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WORLD TRADE ORGANIZATION

Dispute Settlement Body
25 September 1997

MINUTES OF MEETING

Held in the Centre William Rappard
25 September 1997

Chairman: Mr. Wade Armstrong (New Zealand)

Subjects discussed: Page

Prior to adoption of the agenda, the item concerning "European Communities - Measures Concerning Meat and Meat Products (Hormones) - Reports of the Panel" (WT/DS/26/R/USA; WT/DS48/R/CAN) was removed from the proposed agenda as a result of the Communities' decision to appeal the Reports.

1. Surveillance of implementation of recommendations adopted by the DSB

   (i) United States - Standards for reformulated and conventional gasoline - Statements by Brazil and Venezuela concerning the status report by the United States (WT/DS2/10/Add.7)

   (ii) Japan - Taxes on alcoholic beverages: Status report by Japan (WT/DS8/18, WT/DS10/18, WT/DS11/16)

The Chairman recalled that under Article 21.6 of the DSU, "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the two sub-items be considered separately.

(i) United States - Standards for reformulated and conventional gasoline - Statements by Brazil and Venezuela concerning the status report by the United States (WT/DS2/10/Add.7)

The representative of Brazil said that his country welcomed the publication of the final rule amending the requirements for imported gasoline as notified by the United States in is status report pursuant to Article 21.6 of the DSU. These amendments were complex and detailed and were now being carefully examined by his authorities and the Brazilian company *Petrobrás* directly involved in this matter. Article 21.6 of the DSU provided that, an issue subject to surveillance of implementation of the recommendations shall remain on the agenda of the DSB meeting until its resolution. As a Member directly affected by the Gasoline Rule and a party to the dispute, Brazil had a major interest in resolving this matter. However, since the examination of the amendments had not yet been concluded, Brazil was not in a position to indicate whether the amended Gasoline Rule was in conformity with the recommendations of the Panel and the Appellate Body. He therefore reserved his Government's right to revert to this issue.

The representative of Venezuela said that his delegation had requested the inclusion of this item on the agenda pursuant to Article 21.6 of the DSU in order to address the recently amended Gasoline Rule published by the Environmental Protection Agency (EPA). As indicated in the US status report, the EPA's Administrator had signed the amendments to the Gasoline Rule on 19 August 1997. In Venezuela's view, these amendments had not modified the treatment of imported reformulated gasoline which would remain subject to the more stringent requirement of the statutory baseline until 1 January 1998. With regard to conventional gasoline, the amendments provided the possibility for foreign refiners to choose their own individual baseline. However, this was subject to a number of different requirements, the implications of which were currently being evaluated by his Government. The EPA's regulation required thorough analysis as it affected a sector of major importance for Venezuela's economy and because it could indirectly affect other sectors as well. It could also have international implications. Therefore, pursuant to Article 21.6 of the DSU, Venezuela reserved its right to revert to this matter on conclusion of its examination of the regulation. His Government was prepared to continue cooperating with the responsible US agencies in order to ensure that the regulation was fully consistent with the DSB's recommendations.

The representative of the United States said that his delegation was pleased to report that on 19 August 1997, the EPA's Administrator had signed a final regulation amending the Gasoline Rule. This regulation fulfilled the commitment made by the United States at the DSB meeting in June 1996, that it would meet its WTO obligations with regard to this matter. His delegation had made the regulation available through the Secretariat and on the Internet and had transmitted copies to interested parties. The regulation was fully consistent with the United States' commitment to full protection of public health and the environment. As it had been agreed with Venezuela, the United States had completed the implementation process in 15 months. His delegation believed that adoption of these implementation measures by the United States had closed the requirements under Article 21.6 of the DSU with regard to reporting and consideration of this matter as an automatic agenda item at each DSB meeting. Accordingly, the final status report had been submitted to the DSB by the United States on 20 August.

He acknowledged that, as provided for in the DSU, the DSB had a surveillance function with respect to completed disputes and that any Member might raise the issue of implementation of the recommendations or rulings in the DSB at any time following adoption. The United States fully intended to raise issues related to implementation with respect to other disputes at any time after adoption, particularly, those in which it had been a complaining party. Any DSB member had a right to place an issue on the agenda, and the rights of complaining parties remained fully protected under Article 21.5 of the DSU. However, in the view of the United States, the specific requirements outlined in the third and fourth sentences of Article 21.6 of the DSU, no longer existed when a Member, obligated to implement recommendations, had notified the DSB that the implementation had been completed.

As indicated by Venezuela, the few baseline provisions of the EPA's regulations for reformulated gasoline that relied on individual baselines were temporary and would be terminated at the end of 1997. At that point, domestic and imported gasoline would be subject to the same requirements. In its proposed rule, the EPA had requested comments on whether the regulation could allow individual refinery baselines to be used for the reformulated gasoline requirements if a foreign refiner obtained an individual baseline before January 1998. The only comments made to the EPA on this issue had been that there would be insufficient time before January 1998 to justify the use of individual baselines for reformulated gasoline. No request had been made for this rule to apply to reformulated gasoline. This lack of interest in individual baselines for reformulated gasoline was probably due to the short time left before the baseline requirements would expire at the end of 1997 making it unlikely that the time and expense of preparing a baseline petition would yield any economic benefit to foreign refiners.

The representative of Norway said that his country, as a third-party in this dispute, had followed the matter closely. At the present meeting, he wished to inform the DSB that the Norwegian company directly involved in this matter had participated in a hearing and had established a constructive dialogue with the EPA. As a result, the company had made certain legal and technical modifications which had permitted it to resume its activities in the US market. In the view of his delegation this was an example of the utility of the dispute settlement mechanism.

The representative of Brazil said that his delegation reserved its right to revert to this matter in order to discuss the procedural issues raised by the United States.

The representative of the European Communities said that, like Norway, the Communities as a third party had followed this matter very carefully and believed that it should continue to be discussed. The Communities appreciated the EPA's thorough work in revising the requirements of the Gasoline Rule for imported conventional gasoline. They welcomed the basic change made by the EPA which put domestic and foreign refiners on an equal footing in terms of baselines. They also welcomed that, in its final rule, the EPA had rendered some of the monitoring requirements on imports less burdensome. Whether all the additional import requirements were necessary continued to be a

matter for debate. What mattered most to the Communities was that the new system operated in a satisfactory manner. In other words, imports of conventional gasoline, whether based on an individual or statutory baseline could, and would take place without undue hinderance and costs. The future would show whether this would be the case.

The DSB took note of the statements and agreed to revert to this matter.

(ii) Japan - Taxes on alcoholic beverages: Status report by Japan (WT/DS8/18, WT/DS10/18, WT/DS11/16)

The Chairman drew attention to the first status report submitted to the DSB by Japan with regard to its progress on the implementation of the DSB's recommendations.

The representative of Japan said that pursuant to Article 21.6 of the DSU, his Government had submitted its first status report with regard to its progress in the implementation of the DSB's recommendations. He recalled that on 1 November 1996, the DSB had adopted the Appellate Body Report and the Panel Report on "Japan - Taxes on Alcoholic Beverages". On 20 November 1996, Japan had informed the DSB of its intentions with respect to the implementation of the DSB's recommendations. It had indicated that a reasonable period of time would be required to comply with these recommendations. Since then, a series of consultations had been held with all the parties to the dispute on the measures to be taken with regard to the implementation of the DSB's recommendations and a time-period for such implementation.

The adjustment of the liquor tax rates, necessary to implement the DSB's recommendations, required an amendment to the Liquor Tax Law. However, any amendment to the tax system for each fiscal year could only be decided in the form of legislation at the same time as the annual budget, and the content of the draft amendment of the tax legislation had to be decided by mid-December. After examining the results of the consultations with the parties to the dispute and taking into account the relevant aspects of its domestic situation, Japan had drawn up a plan of reform for the liquor tax system. On 31 January 1997, it had submitted to the Diet the draft amendment to the Liquor Tax Law to be enacted at the next fiscal year tax legislation with a view to ensuring the earliest possible implementation of the DSB's recommendations. On the same date, the European Communities and Japan had reached a mutually acceptable solution in accordance with the above-mentioned draft amendment as notified to the DSB on 15 July 1997.[1] The draft amendment to the Liquor Tax Law had been considered and approved by both chambers of the Diet without modifications and on 31 March 1997 it had been promulgated.[2]

As a result, on 1 October 1997, the tax rates on whisky/brandy would be reduced by three-quarters of the total reduction. The tax rates on Shochu A would be increased by half of the total increase and the tax rates on Shochu B would be increased by one-third of the total increase. With regard to the tax rates on Shochu A, the tax adjustment would be completed by 1 October 1998. On that date, the tax differential in terms of tax rate per degree of alcohol content with regard to Shochu A, spirits, liqueurs and whisky/brandy would be dissolved. The tax increases on Shochu B would be implemented in three stages and as of 1 October 2001 the tax differential with regard to Shochu B, spirits, liqueurs and whisky/brandy, in terms of tax rates per degree of alcohol content, would be dissolved. This additional period for Shochu B was necessary in view of the effects of the tax increase by 2.4 times on consumers and producers. In addition to the amendment to the Liquor Tax Law, Japan, upon the Communities' request, would also carry out as compensation, autonomous reductions of import

[1](WT/DS8/17, WT/DS10/17, WT/DS11/15).

[2]Law No. 21, 1997.

duties on whisky/brandy. These reductions would be equivalent to that of the tax differential which would remain on Shochu B during the period 1 October 1998 - 1 October 2001. With this measure, adverse effects on imported whisky/brandy due to the tax differential would effectively be dissolved.

He recalled that on 24 December 1996, the United States had requested that a reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. On 14 February 1997, the arbitrator determined that a reasonable period of time in this case would be 15 months. Japan had been seriously examining possible and practical responses to this issue. At the same time, his Government had held a series of consultations with the United States with a view to finding a mutually acceptable solution with regard to modalities for the implementation of the DSB's recommendations.

The representative of the United States recalled that on 20 November 1996, Japan had informed the DSB of its intentions to fully comply with the DSB's recommendations pursuant to the Panel and the Appellate Body Reports on "Japan - Taxes on Alcoholic Beverages", adopted on 1 November 1996. The United States and Japan had held a series of meetings both prior to and after 20 November 1996, in an attempt to reach agreement on a reasonable period of time for implementation of the DSB's recommendations. During these consultations, it had become apparent that Japan had not been prepared to propose an implementation period appropriate to its status as a major trading power and bearing in mind the long-standing nature of the tax discrimination at issue.

On 24 December 1996, the United States had requested that a reasonable period of time be determined through binding arbitration as provided for in Article 21.3(c) of the DSU. On 14 February 1997, the arbitrator, Mr. J. Lacarte-Muró, had determined that a reasonable period of time for Japan to comply with the DSB's recommendations was 15 months. Despite the arbitrator's ruling, an amendment to the Liquor Tax Law which had been enacted into law in March 1997 had failed to bring Japan into compliance within the 15-month reasonable period. This amendment provided for tax changes over a five-year period. The United States and other foreign distilled spirit producers would continue to face discriminatory tax rates for five years after determination that this discrimination was in violation of Japan's obligations under the WTO Agreement. This lengthy compliance period was not what the drafters of the DSU had intended. Moreover, during the arbitration process Japan had already presented its arguments with regard to a longer compliance period. The arbitrator had already determined that in this case Japan had no justification for a compliance period longer than 15 months. Consultations held over the past months, including in the past week, between the United States and Japan had failed to bring a mutually acceptable resolution of this dispute. The United States was prepared to continue these efforts. It continued to urge Japan, as a leading trading partner and beneficiary of the multilateral trading system to demonstrate its leadership in support of the WTO and its dispute settlement mechanism. The United States had fully complied in the *Gasoline*[3] case within the 15-month period established by agreement. It was time for Japan to make the difficult decision necessary to fully comply with the DSB's recommendations.

The representative of Canada said that his country had carefully reviewed Japan's status report on the implementation of the DSB's recommendations. Although Japan had indicated that it intended to implement the DSB's recommendations, Canada was disappointed and concerned that Japan had apparently decided not to respect the arbitrator's decision that 15 months was a reasonable time period to implement the DSB recommendations. Her country agreed with the view that the dispute settlement system was one of the great successes of the Uruguay Round negotiations. However, Members were now at a juncture in which they were able to determine whether the system was working as it had been intended. This meant, not just automatic establishment of panels and adoption of panel and Appellate

[3]United States - Standards for reformulated and conventional gasoline (WT/DS2).

Body reports, but also implementation as provided for in the DSU, including respecting an arbitrator's clear and unequivocal decision as to what constituted a reasonable period of time. Her delegation noted Japan's reference to its mutually agreed solution with the European Communities as well as its ongoing discussions with the United States to this effect. Canada, a complainant in this dispute, had not been able to reach a mutually agreed solution with Japan on this matter. Therefore, until such a solution might be found, it expected Japan to implement the DSB's recommendations within the 15-month period from the date of adoption of the reports.

The representative of the European Communities said that Japan's status report, as well as its statement, were accurate and correct. The Communities had reached an amicable settlement with Japan, which implied a longer period for implementation than that fixed by binding arbitration. Nevertheless, they took this matter seriously and noted that discussions continued between Japan and other parties to the dispute. He recalled that one of the main objectives of the DSU was that parties should reach amicable settlements and this was valid at all stages of the dispute settlement procedures.

In response to the comments made by the representative of Canada, the representative of Japan said that his delegation was ready to enter into consultations with Canada also at a convenient time. With the Communities, which were the largest exporter of distilled liquors on the Japanese market, Japan had reached a mutually agreed solution consistent with the DSU objectives, in time for the enactment of the agreed amendment for the 1997 fiscal year. In response to the US comment that the amendment was enacted after the binding arbitration, he recalled that the arbitration was issued on 14 February 1997 and could not have been reflected in an amendment for the 1997 fiscal year. Japan had repeatedly informed Canada and the US of the final deadline for the amendment for the fiscal year 1997, but Japan could not have reached agreement with the two parties. The United States had mentioned the lengthy period of implementation in particular with respect to Shochu B which was five years. However, as he had explained, Japan was fully compensating through the reduction of tariffs. This was the basis for Japan and the Communities to reach an amicable settlement. He hoped that other parties to the dispute would also take a flexible and pragmatic approach with regard to the final settlement to this matter.

The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. Korea - Taxes on alcoholic beverages
   (i) Request for the establishment of a panel by the European Communities (WT/DS75/6)
   (ii) Request for the establishment of a panel by the United States (WT/DS84/4)

The Chairman proposed that the above-mentioned sub-items be considered together. He first drew attention to the communication from the European Communities contained in document WT/DS75/6.

The representative of the European Communities said that this was a long-standing dispute which concerned significant tax differences between 35 per cent on domestic products and 50, 80 and 100 per cent on imported products. With regard to the Education Tax Law there was a tax differential of 20 per cent, with domestic spirits being taxed at 10 and 30 per cent. Since the introduction of the Liquor Tax Law, the Communities had repeatedly expressed their reservations and concerns with regard to Korea's tax regime. The Communities believed that their exporters were entitled to equitable treatment and fair competitive conditions in the Korean market. The Communities had a major economic interest in this matter as the spirits sector had an employment level of several thousand of people. The

Communities were the world's main producer and exporter of spirits with an important volume of exports which they hoped to increase.

The Communities sought to eliminate obstacles in a sector in which they were highly competitive and believed that their producers should be allowed to compete in the Korean market, as well as anywhere else in the world, without trade distorting and discriminating measures. In the light of good trade relations with Korea and in the spirit of the DSU, it would have been preferable to settle this matter bilaterally. Unfortunately, the contacts and the consultations held on this matter had not brought a satisfactory solution. Therefore, the Communities requested the establishment of a panel to examine this matter.

The Chairman then drew attention to the communication from the United States contained in document WT/DS84/4.

The representative of the United States said that his delegation requested the establishment of a panel to examine Korea's taxes on distilled spirits. Under its Liquor Tax Law, Korea had imposed a lower tax on its traditional distilled spirit soju, than the high taxes it applied on other distilled spirits such as whisky, brandy, vodka, gin and "ad-mixtures". The tax differential was made even more dramatic by the application of the Education Tax. Thus the tax burden on some US distilled spirits could be over four times greater than that on soju. The United States considered that Korea's internal taxes on distilled spirits were inconsistent with its obligations under Article III:2 of the GATT 1994. The United States had raised this matter with Korea on many occasions over the years, both informally and in consultations. Since the consultations had not settled the matter, the United States requested the establishment of a panel.

The representative of Korea said that his delegation could not agree to the establishment of a panel at the present meeting. Korea was convinced that its internal tax system on alcoholic beverages was in conformity with its WTO obligations. On its part, Korea had made sincere efforts to seek an amicable and mutually agreed satisfactory solution with regard to this matter through consultations with the European Communities and the United States, pursuant to the provisions of Article 3.7 of the DSU.

The representative of Mexico said that he wished to register his country's interest in this matter. This interest was basically due to the fact that Mexico also exported alcoholic beverages, in particular, tequila.

The DSB took note of the statements and agreed to revert to this matter.

3. India - Patent protection for pharmaceutical and agricultural chemical products
   - Request for the establishment of a panel by the European Communities (WT/DS79/2)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS79/2.

The representative of the European Communities said that under this agenda item he wished to make comments with regard to both item 3 and 4 of the agenda. The Communities sought panels in both cases. However, panels on the same matters had already been established at the request of

another Member. In the case of India, the panel report[4] had already been circulated and in the case of Argentina[5] the substantive work of the panel had already been completed. In both cases the Communities had been a third-party. However, they had become aware that the rights of third parties were not the same as the right of complaining parties with regard to the implementation stage. In other words, should there be a problem with implementation, third parties did not have the legal rights to be consulted or to enter into negotiations with countries concerned. The Communities had tried to secure their legal rights at this stage in the process and believed that they had the right to do so. He acknowledged that there might be some practical problems with the establishment of panels in cases in which such panels had already existed. However, he hoped that this could be discussed with the parties concerned.

The Communities had alleged that India was in breach of its obligations under Article 70.8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This was due to the fact that India had not installed the so-called mailbox procedures which would allow companies to make applications to file patents. Furthermore, under Article 70.9 of the TRIPS Agreement, India would be obliged to provide exclusive marketing rights to companies that had filed such applications. Consultations held on this matter had not resulted in a satisfactory solution. The Communities had an economic interest in this matter and believed that they had more patent applications in the pipeline than any other Member, although it was difficult to obtain definite statistics. This reinforced the need to ensure the maximum legal security for the Communities in the settlement of this dispute.

The representative of India said that he wished to respond to the Communities request for the establishment of a panel to examine the matter relating to the alleged failure of India to conform to its obligations under the Articles 27, 65 and 70 of the TRIPS Agreement. He recalled that on 20 November 1996, a panel had been established on the same matter at the request of the United States. The report of this panel had been circulated on 5 September 1997 in document WT/DS50/R and was now being examined by his Government. The Communities had participated in this panel as a third party.

In India's view, the primary interest of the Communities in seeking the establishment of a "fresh" panel was to acquire the right of a complaining party. India had always believed that dispute settlement rights were in the nature of fundamental rights and should therefore be treated as "sacrosanct". Therefore, India had recognized the aspiration as well as the right of the Communities to graduate from the status of a third party to that of a complaining party. However, the timing of the Communities' request had raised certain issues and concerns.

In India's view, at the time when the United States had raised its complaint, the Communities had the possibility to become a co-complainant pursuant to Article 9 of the DSU. However, they had been satisfied with the status of a third party. He recognized that Articles 9.3 and 10.4 of the DSU explicitly provided for the establishment of more than one panel on the same matter. However, it would appear that these two provisions referred only to situations in which a request for a panel was made while another panel proceeding on the same matter was still in operation. Neither of these provisions appeared to contemplate the possibility of a request for the establishment of a panel with regard to a matter on which a panel had already ruled.

Another issue was that the Communities' request for the establishment of a panel referred to a matter which had already been adjudicated upon by another panel and this was related to the principle of *res judicata*. According to this principle, a matter finally decided on its merits by a court of competent

[4]WT/DS50/R.

[5]WT/DS56.

jurisdiction could not be litigated again. He recognized that this principle applied only to re-litigation between the same parties. However, it was possible that this principle could also apply to a party to a multilateral agreement that had joined the original proceedings. He recalled that the only matter on which two separate panels had ever ruled separately had been the United States - Tuna/Dolphin dispute. In this case, the Communities had brought the matter up for a second time.[6] However, it had brought this complaint after it had become clear that the complaining party would eventually withdraw its complaint by not requesting the adoption of the panel report. Under the circumstances, the Communities had no alternative but to request a new panel so as to obtain a binding ruling on this matter. It could therefore be stated that there had been no precedent in the history of the GATT and the WTO with regard to what the Communities had proposed at the present meeting. He did not wish to argue, that absence of a precedent, *ipso facto*, made the Communities' request unjustified or unfair. This was a statement of fact.

He had highlighted certain issues arising from the Communities' request for the establishment of a panel with regard to the matter on which a panel had recently circulated its report on the basis of a similar complaint by the United States. He had raised these concerns in order to draw the attention of DSB members to the issues involved therein. It was possible that during the review of the DSU in 1998, Members would have to consider whether such a repetitive recourse to dispute settlement mechanism on the same subject could be avoided without disturbing the balance of rights and obligations of the parties to the dispute.

At the present meeting, he was in a difficult position since he wished not to delay the establishment of a panel. He recalled that when the United States had brought its request for a panel on the same matter, India had agreed that such a panel be established immediately at the first meeting of the DSB. Thus, it was obvious that India did not believe in unnecessary procedural detail. However, his dilemma at the present meeting was that he wished to preserve his Government's rights to raise all the issues arising from the Communities' action before the panel, because under the current dispute settlement mechanism it was the panel not the DSB which could decide upon such questions, including whether the request for a panel was valid or fair. Therefore, his delegation would need more time to examine whether the standard terms of reference were adequate in this case or whether it should keep open the possibility of seeking preliminary rulings from the panel. In this context, he recalled that nearly two years ago, the previous EC's ambassador had made a statement in the DSB in the context of the *Scallops* panel[7], that the DSU was as much about procedures as about substance. His delegation required more time to carefully examine all the issues arising from this request in order to decide whether the standard terms of reference would be adequate. He therefore regretted that his delegation could not accept the Communities' request at the present meeting. He added that India fully recognized the Communities' interest in wishing to acquire the status of a complaining party and its concerns were essentially systemic.

The representative of Argentina said that, at this stage his delegation wished to be associated with the statement made by India. In particular, he wished to underline the importance of the timing of the Communities' request for the establishment of a panel as well as the importance of *res judicata*, and of the precedent referred to by India. In Argentina's view, it was necessary to bear in mind what had been stated with regard to the importance of the procedural and substantive rules of the dispute settlement mechanism. He reserved his delegation's rights to revert to this matter.

The DSB took note of the statements and agreed to revert to this matter.

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[6]Panel Report on "United States - Restrictions on Imports of Tuna" (DS29/R).

[7]Panel Reports on "EC - Trade Description of Scallops" (WT/DS7/R, WT/DS12/R, WT/DS14/R).

4. Argentina - Measures affecting textiles, clothing and footwear
- Request for the establishment of a panel by the European Communities (WT/DS77/3)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS77/3.

The representative of the European Communities said that the Communities had participated as a third party in the panel established on the same matter at the request of the United States.[8] Much of the work of this panel had already been completed. However, his delegation was under the impression that a settlement between the parties was still possible and if this was the case, the Communities could not have the same opportunities to negotiate a similar settlement. In their discussion with Argentina for almost one year, the Communities had expressed their concerns with regard to certain measures which, in their view, were incompatible with Argentina's obligations under the GATT 1994 and the Agreement on Textiles and Clothing. These measures included the imposition of minimum specific duties on textiles and clothing products that had resulted in duties in excess of Argentina's bound rates. In April 1997, the Communities had requested consultations with Argentina which had been held on 12 June 1997. However, these consultations had not produced any solution to this matter. Therefore, the Communities had no other recourse than to request the establishment of a panel to examine this matter. He added that the Communities were also concerned about certain labelling requirements which had been the subject of consultations held on 12 June 1997. However, in the light of additional information, they were still examining this issue and therefore reserved their right to initiate panel proceedings on this matter at a later stage.

The representative of Argentina said that his delegation had two concerns with regard to this matter. The first was the timing of the Communities' request which related to the point raised by India under the previous item of the agenda. He recalled that his delegation had requested to be associated with India's statement on this matter and had supported it. The second and more important concern was the Communities' attempt to include in the terms of reference of the panel, questions which fell beyond those contained in their request for consultations (WT/DS77/1).

The discussion on timing of the request for the establishment of a panel, or the impact of the conclusions on *ratione temporis*, might have procedural and substantive implications on the fairness of the dispute settlement mechanism. From the procedural point of view, this late request for the establishment of a panel could be in conflict with Article 9.1 of the DSU which stipulated as follows: "Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints … A single panel should be established to examine such complaints wherever feasible". This provision required that a Member requesting the establishment of a panel should respect the timetable outlined in Appendix 3 of the DSU. If not, the responding party would have to repeat the whole procedure before another panel which would entail enormous financial and human resources both for Members and the Secretariat. Furthermore, it could alter the balance established in the DSU which ensured that the rights of the parties were not impaired during the proceedings.

He recalled that this matter had first been raised by the United States on 4 October 1996 when it had requested consultations with Argentina (WT/DS56/1). Pursuant to Article 4.11 of the DSU, the Communities had requested to be joined in these consultations (WT/DS56/3). Argentina had agreed to the Communities' request in November 1996 (WT/DS56/4) and consultations had been held on 12 November 1996. In the view of Argentina, the Communities had not formally objected to the results

[8]Panel on "Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items" (WT/DS56).

of the consultations since they had not raised any special point and had limited their participation to that of a third party in the panel established at the request of the United States. On 26 April 1997, after the members of the panel had been selected -- on 4 April the working calendar for the panel had been established -- the Communities had decided to request separate consultations on this matter. These consultations had been held on 12 June 1997, and in September 1997 the Communities had decided to request the establishment of a panel. This decision had been taken almost a year after the United States had requested consultations in which the Communities had participated. Furthermore, the panel had practically reached the final stage of its work since its conclusions would shortly be circulated to the parties, including to the Communities.

He questioned the Communities' reasons for requesting a new panel on the same matter when, at this stage, the proceedings could not be combined in accordance with Article 9.1 of the DSU. Bearing in mind the DSU provisions, he questioned the need for another panel to examine the same matter. Under the circumstances, he questioned whether the Communities had exercised judgement regarding the fruitfulness of their action in light of Article 3.7 of the DSU. He was concerned that the purpose of Article 3.7 of the DSU with regard to a positive solution to disputes might be overlooked, since the panel established at the request of the United States was to rule on this matter shortly.

Another panel on the same subject could affect the balance which should be maintained under the DSU with regard to the submissions by the parties. This would create an inequality and would unfairly favour the Communities since they had already participated as a third party in the panel established at the request of the United States. During the proceedings of this panel, the Communities had discussed the measures in question with Argentina and, as a third party, would shortly receive the conclusions of this panel. He questioned the need for a Member to reiterate the arguments it had already presented before another panel. In practical terms, this implied that such a Member had to defend itself twice on the same issue before two different parties only because the second complainant had required more than a year to bring this case to the DSB. Argentina recognized that the Communities had the legal right to request the establishment a panel but questioned their decision and pointed to unfairness resulting from gaps in the WTO disciplines.

Argentina believed that this was not the main problem of the Communities' request. The real problem was that of substance, namely the Communities' attempt to extend the terms of reference of its request for a panel beyond the terms stipulated in the request for consultations (WT/DS77/1). This request referred to the provisions of Decree 998/95 which had imposed specific duties on textiles, clothing and footwear products. However, the provisions of that Decree with regard to footwear had been revoked by Resolution 225/97 dated 14 February 1997, which had been duly notified to the WTO in WT/L/204, and referred to by the Communities in their request for a panel. In other words, at the time the Communities had requested consultations with Argentina, the specific duties on footwear had not existed under Argentina's law. This fact had been both notified to the Secretariat and explained to the Communities. He asked whether this meant that the Communities wished to include a non-existent measure in the terms of reference. He questioned the kind of ruling that could be made by a panel with regard to specific duties which had been revoked and asked what kind of nullification or impairment could the Communities claim with regard to a non-existent measure.

In accordance with Article 3.7 of the DSU, the aim of the dispute settlement mechanism was to secure a positive solution to disputes or, in the absence of a mutually agreed solution to secure the withdrawal of the measures concerned if these were found to be inconsistent with the provisions of any of the covered agreements. He questioned whether the measures indicated by the Communities to be contained in Resolution 225/97 could be found consistent or inconsistent when the purpose of this Resolution was to revoke the measures, and how a panel requested by the Communities could deal with this issue.

In their request for a panel, the Communities had also referred to Resolution 226/97 which had not been included in their request for consultations. This Resolution had provided for the initiation of a safeguard investigation and had imposed a two hundred-day provisional measure. The relevant notifications had been submitted to the Committee on Safeguards in documents G/SG/N/6/ARG/1 and G/SG/N/7/ARG/1. Pursuant to Article 12.4 of the Agreement on Safeguards, Argentina had held consultations on this matter with the Communities which the latter had considered to be positive.[9]

He noted two legal contradictions in the Communities' approach. First, Argentina had never held consultations under Article XXII of GATT 1994 or Article 4 of the DSU on the above-mentioned safeguard measure. Thus, it was difficult to see how the measure could be examined by a panel. This would not only be unacceptable, it would be in clear violation of the letter and the spirit of the DSU. A panel could not be established without prior recourse to consultations. The Communities' request for consultations, (WT/DS77/1), contained no reference to either Resolution 226/97 imposing the provisional safeguard measure or, Article XIX of GATT 1994 or the Agreement on Safeguards. Sub-paragraph (b) in the request for a panel (WT/DS77/3) was far from clear. The sentence that, "… the EC hopes that minimum specific duties will not be reimposed and that it will not be necessary to include them in these proceedings" was not only confusing but suggested that any type of specific duty that Argentina might apply in the footwear sector could be addressed by the panel.

Article 6.2 of the DSU stipulated that the request shall "…identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". As sub-paragraph (b) did not state the facts clearly or provide a legal basis, Argentina could only assume that the intention was to include, in the terms of reference, matters that had not formed part of the consultations under Article XXII of GATT 1994. The Communities had to clarify their position before the DSB and in Argentina's view the best way to do so would be to delete sub-paragraph (b) from the request for a panel as contained in WT/DS77/3. Otherwise, the DSB would need to take a decision on the issue since in this exceptional case a non-existent measure was being questioned with respect to which no Member could claim that its rights were impaired. If not, this would set a precedent for other countries to try in future to protect their expectations by requesting the establishment of a panel in response to any proposed legislation. Only when this issue was clarified would Argentina be in a position to present its views on this request.

The representative of Uruguay wished to express his delegation's concerns with regard to the Communities's request. Uruguay did not question the right of any Member to request the establishment of a panel. However, in order to ensure a better understanding of the matter, this request should state the reasons for which the Communities had sought a panel. Without prejudice to the results of the consultations or any decision to be taken by a panel, Members should be fully informed on the subject and the reasons for requesting the establishment of a panel. The Communities' request was based on resolutions issued by Argentina, including Resolution 225/97 which had been revoked and duly notified to the Secretariat. This did not clarify, but further complicated the subject of the dispute. Neither the request for consultations, nor the request for the establishment of a panel, had provided a clear account of the legal instruments applied by Argentina which had impaired the Communities' rights, in particular with regard to Resolution 226/97, which had not been the subject of the consultations. Uruguay was also concerned about the fact that another panel, established at the request of the United States, was dealing with the same subject and its conclusions would shortly be available.

The representative of the European Communities said that in his understanding Argentina could not accept the Communities' request for a panel at the present meeting and therefore the DSB would have to revert to this matter. He recognized that the situation was not clear but, if the same measures

[9]Minutes of meeting of the Committee in document G/SG/M/9.

had been taken under one title on one occasion and then over time modified, then subsequently converted into provisional safeguard measures and later confirmed, it would be difficult to follow all developments. The Communities were prepared to have another look at the way their request had been drafted. However, the fact was that specific duties in excess of Argentina's bound rates had been imposed and were still in force, although they were now given different legal justification. He believed that the confusion with regard to this matter was not limited to the Communities.

The representative of Brazil expressed his delegation's concerns with regard to the procedural issues raised by Argentina. Brazil was concerned about the wording of sub-paragraph (b) contained in document WT/DS77/3 which was as follows: "The EC hopes that minimum specific duties will not be reimposed and that it will not be necessary to include them in these proceedings" and that the Communities' request "… that the panel consider and find that … the measures described in point (b) above are in breach of Argentina's concessions under Article II of GATT 1994 if they are reimposed". In Brazil's view, this amounted to a pre-emptive panel which had not been provided for under the DSU provisions.

The representative of Argentina said that his delegation was not ready to present its view with regard to the establishment of a panel until the followings points had been clarified: (i) whether the Communities intended to include in the panel proceedings Resolution 225/97 which had been revoked in February 1997. If so, this implied that the Communities intended to include, in the terms of reference of the panel, an abstract question; (ii) did the Communities intend to request the panel to examine Resolution 226/97, which had determined the initiation of a safeguard investigation and had imposed a provisional measure, without recourse to consultations under Article XXII of GATT 1994. His delegation questioned whether this was possible in the absence of prior consultations on this subject. Consultations under the DSU provisions were considered to be informal and no records were kept. The only available evidence to determine what had been discussed was the actual text of the request for consultations. The Communities's request for consultations in WT/DS77/1 contained no references to Resolution 226/97, the Agreement on Safeguards or Article XIX of GATT 1994. If such references had been included, no discussion would be necessary. However, in the absence of such references, Argentina considered that this point required clarification; (iii) he enquired about the meaning of the following sentence contained in sub-paragraph (b): "The EC hopes that minimum specific duties will not be reimposed and that it will not be necessary to include them in these proceedings". He questioned whether the Communities intended, as suggested by some delegations, to establish a sort of preventive panel to rule on hypothetical conduct; (i) the request for a panel was even less clear when the statement made at the present meeting was considered, in which the Communities reserved their rights to request inclusion in the panel proceedings the subject of labels which had been excluded from their request for a panel contained in WT/DS77/3. In the absence of clarification from the Communities this request for a panel was far from meeting the minimum clarity requirement under Article 6.2 of the DSU. Only when these questions had been clarified would his delegation be able to present its views on the establishment of the panel.

The Chairman said that the statements made under this item, as well as item 3 of the agenda, raised a number of issues which could not be addressed by the DSB at the present meeting but which could, as suggested by India, be considered during the review of the DSU. With regard to the specific question under consideration, a number of concerns had been raised and the Communities had indicated that they might look further into the nature of their request for a panel. Therefore, he proposed that the parties to the dispute consult on this matter.

The representative of Argentina said that his delegation welcomed the Communities' offer to hold consultations regarding the drafting of a new document reformulating the paragraph under discussion. While his delegation would not oppose to the Chairman's proposal, it wished to have the

Chairman's informal assistance in performing this task. When this new document was ready, Argentina would be in a position to provide its views with regard to the establishment of a panel.

The DSB took note of the statement and agreed to revert to this matter.

5. European Communities - Regime for the importation, sale and distribution of bananas
- Report of the Appellate Body (WT/DS27/AB/R) and Reports of the Panel (WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA)

The Chairman said that this item was on the agenda of the present meeting at the request of Ecuador, Guatemala, Honduras, Mexico and the United States. He drew attention to the communication from the Appellate Body contained in document WT/DS27/11 transmitting the Appellate Body Report in "European Communities - Regime for the Importation, Sale and Distribution of Bananas", which had been circulated pursuant to Article 17.5 of the DSU. He said that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He recalled that under Article 17.14 of the DSU: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

The representative of Guatemala said that the five countries which had filed the complaint on the Communities' banana import regime shared a common position on this matter, but each one of them wished to express their satisfaction at the result of this case. He thanked the members of the Panel and the Appellate Body who, with the support of the Secretariat, had carried out a wide-ranging and thorough review of the Communities' regime for the importation, sale and distribution of bananas. The rulings of the Panel and the Appellate Body were a reflection of a dispute settlement system which operated in an impartial and transparent manner. It had now been established that any Member could insist that the practices and policies of other Members be fully consistent with the WTO Agreement. The adoption of the Reports at the present meeting and rapid implementation of the DSB's recommendations by the Communities would mean that a rule-based system which provides a genuine legal forum was finally emerging. Furthermore, by dealing with the central aspects of the multilateral trading system of interest to Members, this case had also laid down the foundations for a fairer and more equitable trade environment which could improve trade in goods and services. It would be reasonable to expect that these well-reasoned Reports could be useful in future when dealing with other trade disputes. Without any doubt, the examination of this case resulting in a decision that was unprecedented in the history of world trade, contributed to the efficient and credible functioning of the dispute settlement mechanism.

The representative of the European Communities emphasized the great attachment of the Communities to the dispute settlement mechanism and their leading role in establishing this system. His delegations believed that the DSU provisions were at the heart of the system and it was important that this system functioned fairly and properly. Therefore, the Communities, which intended to work within the framework of the DSU, accepted the rulings of the Panel and the Appellate Body in this case. These Reports were now being examined by his authorities. At the next meeting, his delegation would inform the DSB of the Communities' intentions in respect of implementation of the recommendations in accordance with Article 21.3 of the DSU. The Reports, complex and rich in interpretation required a careful study. It was necessary to examine them in their entirety to avoid rushing into simplistic conclusions. Although the Reports had been made available to the public, it

was important to be more careful than journalists who reached quick conclusions such as: "The banana panel condemns preferential treatment to ACP[10] suppliers."

Since all Members, not only the parties to the dispute and the third parties, could be affected by certain rulings or interpretations contained in the Reports, he wished to make some general comments not only limited to the banana import regime but to raise points of systemic nature. The dispute settlement mechanism contained a number of basic principles outlined in Article 3.2 of the DSU which together with Article IX and X of the WTO Agreement constituted a backbone of the system. The main objectives of the dispute settlement system were: (i) to help create legal certainty and predictability in international trade by strictly respecting the legal agreements accepted by Members; (ii) to preserve the rights and obligations of Members under the covered agreements, not only by ensuring compliance by Members with their obligations, but also by upholding their legitimate rights of action against unjustified allegations; (iii) to permit clarifications of existing legal provisions in accordance with customary rules of international law, in particular the Vienna Convention on the Law of Treaties. However, interpretations to fill gaps and the creation of additional obligations were reserved for Members, not for panels or the Appellate Body.

The Communities believed that for an authoritative dispute settlement system to be established it was necessary for rulings to be adopted by the DSB automatically, as would be the case with these Reports. The system would remain credible only if, and to the extent that, it actually achieved the above-mentioned objectives. If Members were to respect dispute settlement rulings and conclusions there must be consensus on the criteria on which these rulings were based and confidence that these criteria would be applied. The Communities appreciated that the rulings in this case had confirmed the legality of three of the basic elements of their banana import regime: (i) the bound tariff-rate quota; (ii) the aid system for the Communities' own producers; and (iii) the principle of preferential treatment for ACP countries. He considered these elements to be positive. However, the Communities regretted that some other rulings had given rise to certain doubts as to whether the general objectives of the system would be satisfactorily met. He then provided some examples to support this. Legal certainty and stability would not be achieved by the interpretation given in the Reports regarding the Agreement on Agriculture. If Members would consider the full consequences of the Reports they would realize that much of the negotiating history of the Agreement on Agriculture had been disregarded. In the view of the Communities, rulings on the interpretation of Article 21 of the Agreement on Agriculture had excessively limited the scope of this Article. The result was uncertainty regarding the outcome of the Uruguay Round negotiations on agriculture. He drew attention to paragraphs 153-158 contained in the Report of the Appellate Body where it had discussed whether Article 21.1 of the Agreement on Agriculture provided for a special relationship between the GATT 1994 and the Agreement on Agriculture. The Appellate Body had concluded that this was the case only if there would be a specific provision to that effect. This meant that in the view of the Appellate Body, market access concessions and commitments for agricultural products which in practice had often taken the form of tariff-rate quotas and country allocations, did not benefit from any particular derogation from GATT rules and this could put those techniques at risk in the future. This was of concern because the Appellate Body had recognized that such concessions and commitments contained in Article 4 of the Agreement on Agriculture were " … fundamental to the agricultural reform process … " and this was the basic objective of the Agreement on Agriculture. Not only importing Members such as the Communities in this case, but also exporting Members were concerned with legal certainty of agricultural schedules. More than fifty Members had negotiated in the Uruguay Round in good faith and had obtained access rights embodied, *inter alia*, in tariff rate quotas and country allocations. Members had bargained hard for these concessions and had received concessions in return. In the view of the Communities, these access

[10]African, Caribbean and Pacific countries.

rights were now open to question and the balance achieved in the negotiations might be affected. This would not create stability in this sector.

The Communities were disappointed with the narrow interpretation given by the Panel to the Lomé Waiver[11] which had been further restricted by the Appellate Body. In the Communities' understanding waivers as exceptions had to be rigorously examined. However, this interpretation had deviated significantly from the understanding of the parties to the Lomé Convention, both with respect to the Convention and regarding the waiver. This was contained in paragraphs 167-178 of the Appellate Body Report which set out measures required by the Lomé Convention and thus covered by the waiver. He recalled that when the parties to the Lomé Convention had obtained a waiver at the end of 1994 they had a clear understanding and expectation of what had been required of them in order to respect the international obligations negotiated by them under the Convention. They had been entitled to the traditional view that they alone determined what commitments they undertook. It was now, three years later, that the Appellate Body had taken a different definition regarding these obligations. This could mean that other current waivers had no longer the effect that had been intended.

With regard to the relationship between the GATT 1994 and the General Agreement on Trade in Services (GATS), the Communities were surprised by the extent of the overlap that the Appellate Body had found between the two Agreements, the brevity of arguments that they had advanced in support of their findings and the lack of operational criteria by which Members could assess their obligations. These results would have been anticipated by few of the people who had participated in the Uruguay Round negotiations. Paragraphs 217-222 of the Appellate Body Report contained the arguments where the provisions of GATS had been interpreted. The conclusions that the measures in specific cases might create overlapping obligations under both the GATT and the GATS created potential uncertainty. For example, an import licensing measure under Article XIII of GATT 1994 might create an obligation of non-discrimination while under Article XVII of GATS it might create an obligation to provide national treatment. The only guideline from the Appellate Body with regard to whether these Agreements overlapped was that this could only be determined on a case-by-case basis.

Finally, it seemed that clearer working procedures for panels and more transparent and precise criteria for the selection of panelists would be necessary, which had also been recognized by the Appellate Body in paragraph 144 of its Report. Clear procedures would guarantee fair treatment and would enhance the possibilities that the results of the dispute settlement procedures would be more predictable and in accordance to well-understood criteria. For example, a definition of rigorous criteria regarding legal standing of complainants would be necessary to avoid undesirable multiplication of disputes and the risk that such disputes be used for renegotiating current agreements. In the view of the Communities, the questions of procedures and the working methods of panels were priority questions for discussion in the review of the DSU in 1998. The experience of this and other cases had demonstrated that Articles 8 and 12 of the DSU and its Appendix 3 could not secure in a satisfactory manner the growing concerns of Members.

The Communities were committed to continue supporting their banana producers in the future, an aspect that had not been considered out of conformity. The Communities were deeply concerned about the negative political, economic and social consequences of some of the findings of the Appellate Body for a number of ACP countries which depended on production and exports of bananas. In the view of the Communities, these implications had not been sufficiently taken into account. The Communities reiterated that they would stand by their international obligations and by the principles of their own development policy aimed at providing economic and social stability to the ACP countries. He reiterated that the Communities were committed to respect their WTO obligations. His delegation

[11]EC-Lomé IV (WT/L/186)

expected that the DSB would adopt these Reports at the present meeting and was ready to join the consensus in favour of the adoption.

The representative of Ecuador said that the history of this case and the various events that marked its development had revealed a broad range of actions by the Communities in order to preserve, as long as possible, their illegal and discriminatory banana import regime that had damaged Ecuador, the world's largest banana exporter. Over the years, the Communities had engaged in delaying tactics by blocking the adoption of the reports of the two earlier panels[12] which had also condemned the Communities' regime. At present, due to the changes in the dispute settlement system, consideration of the Reports by the DSB at the present meeting would result in their adoption, not only for the sake of the reputation of the multilateral trading system, but also because failure to do so could lead to misgivings about a mechanism that was the most effective in ensuring the defence of their rights.

He recalled that in February 1996, Ecuador, Guatemala, Honduras, Mexico and the United States had formally submitted their complaint with regard to the Communities' banana import regime. Ecuador as a developing country had based its development on banana exports, which accounted for 28 per cent of its overall export earnings. Banana production was entirely in the hands of Ecuadorians, with more than 4,500 small and medium-scale producers, and more than 1,200,000 inhabitants dependent on the banana industry, including the export and distribution of bananas in Europe. Ecuador's economy was highly sensitive to changes in competitive conditions in the banana market. Any discriminatory measure imposed by one of the world's major banana consuming markets would inevitably have a serious impact on Ecuador's economy and its population. Any change in the competitive conditions in the European market which would be inconsistent with the WTO Agreement would deprive Ecuador of the profits it would have earned in the absence of such distortions. The Communities' discriminatory regime, which to a large extent had favoured European companies, affected Ecuadorian companies that had traditionally been responsible for a large share of the European trade. Thus, it was no surprise that even before its accession to the WTO Ecuador had firmly opposed this restrictive and discriminatory banana import regime by participating directly, and indirectly, in dispute settlement proceedings concerning this regime under the GATT and now in the WTO.

The Reports submitted for consideration by the DSB at the present meeting had supported Ecuador's complaint. Before its accession to the WTO, Ecuador had been required to reform certain aspects of its trade regime to bring it into conformity with the WTO Agreement. Because of this, and in view of the findings of the Panel and the Appellate Body, his country felt that it was justified to request the Communities to implement the recommendations contained in these Reports as soon as possible. Ecuador and the ACP countries, as well as countries that had signed the Banana Framework Agreement (BFA) which exported bananas to the European market, were developing countries. The benefits granted by the Communities to the ACP countries had to be consistent with the WTO Agreement, as stipulated in paragraph 8.3 of the Panel Reports: "… the system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in the wide variety of circumstances across countries, including countries that are apparently heavily dependent on the production and commercialization of bananas".

Ecuador's position and its legal claims had been upheld in this case. The illegalities of the Communities banana import regime had been clearly established by the Panel and the Appellate Body, and consequently the necessary modifications to that regime would have to be introduced as soon as possible in order to remove the damage it had been causing to Ecuador's banana exports. Rapid implementation of the DSB's recommendations by the Communities would strengthen the dispute

[12]Panel Report on "EEC - Member States' Import Regime for Bananas" (WT/DS32/R); Panel Report on "EEC - Import Regime for Bananas" (WT/DS38/R).

settlement mechanism and would constitute one more step towards transparency in the rules governing international trade, in particular trade in bananas and agricultural products.

The representative of Mexico thanked the members of the Panel and the Appellate Body for the professionalism with which they had examined this matter as well as the Secretariat for their efforts. The history of this case had begun long before the entry into force of the WTO. The GATT 1947 had addressed this dispute on two different occasions and had decided in favour of those who had claimed that the Communities' banana regime was inconsistent with the GATT obligations. Unfortunately, under the previous system, the rulings of panels were easily blocked by the contracting party that had lost the dispute. Due to the improvements in the dispute settlement system it was no longer possible to block the panel reports as arbitrarily as under GATT 1947. At present, whether Members lost or won their disputes, the reports of panels or the Appellate Body had to be adopted. Mexico believed that this would strengthen confidence in the new dispute settlement system and that in the end all would gain.

However, the adoption of the reports was only a first step in solving trade problems. In order for the dispute settlement mechanism to be credible, the party that was required to implement the DSB's recommendations, in this case the Communities, would have to comply with those recommendations promptly and in full. Failure to implement the recommendations or to compensate would not only be contrary to the letter and the spirit of the DSU, but would also be a "severe blow" to those who considered that rules had been made to be complied with rather than to extract payment for non-compliance. Mexico hoped that the Communities would inform the DSB of their intentions with regard to the recommendations as quickly as possible. In accordance with its position taken during the proceedings with regard to the interests of the ACP countries, including its Caribbean neighbours, Mexico had fully supported paragraph 8.3 of the Panel Report which reaffirmed that: " … the system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in the wide variety of circumstances across countries, including countries that are currently heavily dependent on the production and commercialization of bananas".

The representative of Côte d'Ivoire said that the circulation of the Reports of the Panel and the Appellate Body had marked the end of a long process. While his country accepted the rulings, the complexity of the conclusions and the problems of interpretation regarding these conclusions would require an in-depth examination. The Communities had stated that the rulings could upset the economic and social balance of many ACP countries, including Côte d'Ivoire. Indeed, his country was one of the rare African countries that had managed economic growth and development of its agricultural potential. The policy of diversified agricultural production had made it possible to develop, *inter alia*, such new crops as oil-palm, cotton, sugar cane, coconut palm, rubber, pineapple and bananas. Since 1975, its banana sector, which had developed in perfect synergy with the pineapple sector, had become one of the cornerstones of his country's strategy of diversifying agricultural production. With a production of 200,000 tonnes in 1996, the banana sector had been crucial to the support and development of the production and exports of tropical fruits, which had benefited from what was left from a healthy, strong and competitive banana business. In other words, in terms of the multi-product synergies developed in connection with production, outlets, maritime transport and foreign marketing circuits, the Communities' support in the framework of the common organization of the banana market benefited the entire growing fruit sector of his country. Thus, Côte d'Ivoire could not isolate the banana sector from its important fruit sector. On the contrary, bananas had accounted for 2.53 per cent of the GDP in 1993-1994 while providing employment for more than 30,000 persons. Bananas were at the heart not only of agricultural diversification strategy, but also of his country's development of tropical fruit exports.

The challenge to the common organization of the banana market had threatened his country's future fruit production and had compromised chances of Côte d'Ivoire, in the process of adjustment,

for its economic recovery. The immediate consequences could be the disappearance of 25,000 hectares of crops and the elimination of more than 30,000 direct jobs, casting doubt on future development of the fruit sector and seriously compromising the horizontal agricultural diversification policy of his country. Furthermore, entire regions which were mainly banana and pineapple producing areas would become disaster areas in which the rural population estimated at more than 300,000 could be reduced to poverty. Because of this leading rôle of the banana trade and for the sake of social stability in Côte d'Ivoire and the ACP banana-producing countries, his country expected the Communities to respect their commitments under the Lomé Convention. His delegation therefore supported the statement made by the Communities at the present meeting. Since the Communities had declared their commitments to the proper functioning of the WTO and to the collectively accepted rules, they had no choice but to accept the DSB's decision at the present meeting which could not be subject to appeal. However, certain steps and discussions would be needed in order to determine what new measures would be required, and in this connection a time-period for implementation of the recommendations was important. His delegation hoped that everyone would contribute to helping the Communities to strike a balance between their concerns and those of their ACP partners.

The representative of Jamaica said that Article 3.2 of the DSU stated that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Article 3.9 of the DSU stated that the provisions of the DSU " … are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement … ". However, this could not be automatically understood to mean that any interpretation by a panel, or the Appellate Body, could be considered to be an authoritative interpretation of the provisions of that covered agreement. Otherwise it would make Article 3.2 of the DSU superfluous. Some delegations had earlier indicated that third parties did not have certain rights and would have to become parties to be associated with the implementation of the findings and recommendations of panels and the Appellate Body. Although Article 17.14 of the DSU stipulated that the reports had to be accepted unconditionally, he questioned whether Jamaica could in good conscience state that it joined in a consensus for the automatic adoption of the Reports. His country believed that the DSU was a positive contribution to strengthening the credibility and the predictability of the WTO system. Smaller trading countries needed credible and predictable rules but fair rules and procedures had to be such as to secure equal opportunities for them to pursue their interests.

Two other important matters were at the heart of the rights and obligations of Members. One was described in the Appellate Body Report as procedural. The Appellate Body had not been able to address procedural violations, which in Jamaica's view had adverse effects on the way in which third parties could present their case before the Panel. Furthermore, the Appellate Body had not addressed this issue on the grounds that no appeal had been filed on this matter. However, third parties had no right to appeal a panel report. Hence, these defects remained uncured. In dealing with the Lomé Convention which brought sovereign States together in legally binding commitments prior to the WTO, the Appellate Body, like the Panel, had interpreted and reversed the clear intentions of the parties to the Convention. He referred to the 20th century jurist, Prof. Lauterpacht, and quoted that: "Every treaty contains rules governing the international conduct of the signatory states and every treaty, law-making or not law-making, is a source of international law for the contracting parties - and for no one else." He wondered how it could be possible that three members of the Panel and three members of the Appellate Body determine in regard to the Lomé Convention, what was "foreseen" as distinguished from what was "required", what was "mandatory" from what was "not mandatory", and at the same time disregard the clear, explicit intent of sovereign States to enter into those treaties with reciprocal rights and obligations applicable to those States.

The Communities had indicated their view with regard to the conclusions on the GATT and the GATS. Jamaica agreed that any ruling which created an overlap between the GATT and the GATS had not been intended by the Uruguay Round negotiators nor founded on logic. Such a ruling would

create difficulties for Members in the future. With regard to the next stage implied by certain delegations the following options were open. First that the Communities' regime be modified in line with the findings of the Appellate Body. But at present it was difficult to see how there could be any modification in line with the recommendations of the Appellate Body without a change in the Lomé Convention obligations which would require full compliance and the full review by parties to the Convention. The second option concerned compensation. For some complaining parties, compensation was not a viable option since they did not export bananas and this should be clarified. The third option alluded to a modification of the Lomé waiver. This should be the subject of further discussion and clarification. Although he had not mentioned the social and economic consequences, this should not be taken as a disregard to the importance of these consequences for farmers and traders in ACP countries. He had only mentioned the legal aspects since the DSB was an appropriate forum to deal with specific systemic matters related to the GATT 1994, the GATS and the DSU.

The representative of Honduras thanked the members of the Panel and the Appellate Body as well as the Secretariat for their work. His delegation wished to be associated with the complaints and the legal arguments of the countries which, together with Honduras, had filed this complaint. In the view of Honduras, the Communities' banana import regime as demonstrated by the Panel and the Appellate Body, had represented the very antithesis of the basic principles of fair and equitable trade capable of promoting growth and development on the basis of equality of opportunities, rights and obligations. He expressed his country's satisfaction with the results of its first trade dispute and reiterated Honduras' confidence and full support of legal regulations and procedures of the dispute settlement mechanism and of the WTO as a universal forum for countries such as Honduras, to exercise their rights regardless of their share in world trade. Honduras was satisfied with the outcome of this case because it had demonstrated that multilateral commitments prevailed over unilateral decisions aimed at benefiting certain countries at the expense of others. His country was confident that with the adoption of the Panel and the Appellate Body Reports it would be possible to end this controversial chapter without falling into the pattern of winners laying claims on losers and hoped that the Communities' would find appropriate means consistent with the WTO Agreement, to continue to fulfil their obligations under the Lomé Convention.

In order to explain Honduras' reasons for welcoming the outcome of its first trade dispute submitted to the dispute settlement system, he outlined some of the negative economic and social consequences suffered by his country as a result of the introduction by the Communities' of their regime for the importation of bananas. As a result of the application of this regime, the volume of his country's banana exports to the Communities, which between 1990 and 1993 had grown by 34 per cent annually, had shrunk by more than 90 per cent in the period 1993-1994, while its overall banana exports had shrunk by more than 30 per cent. The effect was devastating for his country's economy, since almost 50 per cent of its export earnings had come from exports of bananas. Finally, Honduras hoped that as a result of the adoption of the Reports at the present meeting it would be possible to ensure, *inter alia:* (i) that every Member would renew its commitment to a fair and equitable rule-based trading system; and (ii) that the dispute settlement system would constitute a legitimate, appropriate and effective means of ensuring full respect of rights within the multilateral trading system.

The representative of Nicaragua said that since her country considered that one of the most important achievements of the Uruguay Round regarding stability of the multilateral trading system was the strengthening of the dispute settlement mechanism, it wished to be associated with the consensus for the adoption of the Reports at the present meeting. However, it was concerned with the possible impact of the conclusions of the Panel and the Appellate Body. From the legal point of view, the conclusions of the Reports might affect the balance of rights and obligations of small countries with little diversification of products, such as Nicaragua. The conclusions of this nature might encourage some countries not satisfied with the concessions they had already obtained to seek certain revision. This created uncertainty. From a social and economic point of view, the conclusions of the Reports

could affect the economies of a significant number of countries. In the case of Nicaragua, the BFA had a decisive effect on the recovery of its banana industry. Without a stable market, an enormous investment required in this sector in the early '90s would not have been possible. Her country noted the Communities' statement with regard to the need to study in-depth the complex nature of the Reports as well as the Communities' intention with regard to the implementation of the DSB's recommendations. Nicaragua believed that through consultations with the parties, which would take into account the concerns expressed at the present meeting, it would be possible to obtain better results in terms of implementation. Her country was ready to participate actively in these consultations.

The representative of Senegal expressed his delegation's satisfaction with the conclusions of the Appellate Body, despite their troubling nature. By stating publicly their firm intention to respect their commitments towards the ACP countries, the Communities had demonstrated a great sense of responsibility and this had not come as a surprise. His delegation's reaction to the conclusions and recommendations of the Appellate Body had been a mixture of resignation and fear. Resignation, because for years the structure of the Communities' trade with the ACP countries, in particular with respect to bananas, had been subject to repeated attacks. Fear, because of the manner in which the dispute settlement system had been used in this case. If the primary objective was not to punish a country or a group of countries breaking the rules, but rather to re-establish a balance which had supposedly been upset, it would be necessary to look beyond simple trade relations. This would have helped to understand that the agreements between the Communities and the ACP countries had been concluded on the basis of a shared conviction that efficient economic cooperation between countries with different levels of development should be based on a strong sense of solidarity, and it was this solidarity which explained the privileges granted by the Communities and rejected by the Appellate Body.

Without doubt, these agreements were efficient instruments that had contributed to improving the standard of living and development of the ACP countries, including many LDCs. While the challenge to the preferential regime enjoyed by certain ACP banana-producing countries would constitute a serious setback and cause disruptions in the countries concerned, it had not been established that the maintenance of these privileges had caused similar disruptions for other parties. Several years ago, the World Bank and the FAO had carried out simulations of the impact of dismantling of the preferential regime granted to the ACP countries and had reached the same conclusion, i.e., that the dismantling of the regime would generate adjustment costs beyond what the countries concerned could support. He affirmed that his country's commitment to the dispute settlement system remained intact. However, Senegal was concerned with the tendency, as reflected in this case, to be too restrictive in the interpretation of agreements governing Members relations within the framework of the WTO.

The representative of Costa Rica said his Government had examined the Reports of the Panel and the Appellate Body and had acknowledged their results since Costa Rica considered the dispute settlement mechanism to be a cornerstone of the multilateral trading system. Nevertheless, he wished to comment on some conclusions of the Reports which might affect the system as a whole. In particular, his country was concerned that the Agreement on Agriculture had not prevailed over other general regulations on market access concessions contained in the Schedules negotiated and agreed in the Uruguay Round. In those negotiations it was agreed that in the agricultural sector the system previously dominated by non-tariff measures would be replaced by a tariff system. In this context, many Members had been obliged to accept tariff levels that had gone beyond their previous bindings. In order to maintain market access opportunities, they had made commitments with respect to quotas -- the Communities' commitments being only one example -- many of which could now be questioned in a similar way with respect to the general regulations of GATT 1994. Although during the negotiations it had been understood that the fundamental transformation of the system required exceptions, the Reports had rejected this view in favour of a limited interpretation of Articles 21 and 4.1 of the Agreement on Agriculture. This interpretation threatened the balance of the Uruguay Round results which had been painstakingly achieved. The concessions contained in the Schedules reflected the outcome of a difficult

process of negotiations in which the parties had been able to strike an acceptable balance. Moreover, the cross-concessions between the participants resulting from the single undertaking principle had meant that during the negotiations, sectors as different as agriculture and the TRIPS Agreement had been linked. This made it possible to strike a balance in the diversity of trade interests among participants and to arrive at the wide-ranging results of the Uruguay Round. Unfortunately, this balance was upset by the finding of the Reports that the market access concessions in the Agreement on Agriculture might be reviewed. Finally, he said that there was a number of positive elements including the fact that although the Communities' Schedule had been submitted for review under GATT 1994, certain concessions contained therein had been recognized as legitimate, including the specific quotas allocated to Costa Rica and Colombia.

The representative of Colombia said that her country which had participated in this case as a third party, wished to join in the consensus on the adoption of the Reports. Colombia believed that the multilateral dispute settlement mechanism was a cornerstone of the WTO system. The rulings had recognized the validity of the reference period used by the Communities in calculating the distribution of tariff quotas for imports of bananas as well as Colombia's status as a supplier having a substantial interest with the right to a tariff quota. However, Colombia was concerned about implications for the system of some conclusions. The Panel had stated that " … the tariff rates specified in the EC's Uruguay Round Schedule are valid EC tariff bindings in respect of bananas".[13] The Panel had considered that although the said tariff rates were inconsistent with Article II of the GATT 1994, this inconsistency had been cured by their inclusion in the Uruguay Round Schedule. This reasoning had ignored the understanding that the Schedules of concessions under GATT 1947 had been incorporated into GATT 1994. Moreover, it had implied that any tariff in respect of manufactured or agricultural goods that had been bound at a higher level than the previous GATT 1947 binding became consistent with the obligations of Article II of the GATT 1994 without being renegotiated under Article XXVIII.

The conclusions concerning Article XIII of the GATT 1994, invalidated the GATT practice of allocating country quotas to all those having a substantial interest and to certain small suppliers, leaving a residual quota for others. In accordance with the conclusions, this practice was incompatible with Article XIII, even if every one of the allocations, including the residual quota, was in conformity with the market distribution existing in a given representative period. Furthermore, the conclusions concerning Article XIII had appeared to be contradictory. On the one hand, the Panel had concluded that Members should be required to use a general category for all suppliers other than Members with a substantial interest[14] since: "When a significant share of a tariff quota is assigned to 'others', the import market will evolve with the minimum amount of distortion."[15] At the same time, the Panel and the Appellate Body had concluded that the allocation of shares to some Members not having a substantial interest but not to other Members in a similar situation was inconsistent with Article XIII:1.[16] Colombia therefore questioned what was incompatible with Article XIII, the allocation of country quotas to small suppliers or the allocation of country quotas to some small suppliers and not to others?

With regard to the conclusions concerning Article 4.1 of the Agreement on Agriculture, she recalled the general rule of interpretation invoked in the past by the Appellate Body, according to which "… interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy

[13]WT/DS27/R/GTM and HND, paragraph 7.139.

[14]WT/DS27/R/USA, para. 7.75.

[15]WT/DS27/R/USA, para. 7.76.

[16]WT/DS27/R/USA, para. 7.90.

or inutility".[17] However, this had not been taken into account. On the one hand, the Panel had concluded that Article 4.1 "… is not a substantive provision, but a statement of where market access commitments can be found".[18] On the other hand, the Appellate Body had recognized the existence and validity of the "other market access commitments" negotiated during the Uruguay Round, but had omitted to mention the rights and obligations arising from Article 4.1. This omission would seem to suggest that the Appellate Body had also considered that Article 4.1 did not have legal status. Consequently, it could be understood that Article 4.1 did not provide a legal basis for tariff increases negotiated for agricultural products. Nor was it a legal basis for the distribution of tariff quotas negotiated with the tariff increase, which was governed by Article XIII of the GATT 1994. In other words, Article 4.1 was not necessary in the first case, and was redundant in the second case. She reiterated Colombia's interest in contributing to the introduction and implementation of the banana import regime in close cooperation with the Communities, bearing in mind the need to find solutions which would avoid market manipulation and which, by providing market stability, would have a beneficial impact on the earnings of banana producers.

The representative of Japan said that his delegation had an interest in certain interpretation of the DSU provisions. As the Panel had erred in its interpretation of Article 6.2 of the DSU, Japan had joined the Appellate Body procedures as a third party and had presented its views. Although the Report of the Appellate Body had made correct and important modifications, it had basically agreed with the Panel's findings. If the finding of the Panel and the Appellate Body set a precedent for the interpretations of Article 6.2 of the DSU, that would invite abuse of the dispute settlement mechanism and would adversely affect the system. He stressed that whether or not a request for the establishment of a panel satisfied the requirements of Article 6.2 of the DSU, it should be decided on a case-by-case basis, fully taking into account the factual and legal context of each case.

The representative of the United States said the Reports submitted for adoption at the present meeting had demonstrated how well the dispute settlement process could work in providing clarity in order to resolve difficult disputes. He therefore expressed his country's appreciation for the work of the Panel and the Secretariat in examining the Communities' banana import regime and for the large number of issues presented. The United States appreciated the speed and care with which the Appellate Body had ensured a result that was consistent with the WTO Agreement. It was gratified that both the Panel and the Appellate Body had confirmed the broad scope of the Agreement on Import Licensing Procedures and the GATS. As had been agreed in Marrakesh, the WTO agreements were aimed at "… the elimination of discriminatory trade treatment in international trade relations". The Panel and the Appellate Body had now confirmed that the Communities' banana import regime was uniquely and extraordinarily discriminatory against the United States and other foreign banana wholesale distributors and certain banana exporters. The United States was encouraged by the public statements made recently by trade officials of the Communities recognizing the weight of these Reports and expressing confidence in the dispute settlement mechanism. As it had been indicated, the Communities would inform the DSB of their intentions in respect of implementation of the DSB's recommendations. The United States hoped that the Communities would make a definite and clear statement that they intended to comply with the DSB's recommendations and rulings. His delegation looked forward to working with the Communities to forge a mutually satisfactory solution to this long-standing dispute.

With respect to the comments made by some delegations, the Panel and the Appellate Body Reports had fully supported the ACP tariff preferences over exports from Latin American countries. However, as the Panel had found, a lot more was involved in the Communities' banana import regime

[17]WT/DS2/AB/R, p. 23.

[18]WT/DS27/R/USA, para. 7.124.

than helping Caribbean banana producers through tariff preferences. The Panel had found that the regime included a number of WTO-inconsistent ways of protecting Communities' banana producers and distribution companies and many burdensome and discriminatory licensing procedures on imports from Latin American countries. The United States had expressed its commitment to a WTO-consistent solution that would enable Caribbean countries to continue exporting bananas to the Communities.

In particular, the United States was satisfied with the Panel's analysis concerning the GATS. In 1993, when the Communities had introduced their banana regime, it had been well known that the regime's highly unusual, or unprecedented, structure had been designed to transfer business opportunities from Latin American and US distribution companies to domestically-owned distribution companies. The Panel and the Appellate Body had found that GATS non-discrimination commitments covered all measures that distorted competitive conditions in favour of domestic services or service companies. This interpretation was not only required under the GATS but was not different to how the GATT had been historically interpreted since the 1950s with regard to trade in goods. Specifically, in order to ensure effective non-discrimination, Article III of GATT 1994 had been interpreted to cover all measures that alter the competitive environment in favour of domestic goods. In this case, the Panel and the Appellate Body had rejected a narrow interpretation of GATS that would have permitted Members to evade their services commitments at will, for example by restricting access of foreign service companies, but not domestic service firms, to the goods needed to supply a service. In other words, Members continued to be free under GATS to regulate their goods markets. However, they might not use the so-called goods measures as a means to discriminate against foreign services companies in scheduled sectors. This result should be supported by all those who favoured the elimination of discrimination in trade in services.

The Communities had urged a more careful interpretation of the Panel and the Appellate Body findings than given by journalists. This was positive. However, they had expressed a number of unfounded concerns with respect to generalized implications for Members in connection with the Reports. For example, the Communities had raised concerns with regard to the interpretation of waivers. But, upon review of the relevant paragraphs referred to by the Communities, one could find nothing more nefarious than a reasoned analysis of the precise terms of the Lomé waiver. The waiver was limited to certain preferential treatment for ACP products as required by the Lomé Convention. The Panel and the Appellate Body had reasonably addressed two questions: (i) what was required by the Lomé Convention, and (ii) what was covered by the Lomé Convention. He believed that Members should not fear a process of interpretation of waivers based on sound methodology in developing the waiver. In addition, with regard to the analysis of the Panel and the Appellate Body of the scope of the Lomé waiver, in light of the parties' intentions, his delegation had participated actively in the negotiation of the text of the waiver with the Communities, the ACP countries, and other interested GATT contracting parties. On the basis of this experience he assured all Members that the analysis of the scope of the waiver had conformed completely with the intentions of those who had negotiated the waiver.

The representative of Panama said that his country wished to join delegations supporting the adoption of the Reports. Panama had become a Member of the WTO only recently. Otherwise, it would have joined the proceedings of the Panel. Nevertheless, it had closely followed this case and with great interest, both in the WTO and in other fora. On the basis of the statistics contained in the Panel Report it could be seen that the current banana regime of the Communities had a negative impact on Panama's trade interests. His country was one of the main exporters of bananas to the Communities' market. The existence of thousands of Panamanians had been directly linked to the sale of bananas on world markets, including the Communities' market which was one of the most important. Reduced access to that market inevitably had an immediate and tangible effect on their lives.

He regretted that the settlement of this dispute had often taken the form of a confrontation between rich countries or multinational companies and developing countries whose economic survival was at stake. It was clear that on both sides of this dispute, the lives of citizens of developing countries had been affected. It could only be hoped that in fulfilling trade obligations, it would be possible to find a solution to this dispute. Following an exchange of communications between Panama and the Communities during its process of accession, Panama would soon consult the Communities with regard to its future participation in any events concerning this matter. As a new Member and an interested party with a substantial interest in this case, Panama urged the DSB to adopt the rulings of the Panel and to request the Communities to bring their measures that had been found inconsistent with GATT 1994 and the GATS into conformity with their obligations under these Agreements.

The representative of Argentina said his delegation wished to express its views with regard to the adoption of the Reports pursuant to Article 16.4 of the DSU. Paragraph 256 of the Report of the Appellate Body stated that the Report left intact the findings and conclusions of the Panel that were not the subject of this appeal. The Panel findings, in particular those in documents WT/DS27/R/GTM - WT/D27/R/HND, included an endorsement, in paragraph 7.138, of the second banana panel report[19] which had not been adopted under the GATT system. In the view of Argentina the endorsement by the Appellate Body of a GATT panel could not be given the same legal status as the adoption of a report by a panel or the Appellate Body within the framework of the WTO. In Argentina's view the findings contained in document DS38/R, referred to in the Panel Reports should be considered in the light of the principle laid down by the Appellate Body in the case "Japan - Taxes on Alcoholic Beverages"[20] according to which unadopted panel reports had no legal status in the GATT or WTO system since they had not been endorsed through decisions by the GATT CONTRACTING PARTIES or Members of the WTO.

The representative of Australia said that his country appreciated and recognized the important and diverse trade and development interests involved in this case, and the degree of public attention it had attracted. Australia had consistently expressed its expectation that a solution could be found that would accommodate the interests of all countries involved. It had continued to be its expectation that it should be possible for the Communities to redesign its banana regime to comply fully with their WTO obligations while also addressing the important concerns of all interested parties. Australia hoped that this objective could be advanced through discussions between the Communities and interested trading parties including the ACP countries. The scope of issues considered in the Panel and the Appellate Body Reports was broad. Many of the issues addressed were clearly complex. Australia would be carefully examining the Panel findings and conclusions as upheld, modified or reversed by the Appellate Body. The findings and conclusions, however, referred to a specific situation and no premature conclusions should be drawn about any possible implications for other situations and circumstances.

The DSB took note of the statements[21] and adopted the Appellate Body Report in WT/DS27/AB/R and the Panel Reports in WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, as modified by the Appellate Body Report.

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[19]DS38/R.

[20]Appellate Body Report (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

[21]Including a statement by Saint Lucia which was made available in the room in the absence of that delegation. This statement was subsequently circulated in WT/DSB/COM/3.

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/60)

The Chairman drew attention to document WT/DSB/W/60 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.

The Chairman said that the Secretariat was expected to update the indicative list by the end of September on the basis of updated curricula vitae to be submitted by delegations. As had been indicated at the previous meeting of the DSB, the names not reconfirmed would not appear on the indicative list. The procedure for submission for the updated indicative list had been outlined in document WT/DSB/W/58. Delegations who had not yet done so, were invited to submit updated curricula vitae in accordance with the procedures outlined in that document as soon as possible.

The DSB took note of this information.

7. Canada - Certain measures concerning periodicals
- Statement by Canada

The representative of Canada, speaking under "Other Business", said that on 29 August 1997 in a letter[22] transmitted to the Chairman, Canada had informed the DSB of its intention to meet its WTO obligations with regard to the DSB's recommendations on this matter[23] and that it would require a reasonable period of time in order to do so. She was pleased to announce that the United States and Canada had agreed, pursuant to Article 21.3(b) of the DSU, that a reasonable period of time for Canada to bring its measures into compliance with the recommendations of the panel and the Appellate Body would be 15 months, beginning from 30 July 1997, the date of the adoption of the reports by the DSB.

The representative of the United States confirmed the statement made by Canada on behalf of the United States, to the effect that the parties to the dispute had agreed pursuant to Article 21.3(b) of the DSU that the reasonable period of time for Canada to bring its measures into compliance with the recommendations of the panel as modified by the Appellate Body would be 15 months from 30 July 1997, the date of the adoption of the reports. The United States intended to monitor closely Canada's compliance with the panel and the Appellate Body reports. It was the expectation of the United States that a status report to be submitted by Canada to the DSB pursuant to Article 21.6 of the DSU, would indicate progress towards full implementation.

The DSB took note of the statements.

[22]WT/DS31/8.

[23]At its meeting on 30 July 1997, the DSB adopted the Appellate Body Report (WT/DS31/AB/R) and the Panel Report (WT/DS31/R and Corr.1) as modified by the Appellate Body Report.

8. Letter from the World Wide Fund for Nature to the chairman of the panel on "United States-Import Prohibition of Certain Shrimp and Shrimp Products"
- Statement by Brazil

The representative of Brazil, speaking under "Other Business", said that on 15 September 1997, his delegation had received a letter from the World Wide Fund for Nature (WWF). In this letter, addressed to the ambassadors and the permanent representatives to the WTO in Geneva, the WWF had enclosed a copy of the "amicus brief" for the panel on "United States Import Prohibition of Certain Shrimp and Shrimp Products" (Panel). This letter had indicated that the brief had recently been sent to the chairman of the Panel and the five parties to the dispute. Furthermore, the WWF would also distribute this brief to other relevant governmental bodies and non-governmental organizations (NGOs) at the national and international level.

His delegation was both surprised and concerned about the implications of this initiative. In accordance with Article 13 of the DSU, a panel had the right to seek information and technical advice from sources other than the parties to the dispute. Thus panels could seek information but not to receive unsought information from outside sources. Furthermore, the DSU Appendix 4 laid down specific provisions with regard to the submission of technical information. The DSU did not provide for any *actio popularis* or *amicus curiae*. He recalled that the basic concern of Members participating in consultations held in 1996 with regard to the scope of the Agreement on cooperation between the WTO and the International Monetary Fund (IMF) had been whether to allow the IMF to provide directly to panels written information which had not been sought. Members believed that provision of such information circumvented the rules laid down in Article 13 of the DSU and its Appendix 4. He recalled that even in the case of an intergovernmental organization of fundamental relevance to the WTO's work, a decision of the General Council adopted in November 1996 had been reached after long and difficult negotiations. The functioning of the world trading system would be adversely affected, if Members accepted the initiative of a non-governmental organization to provide a panel directly with unsought information as a *fait accompli*. He reiterated that the DSU did not provide for an *amicus curiae* and therefore the Panel should not accept the so-called *amicus brief* which had not been requested. He then sought clarification from the Chairman with regard to the status of the WWF's letter to the Panel, and with regard to any subsequent action taken thereon.

The representative of Thailand, speaking on behalf of ASEAN countries, said that the matter raised by Brazil was relevant and could have significant implications for the work of panels. The obligations of parties to the dispute and other parties outside this dispute had been clearly defined and the procedures, time-periods, and channels of communication had been established in order to ensure proper proceedings. He recognized that in some cases, panels might seek expert advice in accordance with the relevant DSU provisions. However, in this case, the panel had not sought any information. He noted that the Panel had earlier rejected certain information which had not been requested. His delegation was concerned about inputs not solicited by the panel and without due regard to the DSU provisions. In the view of the ASEAN countries this document had no legal status.

The representative of the United States supported Brazil's statement with regard to the fact that the DSU provisions did not give the WWF or other organizations any right to make such a submission to a panel as well as the concerns of Members with regard to the scope of the Agreement with the IMF and the need to observe the DSU provisions. However, panels were composed of well-qualified governmental and non-governmental individuals which had a wide spectrum of experience and enjoyed independence in their work. They did not need to be sheltered from information submitted by a non-party. Panels were made of intelligent individuals and his delegation believed that panels could be entrusted to determine what weight should be given to such kind of information.

The representative of Argentina said that the procedures for panelists were contained in Article 13 of the DSU and its Appendix 4. He believed that the work of panels had to be carried out in accordance with these provisions. Any action outside the spirit of the above-mentioned procedures would fall beyond the DSU.

The representative of Japan said that his delegation shared the views expressed by Brazil. He recalled that during the Uruguay Round negotiations of the DSU, some delegations had tried to include a text which could allow the NGOs and other bodies to submit their views directly to panels. However, this proposal had been rejected by the majority of delegations. The final result was now contained in Article 13 of the DSU and its Appendixes. Therefore, in the light of the negotiating history of Article 13 of the DSU and its literal interpretation his delegation supported Brazil's statement. Japan also sought clarification with regard to the status of this letter submitted to the chairman of the Panel. He believed that this letter was not relevant for the Panel's proceedings and had no weight within the meaning referred to by the United States. The US representative had stated that it was up to the panelists to determine what weight should be given to this letter. He believed that this letter had no weight and should have no place in the Panel's proceedings. However, his delegation was not concerned as long as these proceedings were conducted in accordance with the DSU provisions and the Panel would make its independent judgement without being politically influenced.

The representative of Thailand clarified that the information that had been rejected by the Panel although confidential was available on the Internet.

The representative of India associated his delegation with Brazil's statement and enquired on the possible action regarding this letter. He referred to the statement by Thailand concerning confidentiality of dispute settlement proceedings and expressed his concern with regard to the availability of confidential information on the Internet.

The representative of Venezuela said that his delegation supported Brazil's statement. Pursuant to the DSU procedures, panelists had an option to seek additional information from other sources, if necessary. However, this did not imply that outside sources could provide information directly to panels. His delegation considered that the question was not only whether a panel could accept the information from an outside source but of transparency for those Members not involved in the panel proceedings.

The representative of the European Communities said that in his delegation's view panelists were individuals of integrity and Members relied on them. The Communities were concerned about this manoeuvre because it distracted the attention of the work of the panel from tasks such as evaluating factual and scientific evidence it had requested from the parties that were allowed to submit information. He enquired whether the Chairman had any information from the chairman of the Panel on this matter.

The representative of Mexico said that his delegation supported the concerns expressed by Brazil, Thailand, India, Japan and to some extent the European Communities. Since it was a fact that the Panel had not requested the information it was outside the scope of Article 13 of the DSU although the WWF had stated that this brief had been submitted on the basis of this Article. Panels could request information or technical assistance under Article 13 of the DSU. However, this letter contained legal arguments which had not been requested and was outside the type of information that might be requested under Article 13 of the DSU. Furthermore, the DSB should determine whether this matter was in line with the DSU. It would be unfair to leave this issue to the panelists. It should not be left to them to make such an important decision but rather to the DSB.

The Chairman said that he had considered the request made by Brazil concerning a possible action with regard to this matter. However, because of the confidentiality of panel proceedings, neither he nor the Secretariat could comment on the status of the WWF's letter or on any action which the

Panel had or had not taken with regard to it. However, the statements made at the present meeting had been to a large extent self-explanatory and he would propose, if it was generally acceptable, to transmit the record of this meeting to the chairman of the Panel. He believed that this would be an appropriate way to deal with this matter. He asked whether his proposal would be generally accepted by Members.

The representative of Jamaica said that Brazil's points were clear and comprehensive, but he was concerned that as Brazil had raised this as a systemic issue related to a specific panel without consideration and due deliberation of the parties concerned, any decision taken by the DSB might be considered to be if not a precedent, then a guide to *ad hoc* decisions and interventions of the DSB. He recalled that in the case of the Banana panel certain difficulties had been raised in the DSB and consultations had been requested in order to have due deliberations. He questioned a decision by the DSB on the matter which had been raised under "Other Business". His main concern was the reaction of the Panel concerning this information rather than the fact that it had received it. He believed that this was a point raised by Mexico and wished to have other views on this matter.

The representative of Mexico expressed concern with regard to the Chairman's proposal to send a report to the Panel because this would create the same problem as the one with the WWF's letter. The Panel had not requested this opinion and Members were not providing technical advice on the content of the letter. His delegation fully trusted that the panelists knew how to interpret Article 13 of the DSU.

The representative of the United States said that in the light of the comments just made and the fact that this matter was raised under "Other Business" it would be advisable to hold consultations on this matter before taking a decision and, at this stage, to avoid sending a communication to the Panel.

The DSB took note of the statements.

9. Application of Article 4.11 of the DSU
- Statement by the United States

The representative of the United States, speaking under "Other Business", said that his delegation wished to address a procedural issue concerning the application of Article 4.11 of the DSU. This issue had been raised recently during the consultations held between India and its trading partners with regard to India's well-known import restrictions or prohibitions on over 2,700 tariff lines. He recalled that the United States, the European Communities, Canada, Australia and New Zealand had requested consultations with India under Article XXII:1 of GATT 1994.[24] The United States, like other complaining parties, had requested to be joined in all the consultations under Article 4.11 of the DSU, on the basis of a documented claim of substantial trade interest in this matter. Article 4.11 of the DSU provided that a Member making such a request "shall be joined" if the Member to which the request for consultations had been addressed would agree that the claim of substantial trade interest was well founded. In this case, India had rejected the US request and those of other complaining parties without providing any legitimate grounds for this rejection. At the same time, it had accepted the Article 4.11 request of Japan.

Under Article 4.11 of the DSU, the only ground provided for rejecting a request to be joined in consultations was the absence of a substantial trade interest. India had not asserted that the United

[24]WT/DS90/1 (US), WT/DS96/1 (EC), WT/DS92/1 (Canada), WT/DS91/1 (Australia), WT/DS93/1 (New Zealand).

States lacked a substantial trade interest in this matter. In the consultations held under Article XXII, India had agreed that his country had a substantial trade interest. India had also rejected the Article 4.11 request of the European Communities, its leading trade partner. The United States had no less a substantial trade interest than Japan, which India had permitted to join in the consultations. The United States was disappointed that the Indian delegation was using such procedural trifling. In spite of the handicaps imposed by economic autarky and a restrictive import policy, India had been a leader in favour of trade expansion and development during the 50 years of the GATT. Invoking procedural technicalities would not change the outcome of the dispute concerning India's quantitative restrictions and prohibitions on imports. It would only create disrespect for the dispute settlement process.

The representative of India said that his delegation did not wish to respond to the views expressed by the United States regarding India's economic policies, such as the "handicaps imposed by economic autarky", since this should be addressed in the appropriate forum, namely the Trade Policy Review Body. With regard to the legal position, India was convinced that once a Member's request for consultations was accepted -- this Member being the "consulting Member"-- there was no legal requirement to permit the consulting Member to join in the consultations held with other consulting Members. The logic was as follows: the first sentence of Article 4.11 of the DSU began with the expression: "Whenever a Member other than the consulting Members considers …". It was clear that there could be more than one consulting Member, since the expression used was "consulting Members". Therefore, the United States was a consulting Member in this case. It was clear from Article 4.11 of the DSU that a request to be joined in the consultations had to be made by a Member other than a consulting Member. Therefore, a consulting Member could not make a request to be joined in the consultations of another consulting Member. There was also no mandatory provision in Article 4.11 of the DSU that joint consultations should be held with all consulting Members. Therefore, in India's view, the United States could neither insist on joint consultations in the absence of any mandatory provisions to that effect nor could it validly make a request to be joined in the consultations held by India with other consulting Members.

In India's view, this interpretation was reinforced by the sentence in Article 4.11 of the DSU which stated that if a request to be joined in the consultations was not accepted, the applicant Member was free to request consultations under Article XXII:1. In other words, it was clear that a request for joining in the consultations had to be made by a Member which had not already requested consultations under Article XXII:1. Furthermore, it was clear that a direct request for consultations under Article XXII:1 and a request for joining in the consultations under Article 4.11 of the DSU held with another Member should be treated as mutually exclusive. If not, it was possible for a Member to request consultations with India, which the latter could not refuse and insist on being allowed to join in the consultations India might hold with every other consulting Member. This would amount to harassment. Another issue related to the manner in which Japan's request for joining in the consultations should have been treated by India. The difference between Japan and other Members was that Japan had not requested consultations pursuant to Article XXII:1. Therefore, it had been allowed to join in the consultations held by India with some of its trading partners.

The representative of Canada said that her delegation shared the concerns expressed by the United States with regard to India's application of Article 4.11 of the DSU and that this meeting had not been the first time that India had provided its explanation concerning its application of Article 4.11 of the DSU. On several occasions, Canada had made its views known to India which were similar to those just expressed by the United States. She regretted that after India's explanation it was still unclear why it continued to apply Article 4.11 of the DSU in this manner.

The representative of New Zealand said that like the United States and Canada, his delegation shared the concerns expressed on India's application of Article 4.11 of the DSU. New Zealand believed that any country that had a well-founded claim of a substantial trade interest with regard to the subject

of Article XXII:1 consultations was entitled to be joined in those consultations whether or not it requested its own consultations. The refusal of well-founded requests to be joined in consultations was not in the view of New Zealand conducive to an efficient functioning of the dispute settlement mechanism. Although his delegation had noted the points made by India in support of its interpretation, it considered that the object and purpose of the DSU would support an interpretation along the lines proposed by the United States.

The representative of Hong Kong, China, said that the part of Article 4.11 which the United States had quoted referred to "substantial interest" and not to "substantial trade interest". He wished to raise this point because Members that might not have a substantial trade interest in quantifiable terms might nevertheless, in his delegation's view, still have a substantial interest in the matter at issue.

The representative of Australia said that his delegation was also concerned about India's application of Article 4.11 of the DSU. It failed to understand India's reasoning given Australia's and other interested parties' substantial trade interests. Australia had already made its views known to India during the consultations held under Article XXII:1.

The DSB took note of the statements.