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3 August 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 3 August 2005

Acting Chairman: Ms Amina Mohamed (Kenya)

Prior to the adoption of the agenda, the Chairman of the General Council, Ambassador Amina Mohamed, welcomed delegations and said that she had the pleasure of chairing the present meeting in the absence of Ambassador Eirik Glenne, the Chairman of the Dispute Settlement Body. She said that this was in accordance with the Rules of Procedure for meetings of the Dispute Settlement Body which provided that: "If the DSB Chairperson is absent from any meeting or part thereof, the Chairperson of the General Council or in the latter's absence, the Chairperson of the Trade Policy Review Body, shall perform the functions of the DSB Chairperson."

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1. United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea

(a) Implementation of the recommendations of the DSB

1. 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. She recalled that at its meeting on 20 July 2005, the DSB had adopted the Appellate Body Report in the case: "United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea" and the Panel Report on the same matter, as modified by the Appellate Body Report. She then invited the United States to inform the DSB of its intentions in respect of implementation of the recommendations.

2. The representative of the United States said that his delegation was pleased to inform the DSB that the United States intended to implement the DSB's recommendations in a manner that respected the US WTO obligations. The United States would need a reasonable period of time in which to do so. His delegation stood ready to discuss this matter with Korea, in accordance with Article 21.3(b) of the DSU.

3. The representative of Korea said that his country welcomed the statement made by the United States, that it intended to comply with the DSB's rulings and recommendations in the DRAMS dispute. Korea noted that the United States had indicated that it would need a reasonable period of time in order to bring its measure into compliance. Korea was ready to discuss with the United States on a reasonable period of time as well as on how the United States would discharge its obligations, as recommended by the Panel and the Appellate Body.

4. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

2. European Communities – Countervailing measures on dynamic random access memory chips from Korea

(a) Report of the Panel (WT/DS299/R)

5. The Chairman recalled that at its meeting on 23 January 2004, the DSB had established a panel to examine the complaint by Korea pertaining to this matter. The Report of the Panel, contained in document WT/DS299/R, had been circulated on 17 June 2005 as an unrestricted document, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Panel Report was now before the DSB for adoption at the request of Korea. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

6. The representative of Korea said that his country had asked that the Panel Report pertaining to the DRAMS dispute be placed on the agenda of the present meeting for adoption. He noted that the Panel had found that the EC countervailing duty on DRAMS from Hynix of Korea was inconsistent with the SCM Agreement. Korea welcomed that conclusion of the Panel and appreciated the efforts of the members of the Panel and the Secretariat in this dispute. However, there were a number of areas where the Panel had come up with wrong interpretations that were not supported by neither WTO jurisprudence nor simple logic.

7. With regard to facts available, he said that the Panel had wrongly permitted the investigating authority to take alleged non-cooperation into account when "assessing and evaluating the facts" not just in establishing what the facts were. Panels might draw adverse inferences when conducting proceedings under Part II of the SCM Agreement dealing with adverse effects. However, investigating authorities did not have that authority; they might make use of facts available when a party was not forthcoming, but by simple *a contrario* analysis they did not have the authority to make adverse inferences. The Panel had found that it was appropriate to make adverse inference since relevant information had been withheld by Korea. There was no information withheld in fact. The EC's request was extremely broad. In countervailing duty investigation, where the administrative entity of one Member was investigating the sovereign acts of another Member, the request had to be sufficiently specific and precise. A convincing explanation had been given when Korea had not been able to submit the requested information. Without showing minimum respect for the reasonable explanation, the Commission had drawn adverse inference and the Panel had regrettably endorsed it. In any event, all of the information had been available to the Commission in one way or another. Thus, facts available were not even applicable. The extension of the "facts available" provision to authorize adverse legal inferences by an administrative agency of a Member government was neither supported by the treaty nor appropriate under international law. The Panel had misunderstood the fundamental difference between domestic administrative proceedings and international tribunal proceedings. That aspect of the Panel's findings was so flawed and illogical.

8. With regard to the flipping the "benefit" and "financial contribution" analyses, he said that non-commercial behaviour by the private body was one of the key aspects of the EC's finding that there was entrustment or direction by the Korean government. "Non-commercial" behaviour should be determined by using market benchmarks. However, the EC had made a non-commercial behaviour finding based on nothing but the assessment of EC bureaucrats, and then it had used it to declare that private bodies' actions had resulted from government entrustment or direction. In that manner, the possible market benchmarks had been conveniently eliminated. He recalled that these private bodies were Hynix creditors. As such, they had had to make some difficult choices in taking risks in an effort to secure their credits. In that regard, Korea regretted that the Panel had come to a different judgment from that of "Korea – Shipbuilding" (DS273) Panel, which had given much more rational review of such behaviour of the creditors. The EC had made the benefit determination first and then had used that to make a finding of entrustment or direction. A desired conclusion was used to justify its own premises. Inexplicably, the Panel had been satisfied with that reversed reasoning.

9. With regard to the government ownership of private entities, he said that the EC had correctly found, that the commercial banks in which Korea's government had taken temporary ownership were private bodies. However, the EC had then undercut that determination by assuming that there was entrustment or direction based on mere government ownership. In upholding the Commission's determination, the Panel had found that there was a different level of "quality of the evidence" based on whether or not there was government ownership.[1] Indeed, the Panel had created a presumption of entrustment or direction based on government ownership. It stated that "Korea has not provided any evidence that the government shareholding power did not allow the government to exercise substantial management power."[2] Thus, the Panel had demanded that Korea prove the negative, an impossible task. The Panel had used that improper presumption to uphold several key aspects of the Commission's subsidy findings.

10. With regard to specificity and injury, he said that the Panel had found that the specificity criteria had been satisfied because a certain fund was disproportionately granted to Hynix. However, the Panel had not considered relative size of the recipient companies. Under the Panel's analysis, large companies would always be found to have received disproportionate grants, even if the funds were disbursed in proportion to the size of the companies. Under that approach, small- or medium-

[1] Panel Report, para. 7.140.
[2] Ibid, para. 7.129.

sized companies would not satisfy the specificity requirements, but large ones always would. The Panel had also erred with respect to the specificity analysis by upholding the EC's finding that certain restructurings were "specific restructuring exercise undertaken for Hynix."[3] Apparently that was because there was a restructuring plan developed specifically to Hynix under the general framework agreements. Of course, a restructuring plan was always particular to the company it applied to. As long as the framework approach was generalized and the particular plan was consistent with such approach, then there could not be any specificity. Korea believed that the general framework was not specific to Hynix at all. Hynix had been created during the period of investigation by the merger of two companies. One would logically count the imports from the two companies at the beginning of the period of investigation and compare them to the imports of the merged company at the end of the period. The Commission had not done so and regrettably the Panel had upheld it. The Panel had even accepted the EC's argument that absolute volume increases alone could undercut prices. But, if the Panel was going to place such reliance on the issue of volume increases, it would have been helpful if it had, at least, counted them properly in the first place.

11. With respect to the EC's obligation of compliance, he said that despite various flaws that had been mentioned, the Panel had found that the EC's measure was not consistent with the SCM Agreement and had put the EC under an obligation to bring its measure into conformity with that Agreement. The Panel had correctly found that the benefit was inflated. The Panel had made it clear that accurate benchmarking was required and comparison of the differences between the actual rates and the market rates was indispensable in order to correctly calculate the amount of benefit. Korea was convinced that a number of these so-called subsidies would either disappear or be found *de minimis* when properly benchmarked.

12. The Panel had clearly rejected the injury finding of the Commission. Important injury and causation factors such as wages and overcapacity had not been even considered by the Commission. The Panel had further found that the Commission had failed to analyze the impact on prices of non-subsidized imports. The non-subsidized imports had been far greater in number than those subject to investigation and they had undersold the products of both Hynix and the domestic industry. Moreover, the Commission had failed to properly separate and distinguish the overall impact of non-subsidized imports both from Korea and elsewhere. Korea remained convinced that an objective review of the facts would demonstrate that the supposedly subsidized Hynix imports had not caused material injury to the EC domestic industry. The EC had an obligation of prompt compliance with the DSB's rulings and recommendations. Korea expected a good faith, accurate and thorough effort from the EC in that regard. Korea considered that the only appropriate manner of proceeding was to terminate the countervailing duty order.

13. In conclusion, he said that, believing that the EC would lose no time in discharging its obligation, Korea recommended that the Panel Report be adopted by the DSB at the present meeting.

14. The representative of the European Communities said that the EC wished to thank the Panel for producing what was, in the main, an objective and balanced Report. The EC was particularly pleased that the Panel had applied a reasonable standard for "entrustment and direction" of private banks by the government, which was an essential element in preventing circumvention of WTO Members' subsidy obligations. The standard applied by the Panel made it feasible for an investigating authority, operating in the real world, to find enough evidence to support a finding of entrustment and direction without being required to produce an explicit written order from the government. The Panel had also correctly examined the totality of the evidence relied on by the EC, which allowed due weight to be given to all the elements, for example, non-cooperation and circumstantial evidence. The EC noted that in that respect the Panel's approach had coincided with that of the Appellate Body in the recent DS296 case.

[3] Panel Report, para. 7.231 (emphasis in original).

15. The EC was also pleased that the Panel had rejected almost all of Korea's complaints about its injury finding. With regard to those points on which the Panel had found against the EC, the EC accepted the Panel's judgement and would comply in accordance with the findings. Notwithstanding that position, one issue did call for some further comment. In calculating the benefit of the subsidies to Hynix, the EC had taken the view that, given that Hynix had been unable to obtain any funding from the private market, it was appropriate to consider the whole amount of the so-called loans or debt-for-equity swaps to be a subsidy, because the Korean government had known, or should have known, that there was no reasonable prospect of any repayment. The Panel had found that approach, even in these exceptional circumstances, to be unreasonable and had made a finding against what it termed the "EC's grant methodology".

16. The EC would not wish to go into the legal arguments behind its objections; suffice to say that there must be some circumstances where a company was in such a bad state and the chances of repayment so slight, that a notional loan or equity infusion could legitimately be treated as a grant. If not, another door to circumvention of subsidy disciplines would have opened up. Having said that, the EC considered that, whatever method or benchmark was used, the egregious levels of financial support granted to Hynix would permit it to implement in such a way as to maintain a legitimate level of protection against injurious subsidies for its domestic industry. Therefore, on the understanding that the findings only applied to the case at hand, and in the interest of the timely resolution of disputes in the WTO, the EC would support the adoption of the Panel Report and would take steps to implement in accordance with its findings.

17. The representative of the United States said that the subject of this dispute was similar to the subject of the dispute in the "US – DRAMS" dispute, the reports for which had been adopted by the DSB at its previous meeting. At the outset, the United States noted the marked difference in approach taken by the panels in these two different disputes. As Members were aware, in the US case, the Appellate Body had found that the panel had engaged in an impermissible *de novo* review of the US subsidy determination. In its comments on the Appellate Body Report at the previous meeting, Korea had repeatedly stated that the Appellate Body had ignored or had not properly considered the panel's weighing of the evidence. But the fact that the panel had engaged in a weighing of the evidence was the panel's major error. While panels must carefully scrutinize determinations by investigating authorities, it was well-established that they were not to engage in their own weighing of the evidence. As Korea admitted, the panel in the US dispute had engaged in its own weighing of the evidence, and because of that, the Appellate Body had properly reversed the panel.

18. With respect to the EC case, the United States had acknowledged at the outset that, as a third party, it was not as familiar with the record in that dispute as were the parties. However, it appeared to the United States that, by and large, the Panel in that dispute had not only articulated the correct standard of review, but, more importantly, had applied the correct standard of review. From the US perspective, one did not see in the EC case the type of second-guessing of investigating authorities on factual matters that permeated the panel report in the US dispute.

19. Turning to the substantive issues in the "EC – DRAMS" Panel Report, the United States wished to make a few comments about the Panel's disposition of injury issues. The United States was concerned about the Panel's statement, at paragraph 7.405 of the Report, that to satisfy the requirements imposed by the non-attribution language of Article 15.5 of the SCM Agreement, an investigative authority "must make a better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models". The Report had thereafter criticized the EC several times for not attempting to provide a quantitative analysis of the effects of causes other than the subsidized imports, although it had also found that the EC had not conducted a satisfactory qualitative analysis either. Why the Panel had deemed it necessary to encourage authorities to conduct quantitative analyses was unclear. Just four sentences before its endorsement of quantitative analysis, the Panel had acknowledged that Article 15.5 did not require authorities to use any particular methodology. The Panel had further acknowledged that the

Appellate Body had not specified any particular methodologies authorities must use to satisfy their obligations under Article 15.5. Because Article 15.5 set forth no requirement that authorities conduct a quantitative analysis, there was no basis for the Panel to state that authorities "*must* make a better effort to quantify the impact of other known factors" (emphasis supplied). The United States also contrasted the statement of the Panel in "EC – DRAMS" with one made by the Panel in "US – DRAMS". Paragraph 7.353 of the "US – DRAMS" Panel Report stated that Article 15.5 did not require an authority to quantify the effects of factors other than subsidized imports. The United States believed that statement by the "US – DRAMS" Panel accurately set forth the requirements of the SCM Agreement.

20. Finally, the United States wished to make a few comments about the findings at paragraphs 7.211-7.215 of the "EC – DRAMS" Report regarding the EC methodology for calculating the amount of the benefit. The US comments were limited to the findings as they pertained to equity infusions in particular. Having concluded that a reasonable commercial investor would not have made equity investments in Hynix, the EC had treated these equity infusions as if they were grants. At paragraph 7.212, the Panel had faulted the EC methodology, because, according to the Panel, the new equity "dilutes the ownership claims of existing shareholders" and thus provided less benefit than a grant. The US concern was that in making that finding, the Panel had created an obligation with no basis in the SCM Agreement. Article 14(a) of the SCM Agreement provided only that the provision of equity capital might be considered as conferring a benefit where such provision "can be regarded as inconsistent with the usual investment practice". Article 14(a) did not go on to specify how the amount of the subsidy benefit should be calculated once a determination had been made that an equity investment was inconsistent with usual investment practice. Thus, as the Panel had acknowledged at paragraph 7.213, an investigating authority was "entitled to considerable leeway in adopting a reasonable methodology". The United States believed it was not unreasonable to calculate a benefit to the recipient equal to the equity infusion as a whole in the case of an "unequityworthy" company, inasmuch as that company would not normally have access to that additional capital. For that same reason, the United States could not agree with the Panel's contention at paragraph 7.212 that the EC calculation methodology "focuses on the expectation of the provider," rather than on the benefit to the recipient.

21. The DSB took note of the statements and adopted the Panel Report contained in WT/DS299/R.

3. European Communities and certain member States – Measures affecting trade in large civil aircraft

(a) Initiation of the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement and designation of the representative referred to in paragraph 4 of that Annex (WT/DS316/2)

22. The Chairman said that this item was on the agenda of the present meeting at the request of the United States. She then drew attention to the communication from the United States contained in document WT/DS316/2, and invited the representative of the United States to speak.

23. The representative of the United States recalled that on 20 July 2005, the DSB had established a panel to examine the US claims regarding the massive subsidies that France, Germany, the United Kingdom, Spain, and the European Communities had provided to Airbus, the European manufacturer of large civil aircraft. At that meeting, the United States had also sought to have the DSB initiate the procedures provided for in Annex V of the SCM Agreement, pursuant to paragraph 2 of that Annex. Regrettably, the EC had blocked initiation of the Annex V process. At that meeting, the United States had also responded to the reasons that the EC had given for blocking the process. The United States had invited the EC to reconsider its stance and to allow the DSB to go forward with the decision that paragraph 2 required it to take. The information-gathering process provided for in

Annex V was an important part of a dispute concerning actionable subsidies under the SCM Agreement. It provided a way for both parties as well as the panel to have access to relevant information. The EC had, in the past, agreed with the importance of the process and the need to engage promptly and constructively. At the present meeting, the United States renewed its request that the DSB initiate the Annex V procedures in this dispute, and hoped that the EC would not stand in the DSB's way.

24. The representative of the European Communities said that the EC had been consulting with the United States with a view to reaching a mutual agreement on the initiation of the Annex V procedure and, in particular its scope, modalities and the name of the facilitator. Unfortunately, these consultations had yet to produce a result. The EC remained committed to continuing these consultations with a view to reaching a mutually acceptable solution. He noted that the United States itself had insisted in the "Cotton" dispute that there must be an agreement between the parties to that end and the then Chairman of the DSB had agreed with the United States. Indeed, that practice had also been followed in the "Korea – Shipbuilding" dispute. The EC had been consulting with the United States with a view to reaching an agreement on the initiation of the Annex V procedure and, in particular its scope, modalities and the name of the facilitator, but these consultations had not yet been successful. The EC was not trying to stall the process, but rather to cooperate with the United States in the spirit called for in Annex V itself. He noted that a full team of lawyers had come from Brussels to Geneva to negotiate as rapidly as possible an agreement.

25. The representative of Brazil said that her country regretted the lack of systemic coherence concerning some Members' positions on Annex V of the SCM Agreement. In 2003, Brazil had requested the DSB to initiate the procedures provided for in Annex V of the SCM Agreement in the context of the dispute "United States – Subsidies on Upland Cotton". At that time, Brazil had expressed its understanding, which remained unchanged, contrary to some other Members' position, on the mandatory nature of that Annex. Brazil noted with concern that the systemic incoherence verified at present of two of the major players in the dispute settlement mechanism impaired the functioning and the predictability of the relationship among Members, one of the main goals of the multilateral trading system.

26. The provisos of Annex V were clear and unconditional. Paragraphs 2 and 5 set out no additional requirement for the establishment of the fact-finding procedure, but the request itself and the "referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement". As to the designation of the facilitator, paragraph 4 of that Annex was even more straightforward: "The DSB shall designate a representative to serve the function of facilitating the information-gathering process".

27. None of the paragraphs mentioned included any reference whatsoever to a consensus rule. Nowhere in that Annex was there a need for mutual agreement between the parties to a dispute as a pre-condition for establishing the fact-finding procedure and for designating the facilitator for the information-gathering process. The only requirements for the development of evidence under the mentioned procedures were the request for initiating of the process and the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement.

28. In Brazil's view, the information gathered pursuant to the Annex V procedures would be a key element for the panel to make its judgment on the case. As a third party to the dispute, Brazil wished to reserve its third-party rights to participate in the Annex V procedure and to receive the information to be gathered by the representative that the DSB would designate for that purpose.

29. The representative of the United States said that his country was disappointed that the EC had chosen, once again, to block the initiation of the Annex V process. It regrettably appeared that the EC wished simply to delay allowing the dispute settlement process to review the terms and conditions of the launch aid and other subsidies that Airbus had received. The United States had discussed the EC's

reference to the Cotton dispute at the previous DSB meeting. At the present meeting, the United States wished to state again that the situation in the dispute under consideration did not resemble the Cotton dispute at all: the EC had no basis to argue that it was "exempt" from actions based on the provisions of the SCM Agreement that the United States had invoked, and consequently no basis to argue against initiation of the Annex V procedure. And the EC had not argued that there was any legal barrier to initiating of the process, which made it all the more puzzling why the EC had simply refused to permit the process to proceed.

30. While it was true that the EC and Korea had reached an agreement on how to conduct the Annex V procedures before the DSB had initiated them in the "Korea – Shipbuilding" dispute, nothing in the SCM Agreement required such an agreement. In fact, Annex V provided for the exact opposite: paragraph 4 of Annex V stated that the facilitator could have a role in "suggest[ing] ways to most efficiently solicit necessary information". However, the United States was pleased to hear that the EC was ready to work to reach an agreement. Given that its panel request of 31 May 2005 contained a request that the Annex V procedures be initiated, the United States would hope that the EC was willing to move toward an agreement expeditiously. For example, the United States had been waiting several weeks for the EC to provide feedback on a proposal that the United States had made.

31. Likewise, when the United States had asked the Chairman of the DSB to assist the United States and the EC in trying to make some progress on this issue, the EC had stated that it was not prepared to meet with the United States and the DSB Chairman at that time, notwithstanding all of its statements in past disputes that the Chairman might have an important role to play in developing the procedures and time-table for the Annex V process and in identifying appropriate facilitator candidates. The United States hoped that the EC would work with the United States to move the process forward without any further delay.

32. The DSB took note of the statements.

4. "European Communities – The ACP–EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001": Award of the Arbitrator (WT/L/616)

(a) Statement by Colombia, on behalf of Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela

33. The representative of Colombia, speaking under "Other Business", on behalf of Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela, said that she was making the statement on behalf of the above-mentioned countries, which were interested parties in the arbitration on the tariff proposed by the EC for the import of bananas. The countries that subscribed to the statement welcomed the Award of the Arbitrator, circulated on 1 August 2005 in document WT/L/616 entitled: "European Communities – The ACP–EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001".

34. She recalled that the conclusions and recommendations of the third banana dispute adopted by the DSB in 1997 had led to an agreement, which provided, *inter alia*, for arbitration. During the Doha Ministerial Conference, through the Ministerial Decision WT/MIN(01)/15, the EC had undertaken to put in place a tariff applicable to bananas that would result in at least maintaining total market access for MFN banana suppliers. In fulfilment of that undertaking, the EC had announced that, as of 1 January 2006, a single tariff of €230 per ton would apply to MFN banana suppliers.

35. That announcement would result in raising the consolidated tariff of €75 per ton to €230 per ton both for the currently bound quota of 2.2 million tons and for the unbound quota or autonomous quota of 913,000 tons and, at the same time, the zero tariff for the ACP countries would be maintained by virtue of the waiver applicable to products of ACP origin covered by the Cotonou Agreement until

31 December 2007. In paragraph 94 of the Award of the Arbitrator it was stated that " ... the Arbitrator determines that the European Communities' envisaged binding on bananas would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market access- commitments relating to bananas". In fact, the result of the EC's proposal to apply a tariff of €230 per ton would be to increase the preference which ACP suppliers enjoyed from 13.4 per cent to 41 per cent.

36. She noted that the Award had been submitted by the three Arbitrators appointed by the Director-General; i.e. two Arbitrators were current Appellate Body members and one was a former Ambassador with wide experience in the field of international trade negotiations.

37. The restrictions on the access of bananas to the EC market, which for many countries constituted one of the major trade products, had systematically violated WTO rules and the EC's commitments. The banana dispute was one of the longest-lasting in the history of the WTO but, thus far, the EC had not provided a satisfactory solution, despite the fact that Panels, the Appellate Body and the Arbitrators had systematically ruled against it. The countries in question called on the EC to take this opportunity to comply with its commitments, which were stipulated in Decision WT/MIN(01)/15 of the Doha Ministerial Conference, as well as with the conclusions and recommendations adopted by the DSB in 1997. That commitment was that the tariff for the import of bananas should, as of 1 January 2006, maintain total market access for MFN banana suppliers.

38. The countries in question welcomed the recent ruling on account of the following findings: (i) The tariff of €230 per ton would result in raising the ACP preference from 13.4 per cent to 41 per cent; (ii) The impact of the margin of preferences for the ACP suppliers on the rebinding was a necessary consideration in assessing whether the envisaged rebinding would maintain total market access for MFN suppliers; (iii) Any gains achieved by the preferential suppliers in the EC market through the increase in the margin preferences to the ACP countries and to countries under the "Everything But Arms" initiative were at the expense of MFN banana suppliers; (iv) In a tariff quota-free environment, at least some of the preferential suppliers would have the capacity to respond positively to the increase in the margin of preference, to the detriment of MFN banana suppliers; (v) Not only bound commitments, but all other aspects of the import regime, such as the so-called autonomous quotas, should be taken into account; and (vi) The requirement of "maintaining" total market access for MFN suppliers involves some degree of perspective assessment.

39. The Chairman reminded delegations that Rule 25 of the Rules of Procedure for meetings of the General Council, which also applied to the Dispute Settlement Body, provided that: "Representatives should avoid unduly long debates under 'Other Business'. Discussions on substantive issues under 'Other Business' should be avoided, and the General Council shall limit itself to taking note of the announcements...."

40. The representative of Honduras said that his delegation wished to be associated with the statement made by the delegation of Colombia on behalf of various banana exporting countries, including Honduras. Honduras also wished to place on record that through a communication, dated 30 March 2005, it had transmitted to the Chairman of the DSB a copy of its request for arbitration pursuant to the Annex to the Decision of the WTO Ministerial Conference of 14 November 2001. In that communication, Honduras stated that it considered that the request for arbitration represented one possible way of settling the protracted dispute concerning the consistency of the EC's banana regime with its WTO obligations.

41. The representative of the European Communities said that his delegation had no instructions in relation to the item under discussion since it had not been made aware that this matter would be placed on the agenda of the present meeting. In that connection, he wished to draw attention to the fact that the Arbitration under the "Doha Waiver" in relation to bananas was not a subject-matter falling under the DSU. Therefore, his delegation had doubts whether the DSB was an appropriate

forum to discuss this matter. The EC also wished to take the opportunity to thank the Arbitrator for its thorough job and for having delivered a reward in time. The EC was currently carefully considering the award and, for transparency purposes, he wished to inform Members that the EC had launched the consultation process with the interested parties as foreseen in the waiver process and had called for a meeting to be held later in the week.

42. The representative of Costa Rica said that his delegation supported the statement made by Colombia. The Award of the Arbitrator, circulated on 1 August 2005 in WT/L/616, determined that "...the European Communities' envisaged rebinding on bananas would not result in at least maintaining total market access for MFN banana suppliers..." (para. 94 of the Award). The EC had, therefore, failed to fulfil the commitment, which it had accepted pursuant to the Annex to the waiver to the Cotonou Agreement of November 2001. According to the provisions agreed at that time, the EC should initiate consultations with the interested parties within 10 days following the notification of the Award of the Arbitrator to the General Council and should rectify the situation. In doing so, the EC should respect the clear conclusions of the Award of the Arbitrator, which should lead the EC to propose a tariff level that would enable the MFN banana suppliers, at least, to maintain total market access.

43. The EC's proposal for a tariff of €230 per ton was based on a series of criteria which the Award of the Arbitrator had rejected, and thus a new tariff would have to be at a much lower level, as had always been asserted by Costa Rica. The EC had claimed that its obligation in terms of market access was 2.1 million metric tons, bound during the Uruguay Round. The Arbitrator had rejected that and considered that it should include, in addition, the autonomous quotas, which would amount to 3.1 million metric tons. The EC had claimed that the increase in preferences for the ACP countries was irrelevant with regard to market access for the MFN banana suppliers. The Award of the Arbitrator had rejected those arguments and stated that "it should be noted that any rebinding above €75 per metric ton automatically increases the preference enjoyed by ACP suppliers over MFN suppliers". As stated in the Award, any gains achieved by the preferential suppliers in the EC's market as a result of that tariff increase from €75 to €230 would come at the expense of MFN banana suppliers.

44. The EC had asserted, in the oral hearing, that it would place a cap or ceiling on the imports of bananas from the ACP countries by means of a quota. The Arbitrator had stated in the Award that it was not convinced that such a ceiling would enable the MFN banana suppliers to maintain their access. Furthermore, the Arbitrator had noted that the least developed countries benefiting from the "Everything But Arms" initiative would be granted unrestricted free access, and that might have an impact on the competitive situation of MFN banana suppliers. It was clear, given the emphatic nature of the conclusions of the Award of the Arbitrator, that the EC, in the next stage of this process, would have to rectify the situation by putting in place a tariff that would not increase the margin of preference and, likewise, would not modify the conditions of competition.

45. The DSB took note of the statements.