Closing Statement of the European Communities

- The EC thanks the Panel and the Secretariat for holding the oral hearing we have had over the past days and which has been an exceptional hearing. Exceptional, first, because this was the first ever panel hearing that was opened to the public and other WTO Members for observation. The EC believes that this experience has been a full success and is grateful to all those involved for contributing to this success.

- The EC believes that allowing public observation of the debate during this hearing has been very beneficial for the public's understanding of the dispute settlement process as well as this particular dispute. The public observation has in no way hindered an efficient conduct of this hearing. On the contrary, the third parties have clearly benefited from their observation of this hearing during the first two days for the purpose of their participation in this dispute.

- As you said, Mr. Chairman, we have had a lively debate over the past days. But this was due not to the public watching, but rather to the Panel's thorough and perceptive questions. Your questions, Mr. Chairman and members of the Panel, have shown your recognition that the systemic DSU issues are on the forefront of the dispute.

- What we have heard from the defendants in the last few days is essentially that a retaliating Member has no obligation whatsoever under the DSU. Instead, the retaliating Member may continue to apply sanctions until the authorization is "revoked" by the DSB. The United States and Canada argue that by virtue of this authorization they can simply lean back and see what the complying Member comes up with. If eventually the complying Member adopts an implementation measure they do not even see a need to review it in due time. Let me remind that in this case the United States and Canada claim that they have even after two years (and I should add after an additional three years of preparation) not made up their mind whether the EC's measure is WTO consistent. Indeed there seems to be no prospect that the United States and Canada will ever make up their minds; Canada has stated that it would never make a determination about the EC's new measures and the United States gave

even less cause for reassurance stubbornly refusing even to agree that there is a disagreement.

- Whatever the defendants may mean by these statements, it is clear that the United States and Canada do not accept a responsibility to submit the EC's legislation to a multilateral review as it has been done in any other case by WTO Members which ended in an adopted WTO decision. And although they do not contest that the EC has acted in good faith, they do not even concede that the EC's measure can benefit from a presumption of good faith compliance.

- This is a very easy going way for the United States and Canada. But it cannot be the correct one under the DSU.

- The EC would recall some essential points which had been discussed by the parties:

➢ First, the EC has advanced what would be the logical solution to this dispute, i.e. to follow its example in the FSC case (launching Article 21.5 compliance procedure by original complaining party, suspension of sanctions in the meantime). Quite remarkably, the United States fully agreed with this EC' approach and considered it as "the appropriate solution" in FSC. Yet, the EC struggles to understand why in a reverse situation where the United States is retaliating, the United States does not follow this example if it considers it as "appropriate".

➢ Second, there has been a lot of discussion about the presumption of good faith and the presumption of compliance, which is important for the EC claim under Article 22.8 and Article 23.1 of the DSU. Neither the United States nor Canada nor any of the Third Parties have contested that the EC has adopted its compliance measure in good faith. Yet, the United States and Canada refuse that the EC may rely on this principle in a "post-implementation" scenario. The United States even wants to go as far as to say that the principle of good faith is not part of the DSU. Obviously, this view is contrary to what the Appellate Body has constantly ruled but also irreconcilable with general principles of public international law. Moreover, when we asked Canada about the basis in the DSU of its assumption that an implementing Member faced with

retaliation is not entitled to this presumption, it could not provide any answer. Indeed, this is so because there is no basis for Canada's theory.

- Third, during the proceeding we have heard a lot about the risks of an "endless loop of litigation" by a "mere declaration of compliance". Yet, as everybody agrees that the EC has adopted its compliance measure in good faith, it is clear that this "endless loop of litigation" does not arise in this dispute. Indeed, such an endless loop scenario presupposes a sort of scam measures notified by a WTO Member in bad faith. This is not the case before us. Indeed, even the EC would not consider that a "mere declaration of compliance" is sufficient but what matters is that a Member complies with its obligations. This is what the EC had actually done in this case after a most thorough review of its measure involving a comprehensive review and assessment of the available scientific evidence.

- There is a paradox about the approach of the defendants to the principle of good faith. They do not contest that the EC has acted in good faith but they argue that WTO Members in general cannot be expected to act in good faith. They argue, Members with a duty to implement will adopt sham or scam measures to escape retaliation, it is argued that implementing Members must have the burden of proving their compliance. The EC does not believe that WTO Members act in bad faith. No Member wants to lose WTO disputes – and to do so repeatedly and ignominiously. There would be a high political cost. Also, WTO Members are not excessively litigious and do not gaily engage in endless loops of litigation. This fear is unfounded. But if this argument about bad faith is allowed, it can also be used the other way round – to argue that the United States' and Canada's approach will lead to Members seeking and exploiting retaliation rights for improper purposes. To extract more from the losing Member than is required for implementation or to neutralise the retaliation rights of another Member. Seeking redress of WTO violations must not be too difficult; but so also must implementation and removal of retaliation not be made subject to the often impossible task of proving a negative. Retaliation rights should not become a new means of advancing unilateralist agendas.

- Fourth, when it comes to the DSB authorization, the United States and Canada argue that this may be revoked if the EC would launch a proceeding under the DSU, be it

Article 21.5, 22.8 or Article 25 etc. However, both defending parties cannot explain how this would even result in revocation of the DSB authorization. Well, Canada argues that the DSB could probably eventually make a recommendation to itself to revoke the DSB authorization but there is absolutely no basis for this in the DSB. And I am not talking about the procedural implications which this could entail. For instance – according to Canada – in an Article 21.5 proceeding brought by the EC against itself the burden of proof would be partly be on the EC for the implementation of the original DSB recommendations and ruling. On the other hand, Canada could bring in its "defence" (in which they would complain about the WTO consistency of the measure) new claims for which it would bear the burden of proof. And of course, Canada's theory cannot even address the question on how these new claims could be reconciled with the more limited Panel request.

Finally, let me once stress again that the EC is not seeking to avoid a proper examination of its compliance measures in the Hormones dispute. We would be delighted if the United States and Canada would initiate an Article 21.5 dispute tomorrow and would do all we can to facilitate and accelerate its conclusion. However the United States and Canada stubbornly refuse to take this logical – indeed appropriate – step. It is they who have sought to avoid having to confront the new EC measures and set out their objections to it in a manner in which the EC can properly respond. They have, it is true, started to set out – for the first time – their objections in their first written submissions. The EC does not understand why they did not want to do this in a proper Article 21.5 proceeding.

Mr Chairman; Members of the Panel, we hope that we have assisted you in you important task and look forward to helping you in any further way that we can in coming weeks.

Thank you.