This 10-day period after the end of the reasonable period of time was the only time in which a negative consensus rule would apply with respect to the DSB's decision to authorize the suspension of concessions. If the EC was prepared to subject all aspects of its banana regulations to review by a panel in a single proceeding involving all complainants, the United States would accept this.

The EC had requested the DSB to establish a panel with a mandate to make a specific finding. She drew attention to four problems in the EC's request. First, contrary to Article 21.5, the EC was not requesting a panel to review its measures but to interpret the provisions of Article 21.5. Second, the EC sought to usurp the exclusive authority of the Ministerial Conference and the General Council in interpreting or amending the DSU. This was an inappropriate use of the panel process. Third, under the DSU there was no basis for the establishment of a panel with a mandate. Panels had terms of reference not mandates. Fourth, under the DSU there was no basis for a requesting party to unilaterally establish special terms of reference for a panel. Panels had standard terms of reference unless the parties agreed otherwise. The standard terms of reference were that a panel "shall examine the matter brought to it" not that a panel shall make pre-determined findings in favour of one party. There was some discrepancy between the EC's explanation of its panel request and the text of the request. She reiterated that the United States had no objections to the EC requesting a panel under Article 21.5, provided that this request was a true Article 21.5 request. In other words, that a panel could make a finding as to whether the revised banana regime was consistent with WTO rules. The United States was prepared to consult with the EC so as to consider its request to reconvene the original panel to examine the WTO consistency of the EC's banana regime. The terms of reference of this panel had to include the WTO-consistency of its measures relating to the revised banana regime.

The representative of Jamaica said that at the November meeting her delegation had urged the US and the EC to seek a solution which would also take into account the interests of third parties. She reiterated this position. Her delegation had supported the inclusion of this item on the agenda of that meeting. In the meantime, Jamaica had requested the EC and the United States to enter into consultations with third parties. However, it had not been possible to hold such consultations. At the present meeting, the EC was requesting the establishment of a panel. The complainants had not sought to pursue this avenue although they had indicated their intention to do so in the past. In Jamaica's view, a decision to reconvene the original panel under Article 21.5 could not be taken by the EC or the US: such a decision had to be taken by consensus. Jamaica wished to be in a position to join this consensus but at the present meeting was not in a position to do so. Any decision on this matter should ensure that third-party rights were fully taken into account. If no consensus was reached at the present meeting, her delegation would initiate consultations in order for Jamaica and

other third parties to be informed, to assist in the de-escalation of any tension and to arrive at a WTO-consistent decision in both letter and spirit.

The representative of the European Communities said that although his delegation had made a proposal in good faith it was considered to be acting in bad faith. He could only attempt to explain that this was a request for a panel under Article 21.5 and that the EC was prepared to agree to reconvene the original panel to review all aspects of its banana import regime on an expedited basis and without preconditions. If the complainants wished other terms of reference for a panel they could make such a request. The EC had been waiting, and this had not happened, neither in October or November. There was a possibility to do this at the present meeting. The EC would not prevent the complainants if they wished to make a panel request. It was ready to discuss any request with them. The only reason the EC's request had been drafted the way it had was that other parties had not yet made a request, and it was not usual for a party to accuse itself of being not in conformity with WTO obligations. The request had been drafted in such a way as to try to persuade the complainants to make their panel request. The EC was not acting in bad faith nor was it using delaying tactics. It was simply proposing a way forward. The complainants could make their own request and the meeting could be adjourned until the parties were ready to provide their terms of reference. The EC was not trying to impose its view and considered that the panel would decide on this matter. The terms of reference for this panel was the matter raised in the EC's request which constituted standard terms of reference. If the complainants wished to have more specific terms of reference this could be done. The EC had only tried to steer other parties in that direction.

The representative of the United States said that her country had requested the EC three times to reconvene the panel and each time the EC had either rejected the US request or had tried to impose unacceptable conditions which cast doubt on its willingness to proceed. If the EC had wished to reconvene the original panel it would have agreed to proceed to do so in July when it had been asked by the United States to cooperate. The EC's written response to the United States had indicated that the EC "saw no reason" to do so. At the DSB meeting on 23 July 1998, the United States and five other countries had asked whether the EC would agree to reconvene the original panel. At that time, the EC had responded that it had "no instructions" to do so. In September 1998, the United States and four other complaining countries had asked the EC to reconvene the panel. At the EC's insistence, consultations had been held which confirmed the need to reconvene the panel. The EC had insisted that as a condition for an expedited panel procedure, the goods and services cases would have to be split, which was not the way the case had originally been brought to the WTO, and this would have undermined the clear linkage between the EC's goods and services violations. The EC had rejected the US compromise proposal that the panel be reconvened on 6 November 1998 and review both goods and services issues. The EC had threatened to block the DSB meeting in September if the United States made any formal request to which the EC had not consented. Due to the EC's position that it would not agree to a specific date to reconvene the panel to examine both goods and services, and faced with the prospect of more EC procedural obstacles in the DSB, the complaining countries had not made a formal request for a panel at the DSB meeting in October. However, the United States had expressed its regret that the EC was not ready to accept a panel. The EC had not contradicted this statement and had stated that it was prepared to reconvene the panel. The recent statements by the EC that the United States or other complaining parties had not formally requested a panel reflected the basic inconsistency in the EC's approach to this dispute. If the EC had been willing to accept reconvening of the original panel it should not have waited until two weeks before the expiry of the reasonable period of time.

In November 1998, the United States had made another proposal to the EC to reconvene the original panel. The EC's ambivalence concerning this request was demonstrated in press reports, and this proposal had immediately been rejected by the EC Trade Commissioner. Shortly after, the EC had indicated that it was reconsidering the US proposal. However, following intensive discussions, the EC had imposed unacceptable conditions for reconvening the panel, including that the United

States would forgo its rights under Article 22 of the DSU. If the EC had believed that its banana measures were WTO-consistent, it would have welcomed the opportunity to test its convictions. Instead, the EC had made conditions and excuses.

The representative of the European Communities said that the United States had wished to set the record straight. He did not accept, in any respect, that the US version was the corrected record. The US had presented an historical perspective, and the DSB had to deal with the current situation. The EC had requested a panel which had been rejected by the complainants. If the EC request was not acceptable, they could make their own request.

The representative of St. Lucia said that the EC had stated that it could not be expected to seek a panel against itself, which was logical. Some countries had indicated that the EC's request was in breach of WTO rules. This was an opinion and not a fact, because a party to a dispute could not be the arbiter of its compliance with the rules. The EC believed that its proposed amendments were in line with WTO rules, and St. Lucia, which benefited from stable and fair access to the EC market, also believed that the current proposals were in compliance with WTO provisions. Since there was a disagreement one party did not have the right to make a final determination, and a third entity had to be involved which had the right to decide on this matter. He recalled that this matter had been at issue for the past several months. He supported the EC's statement that the past was probably irrelevant, because one could go forward if a panel was established at the present meeting. It was for the EC to state that it would wish the panel to examine all aspects of its regime, because it considered its regime to be in conformity with the WTO provisions. If a panel were established at the present meeting it would not be necessary to discuss the past and whether a particular party had acted in good faith. It was important to deal with the present and future of this case. It would be irresponsible not to pay attention to the possibility of an escalation of this dispute in January. This issue would have severe implications for the operation of the WTO and for banana producers. Although this matter was being examined from an academic and systemic point of view, the interests of real people were at stake. Those people could become victims of this exercise if it was not carried out properly.

The representative of Japan reiterated that a disagreement on whether the EC's measures were in compliance with the recommendations should be dealt with pursuant to Article 21.5 of the DSU. With regard to Article 22.6 of the DSU Japan had its own position on this matter but did not wish to complicate the discussion at the present meeting. He would revert to this issue at a later stage, if appropriate. On the basis of the statements made at the present meeting Japan understood that there was an agreement for the establishment of a panel, but there was no agreement on the terms of reference for a panel. When there was a disagreement as to the terms of reference of a panel, Article 7.3 of the DSU provided that the DSB could authorize its Chairman to draw up the terms of reference in consultations with the parties. It was in the interests of all parties to establish a panel under Article 21.5 of the DSU as expeditiously as possible. Therefore, the DSB could authorize the Chairman to determine the terms of reference in consultation with the parties.

The representative of Norway expressed his delegation's serious concern with the present difficulties experienced by the parties to this dispute in solving their differences concerning the implementation of the DSB's recommendations in the banana case. For the sake of the functioning of the multilateral trading system and the continued efficient operation of the dispute settlement system, his delegation urged the parties to make all possible efforts to resolve their differences in accordance with the DSU provisions. He hoped that the parties were aware of the seriousness of this situation and that they would be able to draw appropriate conclusions.

The representative of Switzerland recalled that his delegation had already taken a position at the November meeting regarding the legal aspects of the matter. Switzerland supported Norway's statement and its appeal to the parties to settle this dispute in accordance with multilateral procedures. The stakes for the system were very high and his delegation hoped that Members would assume their

responsibilities and show the necessary wisdom so that the dispute settlement system could continue to operate.

The representative of Hungary recalled that at the November meeting, his country had stated its position concerning the legal substance of this matter. He urged the parties concerned to demonstrate their responsibility as this was a complicated and risky issue. He encouraged the parties to make efforts to solve this problem within the framework of the multilateral system and in accordance with the DSU rules and procedures.

The Chairman said that the meeting had been useful. The EC had clarified its position and as a result it had brought this position into line with that of other parties. Some parties concerned had indicated their willingness to cooperate fully and others had expressed less support. He proposed that the parties hold further consultations with a view to reaching agreement, in order to be able to reconvene the original panel pursuant to Article 21.5 of the DSU. He was at the disposal of the parties to the dispute if they so wished.

The DSB took note of the statements and agreed to the Chairman's proposal to adjourn the meeting until further notice.