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1.4.1 Actions under the DSU which occurred dispute settlement provisions of the DSU shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute. at ncils and Committees in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions.

¹ The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

1.2 General

1.2.1 Legal effect of statements made by Members at DSB meetings

1. In *US – Gambling*, the Panel suggested that the United States was "bound" by certain statements it had made at DSB meetings:

"During two successive DSB meetings, the United States stated that a prohibition on the 'cross-border supply of gambling and betting services under US laws' exists in the

United States.¹ The panel's decision in *US – Section 301 Trade Act* appears to support the view that the United States should be bound by these statements.² The statements were made by representatives of the United States to express their understanding of US law. They were made in the context of a formal WTO meeting for the record. The United States has not argued that the representatives were acting outside the authority bestowed upon them in making these statements.³

2. In *EC – Bananas III (Article 21.5 – US) / EC – Bananas III (Article 21.5 – Ecuador II)*, the European Communities and Ecuador and the United States legally barred those Members from initiating Article 21.5 proceedings. The Panel rejected that argument for several reasons, one of which was that the parties had made conflicting statements to the DSB concerning the nature of the Bananas Understandings, and in particular whether they were properly characterized as a "mutually agreed solution" within the meaning of Article 3.6 of the DSU.

meetings. The Panel had concluded – on the basis of the statements made by Canadian and United States delegates at two DSB meetings – that the United States and Canada had reached "a more or less final decision" that the EC measure at issue was inconsistent with the SPS Agreement and failed to implement the DSB's recommendations and rulings in *EC – Hormones*. Such statements, in the Panel's view, constituted a "determination" under Article 23.2(a) of the DSU and, because the determination was made unilaterally without recourse to the DSU, it breached Article 23.2(a). In the context of reversing the Panel's finding and reasoning, the Appellate Body explained that:

"DSB statements are not intended to have legal effects and do not have the legal status of a definitive determination in themselves. Rather, they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute. As the United States rightly points out, '[s]tatements made by Members at DSB meetings, especially those expressing a view as to the WTO consistency of another Member's measures or actions, are generally diplomatic or political in nature' and 'generally have no legal effect or status in and of themselves'.

The Panel's finding that DSB statements could constitute a definitive determination concerning the WTO-inconsistency of a Member's measure could adversely affect WTO Members' ability to freely express their views on the potential compatibility with the covered agreements of measures adopted by other Members.⁸ This would result in a 'chilling' effect on those statements, because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23. If this were the case, the DSB would be inhibited from properly carrying out its function, pursuant to Article 21.6 of the DSU, to keep under surveillance the implementation of its recommendations and rulings."⁹

1.2.2 Legal effect of DSB "taking note" of statements made at DSB meetings

5. In *EC – Bananas III (Article 21.5 – US)*, discussed above, the Panel stated that:

"As mentioned above, at its meeting of 1 February 2002 the DSB 'took note of the statements' made in the context of the 'Surveillance of implementation of recommendations adopted by the DSB' in the *EC – Bananas III* dispute. In this regard the United States argues that:

'The DSB simply 'took note' of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006.'

The Panel notes that under the agenda item 'Surveillance of implementation of recommendations adopted by the DSB', the DSB would usually both 'take note of the statements made' and explicitly '

before it' and 'to make such other findings as will assist the DSB in making the recommendations or in giving the rulings' under the covered agreements.

(footnote original) ³⁰⁷ The word 'accordingly' is used in a similar way in Article 2 of the DSU. There, the first sentence establishes the DSB. In the second sentence, starting with the word 'accordingly', the DSB is provided with 'the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.'"¹³