WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/54
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Dispute Settlement Body
25, 28 and 29 January and 1 February 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 25, 28 and 29 January and 1 February 1999

Chairman: Mr. Kamel Morjane (Tunisia)

Subjects discussed: Page:

Prior to the adoption of the agenda

The Chairman said that the meeting which initially was scheduled for the morning had been postponed to the afternoon due to some problems related to the banana dispute. He had proposed to postpone the meeting since it was in the interest of both the parties concerned and the dispute settlement system to try to find a solution to the problem at hand. His main objective was to take into account the interest of the system and the need to respect the rights of all parties concerned. For his part, the Director-General had also done his utmost in order to help the parties to reach an acceptable compromise. He regretted that, thus far, it had not been possible to reach such a compromise. He invited the Director-General to report on the work done thus far. Following the Director-General's statement, he would adjourn the meeting for thirty minutes to allow time for further consultations to enable delegations to review the statement.

The Director-General made the following statement: "I would like to clarify for the benefit of all Members my activities in recent days in respect of matters involving bananas. In order to protect and promote the dispute settlement mechanism, which is a fundamental part of the WTO, I have met frequently in the last few days with the Ambassadors of the European Communities and of the United States. The Chairman of the DSB, Ambassador Morjane has attended at many of these meetings. There is a disagreement between the EC and the United States over the procedures to be followed in respect of assessing implementation of the recommendation of the DSB in the banana case. The EC believes that the procedures of Article 21.5 of the DSU should be completed in the first instance; United States believes it has an independent right to seek authority to suspend concession under Article 22. My efforts in this matter have been based on keeping the issues within the system of rules of the Dispute Settlement Understanding, respecting the rights of all parties and allowing all parties to exercise the rights they claim to have. The EC has exercised its rights to pursue its arguments before the original panel in the two Articles 21.5 proceedings that are now ongoing. The United States has exercised its rights to request authority to suspend concession under Article 22. My suggestion is that, in light of the request by the United States, the EC would exercise its right in this context to refer the matter to arbitration under Article 22.6. A request for arbitration by the EC would mean that the DSB would not consider the United States request under item 7 of today's Agenda and the matter would be referred by the DSB to the original panel where available or, if not, to an arbitrator appointed by the Director-General in accordance with Article 22.6. Pursuant to Article 22.7 the Dispute Settlement Body would revert to the United States request following the decision of the arbitrators. In order to move this matter forward within the system, I have suggested that both parties exercise their rights as outlined above. While it has not been possible to resolve all of the problems associated with this matter by this afternoon, I remain hopeful that it will be possible for both parties to move forward within the system, without prejudice to the rights of either party. In this way, the process of starting to resolve these difficult issues within the system of the DSU rules can begin. In a similar spirit, I hope that the parties will pursue the recent requested consultation under Article 4 in order to reach a mutually agreed solution on the substance of the matter. In all my suggestions to both parties I have never asked anyone to make "concessions", but only to exercise their normal rights as contained in the Dispute Settlement Understanding, in a non-confrontational spirit. No party's existing rights would be undermined by following the approach I am suggesting since the exercise of rights cannot be seen as a concession or an agreement with another party's position. Perhaps it would be useful as you have proposed to suspend the meeting for a short time to allow Members to consider my remarks."

The Chairman thanked the Director-General for his statement and said that the meeting would be adjourned until 4 p.m.

Upon the resumption of the meeting, the Chairman proposed that the DSB adopt the agenda.

The representative of Dominica said that his delegation wished to comment on the content of the agenda, namely item 7; i.e, the US request for authorization to suspend the application to the EC of concessions or other obligations under the covered agreements pursuant to Article 22.2 of the DSU.

The representative of the United States, on a point of order, said that the first item of business at the present meeting was the adoption of the agenda and, at this stage, it was not appropriate to make long statements.

The Chairman sought confirmation whether Dominica had objections with regard to item 7 of the agenda of the present meeting.

The representative of Dominica confirmed that his delegation could not agree to the adoption of the agenda if item 7 was contained therein.

The representative of Colombia proposed an inclusion of an item under "Other Business".

The representative of India also proposed an inclusion of an item under "Other Business".

The representative of Saint Lucia supported the statement by Dominica. Her country had strong objections with regard to item 7 of the agenda. In the view of Saint Lucia this was a constitutional issue. The DSB had no jurisdiction at this stage to consider a request for suspension of concessions based on non-compliance. This was not a situation of non-compliance and therefore the DSB had no jurisdiction to exercise its functions on a matter not within its functions as defined by the strict terms of the DSU. This was a point of principle that blocked the inclusion of the item on the agenda.

The representative of Honduras said that any delaying tactics threatened a possible solution and that a DSB's decision to be taken by consensus should be free from such delaying tactics. If not, this would set a precedent with regard to other decisions to be taken in accordance with the negative consensus rule. The time-period to exercise the right under Article 22.2 was 60 days after the date of the expiry of the reasonable period of time, which in this case was 1 January 1999. It was therefore obvious that any delaying tactics would undermine the legitimate rights of the complainant.

The representative of the European Communities said that his delegation supported the statements by Dominica and Saint Lucia. He had a number of points similar to those expressed by the above-mentioned delegations but, at this stage, he wished to limit his statement to one comment. The right to seek authorization to retaliate under Article 22 was not an absolute right but a conditional one. The condition that had to be satisfied was expressed very succinctly in the first sentence of Article 22.2, which read as follows: "if the Member concerned has failed …to comply with the recommendations and rulings". That condition had not been satisfied. Some parties, in particular the United States, had their views and some others, in particular the EC, had other views, but the condition that a Member had failed to comply had not been satisfied. Therefore, a request under Article 22.2 could not be made and the time-frame contained therein did not apply.

The representative of Côte d'Ivoire said that, like Saint Lucia and Dominica, her country could not accept the inclusion of item 7 on the agenda because, to-date, it had not yet been determined whether the measures taken by the EC were in conformity with the DSB's recommendations.

The representative of the United States said that at the 25 November meeting, her delegation had made a detailed statement. It was her delegation's view that Article 22 gave a party an absolute right to withdraw concessions not later than 60 days after the expiry of the reasonable period of time. It did not require to delay recourse to Article 22 until a panel had ruled on the consistency of the responding party's new measure in accordance with Article 21.5. The DSU did not specify that Article 21 was a precondition to Article 22. The EC's interpretation of Article 21.5 would render

Article 22 inoperative as all actions under Article 22 had to take place within the 60-day period after the end of the reasonable period of time. In accordance with treaty law interpretation, one could not adopt a reading of a treaty that would render whole clauses or paragraphs thereof inoperative. If, at the present meeting, the EC and other delegations blocked the adoption of the agenda, this would have consequences for the entire system. The United States had followed the requirements of Article 22, and the DSB procedures, by timely placing its request for the authorization of retaliation on the agenda of the DSB meeting. The DSB was required to take a decision on the US request in accordance with the negative consensus rule. The situation stipulated in Article 22.2 existed and therefore Article 22.6 had to apply. The EC, by blocking the agenda, would create a positive consensus rule that would enable Members to block decisions concerning rights obtained after the adoption of panel reports. Therefore, the position of the EC and of other delegations constituted a step backward to the pre-WTO era. At that time, under the GATT-system, the EC had consistently blocked dispute resolutions in cases related to canned fruits, oilseeds, hormones and, on two occasions, had blocked the adoption of the panel reports on the EC's banana regime. The EC wished to maintain its banana regime at all cost, including at the cost of destroying the dispute settlement system and the WTO. It was the EC practice under the GATT 1947 that had led to certain changes in the Uruguay Round, which constituted a critical element of the overall package under the DSU.

The representative of the European Communities said that he wished to raise two points of order. He clarified that the EC had not stated that it would block the adoption of the agenda or that it could not accept the adoption of the agenda. He had stated that the EC supported the arguments made by two delegations to this effect. The second point of order was that, at this stage, long statements on substance should not be made. In his view it was not necessary to reiterate the aspects of the dispute that were no longer relevant.

The representative of the United States recalled that at the DSB meeting when the EC had circumvented all the procedural steps and had requested the DSB to establish a panel, no attempt had been made to block the agenda. Therefore, if the present meeting did not go forward, the United States could not exercise its rights under the DSU. Under such conditions, public international law permitted the imposition of countervailing measures at the discretion of the winning party.

The representative of Saint Lucia said that in response to the statements made at the present meeting, her delegation wished to underline that its point of order should not be understood as a delaying tactic but it was in accordance with a fundamental constitutional right. Members often referred to past practice as a means to interpret a constituent document under the Vienna Convention in accordance with customary rules of international law. She drew attention to Article 22. 6 which read as follows: " when the situation described in paragraph 2 occurs". The situation described in paragraph 2 was when the Member concerned failed to bring the measure into conformity with the DSB's recommendations. Article 23.2 (a) stated that a Member should not make a unilateral determination as to whether measures conform or not conform to the WTO Agreement. As a small country, Saint Lucia was concerned that if the provisions were to be interpreted to infer that a powerful complainant could threaten retaliation on the basis of its unilateral determination of non-compliance, then the DSU did not protect small countries that were not in a position to retaliate. In her country's view, if the rule of law was to be subverted this constituted a constitutional issue. The issue was not that of delaying but a matter of principle and a constitutional issue and as such should not be compromised.

The representative of Panama proposed an additional item under "Other Business".

The representative of Guatemala wished her delegation to be associated with the statements made by Honduras and United States.

The Chairman said that item 7 on the agenda had been challenged by some delegations. It was a WTO practice to allow Members to place any item on the agenda. Therefore, in conformity

with that practice he had accepted the inclusion of item 7 on the agenda. Some delegations had raised objections with regard to item 7. He therefore asked the following question: " Are there any delegations against the adoption of the agenda, including item 7 and the three items under "Other Business? ".

The representative of Saint Lucia said that in light of the Chairman's statement, her delegation wished to underline that by adopting the agenda it should not be inferred that Saint Lucia considered that, at this stage, the US request under Article 22.2 was within the functions of the DSB. The issue was irregular procedurally and constitutionally.

The representative of the European Communities said that his delegation supported the arguments made by two delegations to the effect that they could not accept the agenda. The Chairman had asked whether delegations were in a position to accept the agenda, and it was his understanding that delegations had clearly opposed it. If the two delegations did not wish to reiterate their objections, he wished to further consider this issue since this was a point on which a ruling was still required. He also wished to make some other points before the adoption of the agenda. In his view, the two delegations had clearly stated that they did not accept item 7 on the agenda, and he was not sure whether they wished to withdraw their objections.

The representative of Dominica said that his delegation continued to believe that the conditions for item 7 to remain on the agenda had not been met. Dominica was not in a position to withdraw its objection.

The representative of Saint Lucia supported the statement by Dominica.

The representative of Côte d'Ivoire said that her delegation was not in a position to accept item 7 on the agenda.

The Chairman said that he had asked whether delegations accepted the agenda and some delegations had stated their objection with regard to item 7 on the agenda. In accordance with past practice and the spirit of the WTO, the consensus rule had never prevented the right of a government to include issues on the agenda. He asked whether delegations could agree to the adoption of the agenda including item 7 and the three items under "Other Business". He was obliged to ask this question because the agenda had to be adopted by consensus. Some delegations did not wish item 7 to be on the agenda. He was not sure whether these delegations would accept the ruling to adopt the agenda with the inclusion of item 7 and the three items under "Other Business".

The representative of Saint Lucia wished to draw attention to some important implications concerning the Chairman's ruling. Article IX:2 of the WTO Agreement provided that the Ministerial Conference and the General Council had the exclusive authority to adopt any interpretation. The Chairman had the authority to accept an item on the agenda on the understanding that this did not prejudice the rights of Members. If the acceptance of the item on the agenda would infer that the DSB had the right to consider it, then this would prejudice Members' rights. This was a fundamental constitutional issue since the DSB did not have the authority to deal with this matter.

The Chairman said that he had not referred to the substance but to the principle without referring to different arguments raised at the present meeting. It was not up to him to interpret whether or not Article 22 was conditioned upon recourse to Article 21.5. He could not make a ruling on this matter. A letter had been sent by a number of Members proposing a solution to this problem. It was difficult to reach a consensus on the interpretation of the relationships between Articles 21 and 22. It was up to the Ministerial Conference to decide on this matter, not to the DSB. However, he proposed to include this item on the agenda to allow Members to express their views. He then reiterated his question whether Members could agree to the adoption of the Agenda with item 7

contained therein and the three items under "Other Business". It was not his intention to interpret the substance of the matter.

The representative of Dominica sought clarification with regard to the Chairman's ruling.

The representative of the European Communities said that two delegations had objected to the adoption of the agenda. The Chairman had asked whether these two delegations were in a position to accept the agenda with item 7 contained therein. The answer to that question was negative. The Chairman had reiterated the question but the reply was again negative. The EC was prepared to support these two delegations. Decisions in the DSB were taken by consensus and it was evident that there was no consensus on the adoption of the agenda at the present meeting.

The Chairman said that there were two stages in the adoption of the agenda. First, one had to ask if there were any additional items proposed for inclusion on the agenda. Then the question was whether the agenda could be adopted including any amendments. There was no consensus on the adoption of the agenda. This had been confirmed by the EC. Therefore if the agenda was not adopted, he had no choice but to stop the meeting. Additional time was required for consultations in order to reach a consensus for the adoption of the agenda.

The representative of the United States sought confirmation of her understanding that if item 7 was not on the agenda, and the DSB could not agree to adopt the agenda, the meeting would be closed.

The Chairman confirmed the US understanding. He said that there was a difference between not accepting an item on the agenda by consensus and not accepting the entire agenda by consensus. He had to stop the meeting because there was no consensus on the adoption of the entire agenda. He had asked the question to this effect and the response was negative. He was therefore obliged to stop the meeting.

The representative of Turkey said that this case would prejudge the future of the institution and its work. Therefore, if the Chairman were to close the meeting, a practice would be established that one delegation could block proceedings of meetings in future. He proposed to suspend the meeting in order not to set a precedent. His delegation was ready to remain in the room as long as necessary in an effort to solve the problem because the future of the WTO was at stake.

The Chairman said that this was an important matter that could have implications for the WTO's jurisprudence in future. He thanked Turkey for its proposal and said that his intention was to close the meeting and to convene another meeting as soon as possible.

The representative of Japan said that his country had serious concerns about the procedural aspect of the issue. Delegations had been waiting for a considerable period of time and had been hoping that the issue would be settled. After five hours, delegations were confronted with the question of whether or not one item should remain on the agenda. He stressed that meetings should not be delayed and should start promptly. He shared the point raised by Turkey and questioned whether the course of action at the present meeting was correct. The item had never been removed from the agenda and it was the normal procedure that the General Council and the DSB could amend the agenda or give priority to certain items, at any time, in the course of the meeting. In his view, the agenda had to be amended by consensus.

The Chairman said that the meeting had been delayed because it had been hoped that a compromise could be reached. With regard to amendments to the agenda, delegations were entitled to propose amendments thereto. However, an amended agenda had to be adopted by consensus. He had asked twice to ensure that the positions of delegations were clear on this matter. He regretted that there was no consensus on the adoption of the agenda.

The representative of the United States said that she had not asked the Chairman to close the meeting but had sought clarification with regard to his statement. The United States could accept the adoption of the entire agenda but could not accept any deletions or additions thereto or a suspension of the meeting to postpone the consideration of one item. Therefore, if the agenda were to be adopted, all items contained therein would have to be considered without suspending the proceedings.

The representative of the Philippines sought clarification with regard to the Chairman's ruling. It was his understanding that if no amendments to the agenda had been proposed at the present meeting, delegations could not have blocked the adoption of the agenda. However, since some amendments had been made this had given the right to delegations to block the agenda.

The Chairman said that even if no amendments had been made, the agenda had to be adopted by consensus.

The representative of Japan referred to his interpretation of the Rules of Procedure and said that the first item of business was to consider and approve the agenda. Delegations could suggest amendments or additions to the proposed agenda. In the case at hand, item 7 was already on the agenda. Dominica and Saint Lucia had proposed an amendment but Guatemala, Honduras and the United States had objected thereto. There was no consensus on the amendments made to the agenda and therefore the agenda should be adopted as proposed. With regard to the additional items to be raised under "Other Business", if there was no objections, these items should be included on the agenda. Under the circumstances, it was necessary to establish a correct interpretation of the Rules of Procedure.

The representative of Panama said that in light of the need for consensus on adoption of the agenda, his delegation did not wish the meeting to be closed. To this effect, Panama supported the view expressed by Honduras.

The Chairman proposed to adjourn the meeting in order to allow time for further consultations.

The representative of the United States sought clarification from the Chairman as to whether it was possible to adjourn the meeting that had not yet started.

The Chairman said that although the agenda had not yet been adopted some delegations wished to continue the proceedings of the meeting and believed that more time should be allowed for consultations. He proposed to resume the meeting on 26 January in order to allow more time on how to reach a compromise on the adoption of the agenda. He proposed to close the meeting with a view to resuming as soon as possible. In the meantime, consultations would continue.

The representative of Japan said that his delegation was concerned the Chairman had proposed to close the meeting. If the meeting were to be closed by the Chairman a notice convening another meeting would have to be circulated, which his delegation could not accept.

The representative of the Philippines said that while his delegation agreed that the best course of action would be to suspend the meeting it was concerned with the reason for the suspension. Since the adoption of the agenda had been blocked, the proceedings of the DSB could be paralysed, if delegations continued to block the agenda. This case involved important trading partners. However, the system should not be sacrificed even for major players. His delegation while accepting the suspension of the meeting did not support the reasons justifying the suspension.

The representative of Turkey said that one should not accept the situation that any delegation could block in future any WTO meeting. The point made by Japan to this effect was relevant. There

should be an understanding, as indicated by the Philippines, that the meeting should not be prolonged indefinitely. The meeting should be reconvened shortly perhaps later in the day because the future of the WTO was at stake.

The Chairman said that when he had proposed to close the meeting, his intention was to resume the meeting as soon as possible. He believed that the position expressed by Turkey was shared by a number of delegations.

The representative of Ecuador endorsed the concerns expressed by Turkey to the effect that this decision would have implications for the dispute settlement system. At the 15 and 21 December meetings, Ecuador had expressed its concerns that the dispute settlement system could be undermined and that Members' rights could be affected. It was important not to set a precedent that would allow Members to block an item or a DSB agenda in future. This would affect the interests of Members. It was the Chairman's responsibility to preserve and defend the system. It should not be possible to block the agenda. If not, the DSB would not be able to function because delegations could object to the inclusion of items on the agenda. It would not be appropriate if other issues on the agenda of the present meeting were not taken up for consideration by the DSB. This would undermine the WTO's efficiency and would not be fair to developing countries that placed their trust in an efficient and effective dispute settlement system.

The representative of the European Communities responded to the point made by Japan. It would have been possible for the agenda to be amended by deleting one item. However, the question asked by the Chairman implied that the whole agenda had to be adopted. The agenda could have been adopted with the deletion of one item but that decision would have to be taken by consensus. A decision to approve the whole agenda also required to be taken by consensus. Saint Lucia had correctly stated that the case at hand involved constitutional implications. This situation should not lead to a precedent. At the present meeting there was no consensus on the adoption of the agenda. One delegation was asserting its rights despite the fact that its rights were not legally founded since the conditions under Article 22 had not been met, and despite the fact that the General Council had been asked to make an interpretation on this matter. This was not only a question of one delegation's right to refuse but also another delegation's right to insist.

The representative of Canada said that her delegation supported the concerns expressed by the Philippines. Canada would have made comments on item 7 if that item had been discussed. Canada was in favour of the Chairman's suggestion to allow more time to enable the parties to carry out consultations.

The representative of Mexico said that the issues raised had important systemic implications. His delegation supported the Chairman's proposal to adjourn the meeting. The meeting should be suspended and delegations should agree when they wished the meeting to be resumed. In the meantime, an informal meeting of the DSB should be held to enable Members to exchange their views on the Rules of Procedure. It would be useful to discuss these issues in light of the statement by Japan. The issue had some systemic implications and was not only related to the banana dispute. There should be a common interpretation of the Rules of Procedure.

The Chairman thanked Mexico for its proposal and invited the Director-General to draw his conclusions.

The Director-General said that he had followed the discussion with a lot of concern. He thanked Turkey, Mexico and other delegations that had rightly underlined the fundamental systemic issues in the discussion, which not only concerned bananas but the entire system and its functioning. The proposal to adjourn the meeting for a short period of time was the best way to oppose the idea that a few delegations could block one item on the agenda or adoption of the agenda. Therefore, it

was correct to oppose this by suspending the meeting and to continue the discussion with a positive spirit that would lead to a solution of the problem.

The Chairman thanked the Director-General and the delegations for their statements and proposals. He proposed to adjourn the meeting. He would inform delegations as soon as possible when the meeting would be resumed. The meeting could be resumed on short notice. In the meantime, he would try to hold an informal meeting as proposed by Mexico.

The representative of the United States said that the meeting should be adjourned until the next day.

The Chairman proposed to adjourn the meeting until the next morning, at 10 a.m.

The DSB so agreed.

Upon the resumption of the meeting on 28 January, the Chairman recalled that on 25 January he had ruled to the effect that item 7 should remain on the proposed agenda. That ruling was based on a long-standing GATT/WTO practice. In accordance with that practice any Member could suggest items for inclusion in the proposed agenda. At that meeting, some delegations had considered that the ruling was correct since, in accordance with Rule 6 of the Rules of Procedure, the proposal to delete item 7 from the agenda constituted a modification of the proposed agenda and no consensus had been reached to modify the agenda. Due to lack of consensus on the adoption of the agenda the meeting had been suspended in order to allow time for consultations on, *inter alia,* the Director-General's proposal. On 26 January, an informal DSB meeting had been convened to discuss possible courses of action. He and the Director-General had held consultations with delegations, including the EC and the United States in an effort to find a solution. To this effect, an informal proposal had been received from the EC and a formal proposal from other Members. He regretted that to-date no solution had been found. The Chairman's role was to settle procedural questions related to the conduct of business. The Rules of Procedure for meetings of WTO bodies should not modify the rights and obligations of Members under the WTO Agreement. In particular, they should not be so interpreted as to block meetings in cases where a Member had the right to request a specific decision unless there was a consensus against such a request. He proposed that the meeting continue on the basis of the proposed agenda including the three items under "Other Business". He also proposed that item 7 be considered first. Any point of order in relation to item 7 could be taken up during the consideration of that item.

The representative of the European Communities said that he did not wish to challenge the Chairman's ruling. The EC was prepared to work on the basis indicated by the Chairman and wished to proceed to the substance of item 7. It was the EC's view that the DSB's decision to adopt the agenda had to be taken by consensus. It appeared that the Chairman had reversed this and that in future the agenda would be adopted unless the DSB decided by consensus not to do so. Rules 6 and 7 of the Rules of Procedure were the prerogative of Members and were not part of Chapter VI of the Rules of Procedure dealing with the conduct of business. Therefore, the Chairman could not rule on this matter. In the case at hand, the EC believed that the Rules of Procedure were being modified, and in accordance with Rule 39 of the Rules of Procedure, the General Council had the authority to revise these Rules. The EC did not wish to pursue this issue and despite its reservations would accept the Chairman's proposal in order to be able to deal with the substance of item 7.

The representative of Saint Lucia said that in the spirit of compromise, her delegation wished to move forward with the agenda on the understanding that the adoption of the agenda was not a tacit ruling on the jurisdiction of the DSB to deal with any item on the agenda and that the issue of competence, as a point of order, might be raised at any time before a substantive discussion so as to deal with the competence of the DSB at any time thereafter.

The representative of the Philippines said that his delegation had concurred with the Chairman's ruling. The Philippines considered that the Chairman had the authority to make the ruling. He noted that the Chairman had stated that the Rules of Procedure would not prevail over the substantive rights of Members under the DSU. It was his delegation's understanding that the Chairman's ruling was based on automaticity in the DSU provisions and would only apply to the DSB, not to other WTO bodies.

The Chairman proposed that the DSB adopt the agenda and that item 7 be taken up for consideration as the first item on the agenda.

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

(a) Recourse to Article 22.2 of the DSU by the United States (WT/DS27/43)

The representative of Saint Lucia on a point of order, questioned the competence of the DSB to deal with the substance of this matter. She contended that it was premature for the DSB to deal with or receive the US request. In her view, the request was untimely, because the DSB had deliberative powers only in certain limited circumstances. This was because the WTO was an international institution and not a sovereign entity. Its powers were limited by the agreements and each WTO body had limited competence. The DSB had the same membership as the General Council, but its functions were more limited. The General Council was the exclusive authority to interpret the US request in accordance with Article IX:2 of the WTO Agreement. She believed that the conditions for a Member to make a request under Article 22.6 had not been satisfied and therefore the DSB had no jurisdiction to consider the request. Article 22. 6 referred to the situation described in Article 22.2, which she believed had not arisen. She drew attention to the first sentence of Article 22.2 which read as follows: "if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith". The measure found to be inconsistent by the panel had been radically modified by the EC. The DSB was not competent to decide on the conformity of the new measure with the WTO Agreement. As provided for under Article 23.2(a), a Member could not make a unilateral decision. The issue at hand was currently being examined by the panel in accordance with Article 21.5. It appeared that there was disagreement among Members on the issue of competence of the DSB to deal with this issue. The issue of competence was related to the interpretation of the DSU. Article IX:2 of the WTO Agreement stipulated that the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations. The DSB did not have the competence to deal with this matter since this was an institutional issue. The role of the DSB was to ensure procedural and substantive justice.

The representative of the United States said that on 14 January her country had submitted a request for authorization to suspend application to the EC of concessions covering trade barriers at US$ 520 million. This level of suspension was equivalent to the level of nullification and impairment of the United States' rights under the GATT and the GATS that had resulted from the EC's failure to comply with the DSB's recommendations. The EC's reasonable period of time for compliance had ended on 1 January 1999. Unless the EC at the present meeting contested the level of the suspension of concessions, the US request had to be authorized by the DSB, pursuant to Article 22.6 unless there was a consensus to reject it. Since the United States would not object to its request, the authorization had to be granted at the present meeting. She underlined two points with regard to the course of action. First, it was regrettable that the United States had to make its request at the early stages of the operation of the dispute settlement system. The first few cases had resulted in positive solutions which were mostly consistent with the WTO Agreement. The United States had implemented or was in the process of implementation of four rulings which were against it. The suspension of concessions was always a last resort. The DSU stipulated that the preferred solution was always one that was mutually agreed upon and consistent with the WTO Agreement. From a domestic perspective, the suspension of concessions was a drastic action. However, after the end of the reasonable period of

time for compliance, the Member that had a discriminatory WTO-inconsistent regime, had to understand that there would be a cost if the rights of Members were nullified and impaired for a long period of time. The Members that had suffered the nullification had to obtain redress in order to restore the balance of rights and obligations. Article 22 provided for the suspension of concessions and the United States had insisted that, as a fundamental part of the Uruguay Round package, the application of that Article would be automatic. However, nothing, not even the action to seek authorization, could restore to the United States or to the other complaining parties the time spent on litigating the banana dispute and exports lost in the three years while the United States had hoped in vain that the EC would pay attention to its concerns. The US losses went back to 1993 when the EC regime had first come into effect. The United States regretted its request but recognized that unless it insisted on the enforcement of its rights, the DSB's recommendations would be merely paper victories without tangible economic gains, which should follow as a result of enforcement of WTO obligations.

Secondly, the EC had full responsibility for the situation that the DSB was facing. The complaining parties and Panama had made consistent efforts over the past 18 months to ensure EC's compliance. In July 1998, the United States had wished to reconvene the original panel in time to render a report on the modified EC regime before the end of the reasonable period of time. However, the EC's conduct had been aimed at delaying WTO procedures in prolonging its discriminatory banana regime. In the summer of 1998, the EC had refused to cooperate for a recourse to the original panel to review the new measures. In August, the EC had insisted on holding consultations which had been delayed and in September, it had threatened to block the US request for a panel on the basis that the consultations had not been held. The United States was prepared to invoke Article 22 rights while the EC sought a panel. The EC had requested the establishment of a panel to examine its measures without holding prior consultations. While the United States wished that the EC would bring its measures into prompt compliance by some other means, it was convinced, and the EC's procedural manoeuvres at the present meeting had confirmed this, that the EC would not enter into negotiations of a mutually acceptable solution unless there was some tangible harm. The experience of the United States and other countries had demonstrated that the panel's rulings did not provide sufficient incentives for the EC. Therefore, the United States was asserting its rights under Article 22 for the purpose for which they had been intended: i.e, to obtain a balance of rights and obligations and to improve the chances for the negotiation of a mutually accepted solution consistent with the WTO Agreement.

The representative of the European Communities on a point of order drew attention to the US request in WT/DS27/43 which contained the following: "these [EC] regulations perpetuate discriminatory aspects of the EC's banana regime…. Therefore, these amendments fail to bring the EC's banana regime into conformity with the EC's WTO obligations….The United States thus is entitled to redress under Article 22 of the DSU." It was surprising what the United States was trying to do. The EC had modified its banana regime and maintained that it had complied with the DSB's recommendations. In reality, the US request meant that the United States considered that the EC's implementing measures perpetuated discriminatory aspects of the banana regime. Furthermore, the United States in considering that the EC's implementing measures had failed to conform was therefore entitled to suspend concessions.

The representative of Saint Lucia raised three crucial points. First, she stated that the conditions of Article 22 had not been met. The EC fully supported this argument. She had referred to the relevant parts of Article 22 paragraphs 2 and 6, and it was clear that the situation described in paragraph 2 did not exist. The condition under Article 22 was that a Member had to fail to comply and that condition had not been satisfied except in the opinion of one Member. The right of the DSB under Article 22 to authorize the suspension of concessions was explicitly made subject to a prerequisite, namely the failure by a Member to implement. Before granting authorization, the DSB should determine whether the measures taken to implement its recommendations conformed, and this had not been done. The DSB had established two panels to examine the conformity of the EC's measures and their rulings were now awaited. Therefore the conditions of Article 22 had not been

met. Second, as stated by Saint Lucia, Article 23 specifically excluded unilateral determinations on a number of issues, including that of whether implementing measures were in conformity with the DSB's recommendations. Article 23 which prohibited unilateral actions was a key DSU provision. If this provision were to be ignored the foundation of the multilateral dispute settlement system would disappear. Should the DSB accept the US request and act upon it, it would endorse a clear violation of the DSU provisions.

The EC supported the third point referred to by Saint Lucia. If the DSB were to take action on the US request while the conditions in Article 22.2 and 22.6 had not been met it would amount to an interpretation implying that the conditions had been met. The United States believed that a Member had failed to comply. This was an offensive situation for two reasons. First, if an interpretation of the provisions was required then the General Council, not the DSB, had to deal with this matter. Second, there was no factual basis for the DSB to decide that a Member had not complied in this case.

The US statement was a one-sided presentation of the situation. He made four points to demonstrate that attempts had been made by the EC towards finding a solution to the problem. First, since September 1998, the EC had continued to propose to the United States the accelerated procedure under Article 25. The EC had been ready to limit to an absolute minimum its rights of defence reducing the already accelerated procedure of 90 days by more than half. There was still time for the United States to launch its own procedure. However, it had chosen not to participate in the procedures that had been invoked. Second, the EC had taken an unprecedented step of initiating Article 21.5 procedure in the hope of persuading the United States to participate therein. Thus far, the United States had refused to do so, but it was still possible for the United States to join the proceedings.

Third, the EC had made an informal proposal, which he confirmed at the present meeting, that the United States would not lose any of its rights to obtain authorization to suspend the concessions if its request were to be considered later: i.e., after the DSB had adopted the panel's or, in case the panel was appealed, Appellate Body's report under Article 21.5 procedure, provided that such a report had found that the EC's measures did not conform to WTO obligations. It was possible to reach an agreement endorsed by the DSB to preserve those rights. In the meantime the request would remain suspended which was also in line with the proposal made by Japan and some other delegations.

Fourth, the EC had recently submitted its request for an authoritative interpretation to the General Council on the question of the correct procedure to be followed by the DSB. If no consensus were to be reached at the present meeting, then the only option was an authoritative interpretation by the General Council. The United States had a legitimate right to obtain confirmation that its rights would be preserved. He had indicated various approaches to be followed in order to find an agreed solution to the problems so that the United States would not lose its rights. The United States would be able to use its rights later in accordance with the same procedure and timetable.

The representative of Mauritius drew attention to a letter sent to the Chairman by 15 countries requesting that the issue of competence be addressed.

The representative of the United States said that the only issue to be determined at the present meeting was whether there was a consensus to reject the US request for authorization to suspend concessions. Since the United States would not object to its own request there would be no such a consensus. In accordance with Article 22.6, the DSB's authorization would have to be granted. The discussion at the present meeting suggested that the question of the sequencing of Article 21.5 in relation to Article 22 was a procedural issue to be taken up in the DSU review. That question was already on the table in the DSU review. The DSU review was the proper forum for addressing the question of sequencing in the context of the issues related to implementation of the DSB's recommendations. Resolving this issue in the DSU review would enable Members to avoid similar

procedural discussions with regard to future cases. At present, the DSB was operating under the existing DSU provisions which did not provide that a panel finding pursuant to Article 21.5 had to precede action under Article 22.6. Nor was there any question whether the DSB was empowered to grant authorization for the suspension of concessions when requested by a Member in the context of Article 22. The DSB had a clear obligation to grant authorization unless it decided by consensus not to do so. A suggestion that a panel finding of non-compliance was a condition for request under Article 22.6 would lead to absurd results. For example, a losing party could take the same inconsistent measure and name it differently, or even do nothing with respect to its inconsistent measure during the reasonable period of time. This would also render meaningless the time periods provided for in Article 22, unless one accepted that the panel process under Article 21.5 had to take place within the reasonable period of time in order to be completed prior to the period in which the party could exercise its rights under Article 22.

In the banana dispute, the United States had repeatedly sought the EC's consent on Article 21.5 process in advance of exercising its rights under Article 22. If the EC had not tried to impose unacceptable conditions, that process could have been completed before authorization under Article 22 were to be granted. If the EC had accepted the US suggestion in July 1998 to reconvene the panel, the present discussion would not have ensued. The purpose of the present meeting was for the United States to exercise its rights under Article 22 as it had already informed the EC in July that it would do so. The United States did not suggest that this was preferred to a negotiated solution. In every case where US measures had been the subject of a DSB ruling, the United States had either immediately removed the measure at issue without replacing it with some other form of protection or had engaged in a constructive dialogue on implementation. The United States had tried for the past 18 months, to seek negotiations with the EC on a consistent solution to the banana case. She regretted that the EC thus far had been unwilling to do so. In 1998, the United States had proposed different substantive ideas on how the EC could implement a WTO-consistent banana regime. These ideas included both tariff and tariff-quota systems which would preserve specific preferences for the Caribbean countries. The United States continued to hope that a mutually satisfactory solution could be reached through negotiations. In the meantime, the decision that the DSB had to take at the present meeting in accordance with Article 22.6 would send a strong message to the world trading system that the WTO Agreement provided an effective mechanism to ensure compliance with WTO obligations, and that it did not encourage prolonged non-compliance or endless litigation. Article 3.3 of the DSU recognized that the prompt settlement of disputes was essential for the effective functioning of the WTO and for the maintenance of a proper balance between the rights and obligations of Members. Taking the decision that it was obligated to take, the DSB would avoid tipping the balance in favour of a Member that had maintained an import regime that nullified and impaired benefits of several other Members in disregard of multilateral recommendations. The DSB did not have a right to authorize, but rather a right to disapprove under Article 22.

The representative of Japan wished to express his delegation's views on the point of order raised by St. Lucia. Disagreement with regard to the compliance by the EC with the panel's and the Appellate Body's rulings still existed. In Japan's view, when there was disagreement, a prevailing party could not resort to Article 22.6 without resolving this disagreement through the process of Article 21.5. At the same time, Japan recognized the right of the United States to request the authorization of suspension of concessions within the 30-day period as stipulated in Article 22.6. For this reason Japan had made the proposal contained in document WT/DSB/W/91, which was supported by a number of Members. However, since there was no agreement between the parties as to the procedures of Article 21.5 and 22.6, Japan supported the point of order raised by St. Lucia that the DSB was not in a position to take a decision on the US request.

The representative of the European Communities said that the United States had stated that the DSU did not require the sequence to invoke Article 21.5 before Article 22. The EC had not argued this but that the DSB, in the absence of a factual basis, was not in a position to determine whether the Member had failed to comply. Since the panels had been asked to rule on this, it would

be logical to have such rulings first. The United States had argued that if the Article 21.5 process had to be terminated before the DSB could decide on the US request it would effectively nullify their rights. That argument worked both ways. If the Article 21.5 procedure had been launched, and in this case it had been launched before the end of the reasonable period of time, and if a party then under Article 22 had sought to short circuit it that would nullify Article 21.5. In terms of international law no provision of a treaty should be reduced so as to render whole clauses or paragraphs of a treaty meaningless. This worked both ways. If the conditions of Article 22 did not exist in the sense that it had not yet been determined that a Member had failed to comply then the other provisions of Article 22 could not apply, including the timetable contained therein. Finally, the United States had stated, which was correct, that if the EC had agreed to launch this procedure in July 1998, the present discussion would not have taken place. However, when the United States asked the EC in July, its first regulation for the new regime had not yet been passed and furthermore its implementing regulation had been approved only at the end of October. Hence, when the United States had asked for a review under Article 21.5, the EC had not yet finalized any of its decisions.

The representative of the Philippines said that in accordance with Rule 18 of the Rules of Procedure, if a point of order was raised, the Chairman had to rule immediately and he could invite a discussion only if there was an agreement.

The Chairman proposed to adjourn the meeting for a short while in order to reflect on the issue.

The DSB so agreed.

Upon the resumption of the meeting, the Chairman said that he had decided to reject the point of order made by Saint Lucia because he could not take a decision on the legal validity of the US request and whether that request was in conformity with Article 22. This would be tantamount to an interpretation of the DSU provisions which was not within the powers of the Chairman. His decision was motivated in particular by the need to preserve the automatic nature of the DSU with regard to the establishment of panels, the adoption of reports, and the authorization of suspensions. To allow Members to block such measures for any reason, or for reasons not explicitly provided in the DSU, would jeopardise the dispute settlement system. His decision was consistent and in conformity with his previous decisions and, in particular, with his decision taken at the DSB meetings when he had not allowed the EC's request under Article 21.5 to be blocked, in spite of the fact that delegations had raised objections to the request. His decision would not leave the EC without defense. The EC could still prevent the authorization of suspension of concessions by requesting that the issue of the level of suspension be submitted to arbitration as stipulated in Article 22. The EC could bring before arbitration the fact that the appropriate level of suspension should, in the circumstances be at a zero level. He underlined that his decision was not an interpretation of the DSU provisions. It was without prejudice to any future decisions which might be taken in other WTO bodies. Since he had rejected the point of order, he proposed that the DSB proceed with the consideration of the US request.

The representative of Saint Lucia challenged the Chairman's ruling. She said that under Article 2, the responsibility of the DSB was to administer the DSU rules and procedures. The DSB could not undermine the dispute settlement process which was at the very foundation of the multilateral system. She said that the Chairman's ruling was a *de facto* interpretation of the DSU provisions. Article IX:2 of the WTO Agreement provided the explicit procedure for adopting interpretations and gave the General Council the exclusive authority to do so. The explicit provision in the WTO Agreement and other procedures for a formal interpretation had to prevail over less formal means that might be contemplated. Exclusive authority to adopt interpretations had been conferred to the General Council. The DSB had no authority when there was disagreement over fundamental rules of procedural justice. The matter had to be determined by the General Council.

The representative of Japan said that his delegation believed that the US request had not met the conditions in Article 22.1 and that the DSB could not accept that request. He asked when and how the DSB had determined, as stipulated in Article 22.1, that the recommendations had not been implemented within the reasonable period of time.

The representative of the European Communities said that his delegation also wished to challenge the Chairman's ruling. It was his understanding that the Chairman could not take a decision on the validity of the US request in relation to Article 22. It was clear that factually the request had not met the condition provided for in that Article. This was a conditional right only if the conditions were satisfied. It was clear that this was not the case, and that the Chairman did not wish to pronounce on it but since this was a factual issue, the question raised by Japan had to be answered. The Chairman had stated that he had been guided by the fact that in the DSU the negative consensus rule was designed to ensure that decision-making would be rapid, straightforward and automatic. In many cases, this feature had resulted in dramatic improvements in the dispute settlement system. Therefore, it was important to preserve this element. However, a request had been made which was not justified since the conditions had not been met. If the situation that a Member had failed to comply was demonstrated, then the timetable would apply and the negative consensus would ensure a rapid decision. He wished to reserve his delegation's right to raise these matters in the General Council because this amounted to an interpretation.

The representative of Dominica wished to associate his delegation with the views expressed by Saint Lucia and the EC. Dominica continued to believe that the DSB did not have competence, at this stage, to consider the US request. It was necessary for the procedures of Article 21.5 to be exhausted before a request for authorization to suspend concessions could be dealt with by the DSB. His delegation was prepared to join in a consensus to allow the adoption of the agenda on the understanding that the DSB had no competence to deal with this item at the present meeting. Some delegations had expressed an opposite view and there was a fundamental difference of opinion regarding the interpretation of the DSU provisions. This matter should be referred to the General Council for its consideration.

The representative of the United States said that her delegation agreed with the Chairman's ruling. With regard to the question raised by Japan, the United States believed that there was no requirement in the DSU that the DSB had to make a factual determination under Article 22.1.

The representative of India said that the DSB's decision at the present meeting would have important implications for all Members. Therefore, all delegations had a responsibility to bear the future in mind. He wished to speak from the point of view of the system without taking any position in the dispute at hand. First, the US request under Article 22 was based on the US assertion that the EC had not complied with the DSB's recommendations. He was not in a position to know whether or not the EC had complied with the rulings and recommendations. However, one had to be careful to ensure that a decision of the DSB was not taken on the basis of a mere assertion by the winning party because that would have implications for all. He did not wish to imply that the winning party was wrong but as pointed out by Japan, delegations were not in a position to know whether or not the US assertion was wrong. The question was who would decide on this matter. It was his delegation's understanding that the provisions of Article 21 and 22 had to be interpreted in a harmonious fashion. This would be a difficult task because the time-frames contained therein could lead to a conclusion that there was no linkage between the two Articles. India believed that when there was disagreement as to whether or not a Member had complied with the rulings, it would be up to the panel to determine the issue. It was important to accept this basic premise.

He drew attention to the Appellate Body's rulings in the shrimp case (WT/DS58) which had involved India, the United States and some other countries. In that case, the Appellate Body in paragraph 129 of its Report in interpreting Article XX of GATT 1994, had placed reliance on the WTO preamble. One important element of the preamble was that the parties to the Agreement

"*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade". The preamble emphasized the importance of the multilateral and rule-based approach, not a power-based multilateral trading system. Therefore, how was it possible to deal with a situation in which one Member had made a unilateral determination with regard to non-compliance by another Member. When there was disagreement, the DSB had the responsibility to interpret the provisions taking into account the objectives of the WTO Agreement and the long term interests of the system. At present, it would not be appropriate to decide on this issue since the banana dispute had generated passions and since there was a general perception that the EC was deliberately "dragging its feet". However, one should not base any decision on perceptions but make a clear finding that the EC was in violation. Like Japan, India did not have a factual basis to reach that conclusion. However, that did not mean that the EC had complied.

The second point related to the long-term implications of this issue. He was concerned that if at the present meeting the DSB accepted the US request, this would lead to a situation that a winning party could unilaterally determine that the other party had not complied and seek authorization to suspend concessions. Due to the negative consensus rule, the DSB would have no option but to grant such authorization. This was the consequence of the US request. He reiterated that it was not his intention to criticize delegations as he only wished to present the systemic implications. Any Member could find itself in a situation similar to that of the EC at the present meeting. He was concerned with the reading into Article 22 a rule for unilateralism, thereby legitimising recourse to unilateral actions. It was necessary to find a solution to this matter. Three options were available: one was an interpretation by the General Council, the second option was to preserve the rights of the United States and the EC as proposed by Japan in order to gain time and the third option was the Chairman's interpretation. In accordance with the DSU provisions subject to certain conditions, authorization had to be granted according to the negative consensus rule. The issue was that of competence of the DSB to determine whether or not the conditions had been met. He recalled that issue had been determined by the DSB in the past with regard to the EC 's request in the case "EC-Trade Description of Scallops". The EC had been a respondent in that case and a panel request which had been submitted to the DSB within 60 days for consultations, had been removed from the agenda on the grounds that the mandatory conditions of 60-day period had not been met. If in a hypothetical example, India requested a panel after announcing that it would not enter into consultations before requesting such a panel and had placed that request on the DSB's agenda, then due to the negative consensus rule, even if the request was inappropriate, it would have to be accepted by the DSB. If a request was made before the 60-day period had expired and if the approach to be taken at the present meeting was correct then a panel would have to be established, despite the fact that no consultations had taken place. It was therefore necessary to be careful in applying the rule of automaticity so as to avoid turning the DSB into a robot. If the DSB considered that it was incompetent to examine the issue, this could have negative consequences. If in the same case, India were to state that it would not respect 60 days for consultations and the Chairman would indicate that the parties should deal with the matter before the panel, this would lead to increased workload. If, for example, a request for a panel was made on a non-WTO related issue then again the establishment of a panel would be automatic. While it was important to preserve automaticity of the system, India, like other developing countries, believed that semi-automaticity was good and in particular with respect to the adoption of panel reports which should not be blocked by major players. He did not wish to argue against the automaticity or the negative consensus rule. However, with regard to those provisions which involved decisions in accordance with the negative consensus rule, one had to be careful to ensure that the necessary preconditions were satisfied. As indicated by Japan, the DSB at the present meeting did not have any factual basis regarding compliance. Despite the fact that no consultations had taken place, a panel would have to be established. He, therefore cautioned that if the DSB were to take a decision different from that sought by the United States this would undermine the automaticity of the system. The DSB was the supreme body with competence in all matters. Therefore, if there was an unprecedented situation in which the legal position was ambiguous, the DSB had to deal with the matter, otherwise it would not be fulfilling its duty. He therefore suggested that it was necessary to find a formula in order to enable the DSB to perform its legitimate function. If not, the whole

exercise would be fatal. In this context, there were several proposals, including that by Japan and by the Director-General. He urged the two major delegations which were the greatest beneficiaries of the system and had the responsibility to ensure that that system was not considered to be discriminatory, in particular in countries such as India. The United States and the EC should enter into discussion and put their legal resources together in an effort to find a solution so as to preserve their rights and to avoid legitimization of unilateral approaches.

The representative of the Philippines said that he hoped that it would still be possible for the United States, the EC and the other parties to the dispute to reach a compromise. Like India, he also wished to comment on long term consequences for the WTO of the DSB's decision at the present meeting. When there was a failure to comply there would always be a disagreement regarding compliance or non-compliance. It should be recognized that, at present, there were irreconcilable differences between Articles 21.5 and 22. The General Council should make an authoritative interpretation of these differences before a compromise solution were to be reached in the DSU review. From a systemic point of view, it should be recognized that the two Articles were textually irreconcilable. As stated in Article 21.5 if there was a disagreement between the parties then the matter could be resolved through the dispute settlement procedures, including, if possible, recourse to the original panel. This covered Article 22 procedures or a referral to the original panel. Panels might suggest how to comply but if there were many ways to comply panels should not have the authority to suggest a manner of compliance. In this situation there were many ways to comply and a panel could not compel the EC or other parties to comply in a particular manner. If another measure had been taken in an effort to comply but the other party disagreed that the measure was in compliance and requested a panel under Article 21.5, no decision would ever be enforced. That would damage the system. The Philippines as a developing country would have no interest in suspending concessions. It would probably never invoke it against a developed country. It was necessary to analyse closely the issue of suspension of concessions. If there was a failure to comply and there would always be disagreement as to whether or not there was compliance, the prevailing party would request the DSB to authorize the suspension of concessions. This did not mean that the losing party had no recourse because it could request arbitration. In the arbitration, as pointed out by the Chairman, any losing party could establish that the level of suspension was zero because there was full compliance. The question was therefore what would serve the system: the insistence on Article 21.5 or reluctant acquiescence to Article 22. It was necessary to resolve this issue of interpretation of Articles 21.5 and 22 in the proper forum and at the proper time. In the meantime, because of the long-term consequences for the WTO, it was important to keep in mind that any losing party who believed it had complied could prove this in the arbitration proceedings claiming that the level of the suspension should be zero.

The representative of Honduras said that his Government considered that the US request under Article 22.2 should not be dealt with by the DSB without taking due account of precedents and the relevant provisions of the DSU. He recalled that in February 1996, the five countries had requested consultations on the EC's banana regime. In the course of the consultations the matter had been examined and detailed questions had been asked. Five countries had made considerable efforts to find a satisfactory solution. In May 1996, due to the failure of the consultations, the parties had requested the DSB to establish a panel. Subsequently in September 1997, the DSB had adopted the reports of the panel and of the Appellate Body. The EC had been requested to bring its banana regime into conformity. Although this was a long-standing dispute, the EC had argued that it was not in a position to comply immediately with the DSB's recommendations. The arbitrator had been appointed to set a reasonable period of time for compliance. That period had expired on 1 January 1999. In order to avoid that the EC formalize and bring into force modifications which were not appropriate to achieve compliance with the DSB's recommendations, the five countries had, in good faith, indicated their disagreement through all means available, including in the DSB. In the summer of 1998 and in the past months, the complaining parties had renewed their efforts to request a panel under Article 21.5 to review the incompatibility of the EC's measures. Although there was no need to hold consultations under that Article, the complaining parties had accepted such consultations. However,

the EC had used various tactics to avoid the application of the review mechanism under Article 21.5. Every initiative to find a negotiated solution had been rejected by the EC. The EC had placed obstacles against efforts for a timely review under Article 21.5 to hamper the US request under Article 22.2. The DSU provisions did not allow the EC strategy to cancel out the rights under Article 22. The new dispute settlement rules were aimed at improving the previous system under the GATT. Not only in terms of automatic adoption of panel and Appellate Body reports but also in terms of Article 22, which had been designed to ensure that the DSB's recommendations were adopted within a reasonable period of time. Article 22 established a time-frame for the complaining party to request authorization to suspend concessions, and that period was 30 days for the DSB to grant such authorization. Both the time-frame for the complaining party to request authorization and the time-frame for the DSB to grant such authorization should count from the date of the expiry of the reasonable period of time. The intention of the drafters to include Article 22 in the DSU was confirmed by the fact that the authorization to withdraw concession was always granted unless the DSB decided by consensus to reject the request. The drafters had not imposed any conditions or linkages of these rights under Article 22 which would justify a decision to deny the US request. He supported the Chairman's ruling.

The representative of Trinidad and Tobago said that her delegation wished to make a statement not only as a partner and a beneficiary country under the Lomé Convention, which had been the cornerstone of ACP-EU cooperation for the past 25 years, and not only in solidarity with the banana-producing and exporting Caribbean countries, but also because this issue went beyond the issue of banana trade since it dealt with the essence of the dispute settlement system. It had far-reaching systemic implications for all Members and for the issue of compliance with the recommendations. The issue of conformity of the EC's measures was currently being examined by the original panel in accordance with Article 21.5 at the request of the EC and Ecuador. Therefore, the panel should complete its task and report on the conformity or non-conformity of the EC's measures. Only then could the issue of retaliation be considered, provided that the measures were to be found not in conformity. Trinidad and Tobago supported the EC's position which was shared by many other delegations that determination of whether or not a party had brought its measures into conformity with WTO rules was a matter for the General Council and should not be decided unilaterally by any party. If not, the rule of law in the dispute settlement system would be undermined. As a small developing country, his country considered this prospect with extreme dismay and apprehension. It was essential that the rights of all parties were respected. For this reason, his delegation welcomed the proposal by Japan. If that proposal was supported by the majority of Members, this delegation would recommend to adopt it since it would help to move forward in a positive manner on this issue, which had far-reaching implications for the dispute settlement system and the future of the WTO. At present, there was no factual basis for a decision that the EC had not complied with the recommendations. If the DSB were to authorize the US request to suspend concessions, its decision would cause an irreparable damage to the WTO and its dispute settlement system.

The representative of Hungary, speaking also on behalf of Bulgaria, the Czech Republic, Poland, Romania, the Slovak Republic and Slovenia (the CEFTA-countries), underlined that it was not his intention to judge the implementation of the DSB's recommendations. However, the CEFTA-countries had an interest in preserving an efficient multilateral dispute settlement system and for that reason wished to express their view on some important systemic issues. He recognized the interests at stake for the parties to the dispute and the complexity of the dispute. However, he was concerned with recent developments since the dispute settlement system would be seriously threatened. He believed that the dispute should be resolved within the multilateral framework and any attempt to seek solutions outside that framework should be discouraged. The lack of clarity and a contradiction between the language of Article 21.5 and Article 22 had led to a disagreement over the relationship between the two Articles. It was his understanding that the first sentence of Article 21.5 read together with Article 23.2(a) implied that it was for a panel and, if appealed the Appellate Body, to make a determination of non-compliance with the DSB's recommendations. This principle which was at the

heart of the dispute settlement system was of paramount importance. These textual ambiguities constituted a major shortcoming of the DSU and had to be corrected in an appropriate manner as soon as possible. With regard to the US recourse to Article 22.2, the CEFTA-countries considered that both the letter and spirit of the DSU as well as the legal principle of due process required that the suspension of concessions was dependent upon the conclusion of the Article 21.5 process that had just been initiated. This did not mean that the legitimate US rights under Article 22 should be denied but that any action thereunder should be suspended until the Article 21.5 process had been completed. Therefore, legal assurances should be given to the United States. The CEFTA-countries supported the proposal by Japan to suspend consideration of this item until the Article 21.5 process had been concluded. The CEFTA-countries were open to any other initiative which could lead to a reasonable compromise. They supported the Director-General's efforts aimed at providing a basis for a mutual understanding for the parties to the dispute. They also supported the EC's initiative to seek an authoritative interpretation by the General Council. Their main objective was to preserve the integrity of the dispute settlement system.

The representative of Switzerland said that the issue at hand raised important questions concerning the implementation of the DSB's recommendations. The manner in which these questions were dealt with would have broad implications for the dispute settlement system. It was his delegation's position that when there was disagreement among the parties to the dispute as to the consistency of implementing measures with a covered agreement, the procedures of Article 21.5 had to apply. That Article ensured that the determination of whether a party had failed to bring the measures found to be inconsistent into compliance with the covered agreement was made multilaterally. In addition, Article 23 clearly stated that Members should not make unilateral determinations concerning violations of agreements. If a party were allowed to omit the procedure of Article 21.5 and use directly the procedures of Article 22, this would lead to accepting that a party could unilaterally determine that a violation had occurred. This was not within the meaning of Article 23. Neither would such an interpretation be covered by the language of Articles 21.5 and 22. The procedure of Article 21.5 could not be omitted. The DSU did not provide that Articles 21.5 and 22 could be used in parallel. If parallel procedures were possible, the procedure of Article 21.5 would be devoid of meaning and lose its applicability, because the suspension of concessions could be decided before the outcome of the procedure of Article 21.5. For these reasons, the DSB at the present meeting should not take a decision on the US request. In this context, Switzerland supported the proposal by Japan and believed that the DSB should suspend consideration of the item in question and could not be in a position to take any decision until the procedure of Article 21.5 had been completed. It should also be understood that the time-frame provided for in Article 22.2 and 22.6 should be suspended until the procedure of Article 21.5 had been completed. Switzerland's concerns were of a systemic nature, namely to preserve the dispute settlement system as a multilateral instrument for resolving disputes. Therefore, the statement at the present meeting was not aimed at making any judgement on the substance of the disputed measures. She appealed to the parties to the dispute to take their responsibility in ensuring that the issue was resolved in a manner which would strengthen the multilateral system. The parties should refrain from actions which could weaken the system and abstain from resorting to protracted procedures, which were not in accordance with the spirit of the dispute settlement system. The parties had a very important responsibility in this respect. They should apply the multilateral procedures for the settlement of disputes while ensuring that these procedures were not used to prolong them. The DSU provided for a prompt resolution of disputes and this should be taken into account when invoking the procedures of Articles 21.5 and 22.

The representative of Norway said that his delegation was concerned about the dispute settlement system and the multilateral trading system if this dispute were allowed to continue. It was unacceptable that the parties be allowed to escalate their conflict beyond any reasonable proportions, which he feared could be the case. It was therefore imperative for the parties to find a solution and he urged them to try to do so. He recognized that there was a lack of clarity concerning the relationship between Articles 21.5 and 22. This had to be examined and clarified as soon as possible. He also recognized the particular background of the present conflict but regretted that this had been allowed to

persist for such a long period of time. However, the spirit of multilateralism and the letter of the DSU provisions were not consistent with any unilateral decisions. When there was a disagreement as to non-compliance any determination had to be made by an impartial procedure such as Article 21.5 procedures or arbitration before a party could resort to Article 22. This was in line with the systemic interests of safeguarding the multilateral system. Norway fully recognized that effective guarantees on implementation and safeguards against perpetual delays were necessary. Such delays would be unacceptable and contrary to the spirit of the DSU.

The representative of Saint Lucia said that her delegation was reassured that the majority of delegations had understood her concerns. Article 22 preserved the integrity of the system if the Agreement was read in its context. The majority of Members had no capacity to retaliate and she questioned what would preserve the integrity of the rule of law. If a Member were permitted to unilaterally determine that measures were not in compliance, which was counter to Article 23.2(a) which stated that no Member shall be allowed to do that, multilateralism would be undermined and unilateralism would be promoted and the dispute settlement system would be undermined which was a central element in the protection of the rule of law.

The representative of Panama said that his delegation supported the Chairman's ruling which was not an easy decision taken after lengthy consultations. Panama recognized its importance and supported the US request under Article 22. This was an important and difficult case under the dispute settlement mechanism, which constituted a step forward compared with the GATT-rules. The US request had been made after many years of efforts by the United States and other countries, including Panama, aimed at convincing the EC of the need to eliminate the illegalities of its banana import regime. Panama with the United States, Guatemala, Honduras and Mexico had expressed, on several occasions, their objections to the EC's regime and its modifications. Their arguments had been presented in communications to the EC as well as in WTO bodies. Several requests had been made to the Commission to enter into a substantive dialogue in an effort to seek a solution. The EC had ignored their arguments. It had changed its regime without consulting with complaining parties and this regime was not consistent with the recommendations of the panel and of the Appellate Body. In September 1998, the complaining parties had tried to request the reconvening of the original panel under Article 21.5. If the EC had then cooperated with the parties, the panel would have presented its report by now. However, the EC had not considered the request and had used procedural tactics. The reasonable period of time for the EC to implement the recommendations had elapsed but the rights under Article 22, which constituted a critical advance compared to the previous system also existed. Article 22 contained the time-period which in Panama's understanding enabled the United States to make the request at the present meeting. Despite the assurances by the EC that the United States could suspend its rights under Article 22, the time-frame contained therein implied that if these rights were to be valid this would not be possible. The retaliatory measures were aimed at ensuring that Members had an incentive to comply with its obligations. Panama did not wish Article 22 to be affected. The efforts of the complaining parties were aimed at reaching a rapid legal solution to the dispute. The request was the most recent step to achieve this objective and during the past week the complaining parties had kept the door open towards finding a negotiated solution. His delegation supported the US request and urged the EC to enter into discussions with all interested parties to modify its banana regime in an effort to solve the problem.

The representative of Barbados wished to associate her delegation with the systemic concerns raised by previous speakers. Her delegation believed that it was necessary to ensure that the proper sequence in the DSU provisions was observed. There was a need to address and seek clarification on the systemic issues which threatened the integrity of the system and ability of the rule of law to protect countries, especially those with small, fragile and vulnerable economies. This was a turning point and it was necessary to take the correct course of action.

The representative of Indonesia regretted that the DSB had been unable to resolve this matter as considerable efforts had been made, since the inception of the WTO, to strengthen the multilateral

trading system. In Indonesia's view, all Members had to recognize that promoting and respecting the impartial rule of law should prevail over the case in question. Indonesia was concerned about systemic implications and that the system would be undermined if unilateral determinations on compliance were to be endorsed by the DSB. He recognized that the DSU provisions did not provide a perfect formula for resolving disputes but, while the review process was ongoing, thus far the system had proved to be the most comprehensive and reliable set of multilateral rules to resolve trade disputes. Indonesia believed that recourse to the dispute settlement procedures and multilateral rulings should be the only way to resolve the current dispute on compliance. He reiterated that Article 21.5 had to apply and that it was obligatory, not optional, in the event of disagreement as to the consistency of measures. Further steps which might be taken, such as the procedures of Article 22, would be justified only when the implementing measures had been found by the multilateral ruling to be inconsistent with the covered agreements. In light of Article 21.1, Members should not attempt to delay the implementation of the DSB's recommendations by drawing upon any relevant DSU provisions including the 21.5 procedures. In accordance with Article 23.1, it was the obligation of all Members to have recourse to and abide by the rules and procedures of the DSU whenever they sought redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements. In accordance with the DSU provisions and considering that the DSB had on 12 January referred the banana dispute to the original panel to make rulings on the consistency of the measures concerned with the DSB's recommendations, Indonesia proposed that the DSB suspend consideration of the request for authorization to suspend concessions until such rulings had been made by the original panel.

The representative of Canada said that her country was concerned that the dispute over bananas had continued to deteriorate. This was no longer a matter for the disputing parties alone, but raised serious institutional issues for all Members. The DSB was now faced with the prospect of sanctioning a request for retaliation after a unilateral determination of non-compliance by the United States. Canada did not wish to be drawn into the merits of this specific dispute. Nevertheless, it was concerned that the DSB had been asked to approve the suspension of concessions in the absence of any multilateral determination of non-compliance. Article 23 clearly provided that Members shall not make a determination that a violation had occurred except through recourse to dispute settlement. She recognized the ambiguities in the language of Articles 21.5 and 22. It was clear that this problem had not been envisaged at the time these provisions had been negotiated. The relationship between Articles 21.5 and 22 and the necessary preconditions for the successful invocation of Article 22 would have to be addressed by Members in the near future. Canada looked forward to working with all Members in an effort to clarify these provisions. However, until these provisions were clarified, Canada urged the disputing parties not to try to take advantage of any drafting ambiguities in the DSU or to seek to assert their rights in a manner that was prejudicial to the rights of other Members and inimical to the continued stability of the WTO. She reiterated that the dispute raised critical systemic issues for all Members and urged the parties to seek solutions that would fully preserve the integrity and credibility of the WTO.

The representative of Colombia said that his country had a great interest in this issue and had requested a third-party participation in the process. He wished to make a statement to defend the system and the institution. At the present meeting, the DSB would take the most crucial decision since the inception of the WTO. He thanked the Chairman and the Director-General for their efforts aimed at finding an agreement. Multilateralism was the most important word of the preamble and of all agreements. Efforts were being made to find a compromise which would avoid a decision leading to unilateralism. He did not wish to enter into discussion on whether the United States had the right to make its request or whether the implementing measures were in compliance with the DSB's recommendations. Since compliance had not yet been determined, there was a need for a political will of both parties to proceed in such a way so as to save the institution and its image. It was important for the institution not only to respect the rules but also to use them in such a way that its multilateral approach was recognized outside the institution. He appealed to both parties for conciliation.

The representative of Jamaica wished to associate his delegation with the statements made by Saint Lucia, Trinidad and Tobago, Barbados and Dominica. Jamaica supported the proposal by the EC and others countries to the effect that the US request be postponed. In Jamaica's view, the US request to suspend concessions was without any legal basis. The DSB had not yet determined or examined the consistency of the EC's banana regime which became effective on 1 January 1999. He recalled that two panels had recently been established under Article 21.5 to review that regime. It was important to be consistent and the DSB should not act on the US request while a matter was still awaiting a judicial determination. The United States and other parties should work together in an effort to find a balanced and fair solution. The objective should be to respect the rules and commitments in order to meet the WTO's fundamental objectives of expanding the volume of trade and achieving higher standards of living. Jamaica's position was that the role of panels was to assist the DSB in discharging its functions. For that reason, his delegation supported the proposal by Japan as a possible way forward.

The representative of Japan supported the concerns expressed by previous speakers. His delegation appreciated the effort on the part of the Chairman and the Director-General towards finding a solution. He recognized that the United States had difficulties in obtaining remedies to a nullification or impairment to its WTO rights. However, the problem was due to the inconsistencies between Articles 21.5 and 22. Although there was a time constraint, one had to find a flexible solution. It was important not to resort to unilateralism and before the DSB authorized a request for suspension of concessions, there should be a factual determination of a violation of the WTO Agreement or non-compliance with the rulings of the panel or the Appellate Body. This would safeguard the long-term integrity, fairness and impartiality of the system. Japan had proposed to suspend the US request and wait for the determination of the panel under Article 21.5. The United States would not lose their legitimate rights but would have to wait for a short period of time. He urged the two parties to consider whether this proposal could be the basis for a compromise, and if not, to state their reasons for not accepting it.

The representative of Korea regretted that the dispute under consideration had deteriorated despite delegations' desire to seek an amicable solution. Korea was concerned that the current situation, if not properly handled, might undermine the public's confidence in the WTO system. The implementation of DSB's recommendations was an integral part of the dispute settlement process. Failure to implement the DSB's recommendations would not only frustrate the entire process but would also cause serious damage to the credibility of the dispute settlement system. Korea believed that when there was a dispute on whether or not the implementing measures complied with the DSB's recommendations, such disputes had to be resolved in accordance with the principles and rules of the multilateral trading system. For that reason, recourse to Article 22 should be preceded by the procedures of Article 21.5. He recalled that Korea together with other Members had made a proposal contained in WT/DSB/W/91. Korea's objective was to safeguard the system and to provide a possibility for the parties to reach a compromise. He hoped that the parties to the dispute would take into consideration that proposal and redouble their efforts to work out a compromise solution. He called for political will from both parties. Korea welcomed the efforts by the Director-General and the Chairman aimed at facilitating a desirable settlement. Further efforts should continue in this regard.

The representative of Brazil said that his country attached great importance to the multilateral rule-based trading system. In 1994, his Government, in proposing the single undertaking to the Congress had underlined the establishment of a strengthened, more predictable, transparent and effective organization which would counter threats of unilateralism and power politics in trade-related matters. At present, Members were faced with a situation that highlighted that the system was not prefect and contained some deficiencies. Since the inception of the new system, different interpretations of provisions and procedures had been recognized in several areas. Thus far, the problem encountered with the provisions of Articles 21.5 and 22.2 had proven to be the most

challenging. He did not wish to comment on the substance of the dispute or any substantive claims or positions but on the potential negative implications of the US request for the dispute settlement mechanism and the WTO. In Brazil's view, unless the defending party did not take any steps to comply with the DSB's recommendations within a reasonable period of time, Article 21.5 was a precondition for the application of Article 22.2. If a defending party indicated that it had brought its measure into compliance and a complainant disagreed, Article 21.5 procedures would be the only means to settle such a dispute and eventually enable the parties to invoke Article 22.2. The DSB through recourse to the original panel or the Appellate Body, was the only body to determine compliance and make a recommendations. This was a logical interpretation of the provisions, and in line with Article 23, which was shared by many delegations. In addition, the alternative interpretation of the application of Articles 21.5 and 22.2, as in the present case, would result in a systemic crisis.

In the absence of a DSB's recommendation on compliance there was a risk that the DSB would become an instrument for Members to take decisions regarding suspension of concessions. The principle of automaticity and the negative consensus rule would cease to be viewed as an improvement to the dispute settlement mechanism. It would cause grave concern. Brazil's view was based on its commitment to multilateralism and reflected its concern with regard to the functioning of the dispute settlement mechanism. Due to the lack of common interpretation of the provisions it was necessary to continue to operate within the rules of the system in order to find, by consensus, a solution acceptable to all. Brazil believed that respect for the rules enshrined in the DSU should not become an excuse for procrastination, and that a simple respect for procedures should not replace compliance. The effectiveness and the credibility of the system depended on Members' commitment to WTO rules. While his country would welcome an early solution to the current banana dispute, it did not believe that such a solution should in any way affect the rights under Articles 21 and 22, or set a legal precedent.

The representative of Guatemala said that his delegation supported the Chairman's ruling. His country had made efforts with regard to the banana dispute and believed that the system with its procedural rules designed to guarantee security and predictability was the best option. Guatemala considered that, contrary to the GATT-mechanism, the negative concensus rule with regard to the adoption of reports guaranteed that the EC could not ignore the recommendations of panels. Guatemala had carefully examined Article 22 and had concluded that it had been drafted in such a way as to avoid any postponements of specific time-frames. The basis of the US request under Article 22 was of great concern to those delegations that had accepted the system from the point of view of what was contained in the DSU and the actual text, which should not be conditioned on mechanisms that had not been foreseen by the drafters. Any initiative aimed at preventing the negative consensus rule to work in order to defer the US request, would demonstrate that it could not be possible to have a system without future consequences.

The representative of Australia said that the basic issues regarding bananas predated the WTO and it was regrettable that a mutually satisfactory solution had not been achieved within the GATT/WTO systems over a considerable period of time. Australia did not have a direct commercial stake in regard to bananas, but along with all other Members it had a direct policy stake in the effective functioning of the dispute settlement system and the credibility of the WTO system. Continuing differences between major Members were unfortunate at a time when Members were attempting to promote the benefits of trade liberalization through the multilateral trading system. There were important procedural rights embodied in the DSU and Members recognized that recourse to Articles 21.5 and 22 processes should not serve to remove meaning from either provision. One could not deny the ambiguities contained in Articles 21.5 and 22 and the need for their clarification. Nevertheless, his delegation called upon the EC and the United States to show leadership in this matter and to work towards an outcome that would reflect the provisions of Article 3.5, in particular an outcome that would not impede the attainment of the objectives of the WTO Agreement. Whatever the legal issues involved, unlike others who had spoken, Australia did not have a desire to take sides on a particular background and issues in this case. But the WTO system and the dispute

settlement provisions would not function properly unless Members were prepared to adhere to the spirit and the letter of the law. The major partners involved in this case had a leadership responsibility. One should not forget that the legal procedural matters continued to mask fundamental differences over a product of major importance to a range of developing countries. Australia was prepared to support a pragmatic outcome which would not damage the WTO system or the interests of other Members and would stand ready to consider suggestions in this regard which could be supported by the parties.

The representative of Argentina said that his country had already expressed its view on the scope of Articles 22.1 and 22.6 in the document submitted during the DSU review. However, his delegations wished to express its concern on substantive aspects for the multilateral system. Argentina considered that the substantive problem for the multilateral system in this dispute was not that of procedure. He drew attention to three elements related to substantive problems. First, the two most powerful trading partners had the additional responsibility to solve the problem. The escalation of the dispute might undermine the functioning of the system. Second, Argentina, as a major agricultural exporter wished to reiterate its support for the liberalization of the banana regime. Third, it was unacceptable to have an interpretation which would avoid compliance with an obligation resulting from the procedure which in practice would lead to decisions in the dispute settlement system allowing Members to avoid their obligations. The dispute settlement mechanism had been designed to deal with the problem of a dispute going through all the steps. There should be a possibility that the party whose rights had been nullified be allowed to withdraw concessions. However, this had to be conditioned by prior recourse to Article 21.5.

The representative of New Zealand regretted that there was a lack of consensus with regard to the key provisions of Articles 21 and 22. This was a very serious situation that had to be resolved for the future, if the dispute settlement system was to operate with the necessary harmony and predictability that would ensure its effectiveness. Given the lack of agreement, the DSB was faced with a dilemma where it was necessary to find a practical way to deal with the current situation. In this regard, his delegation noted the proposals put forward in an effort to resolve the current disagreement on the interpretation. New Zealand hoped that the prospects of reaching an agreement on the basis of the proposal outlined by the Director-General on 25 January were still possible. In the current situation, no solution was ideal. The procedures proposed by the Director-General might provide the hope, in the immediate future of casting some much-needed light on the precise relationship between Articles 21 and 22. Therefore, New Zealand encouraged further efforts by the parties to reach a settlement in this regard. He thanked the Chairman and the Director-General for their efforts and believed that further efforts should continue towards seeking a solution to the current serious situation.

The representative of Egypt said that his delegation had, on numerous occasions, been critical with regard to some elements of the multilateral trading system. However, Egypt was determined to do its utmost in order to preserve the system. He expressed his delegation's appreciation to the Chairman and the Director-General for their efforts to resolve this issue. He supported the proposals by Japan, the Director-General and some developing countries aimed at resolving the issue. Egypt was concerned about the systemic implications of the issue at hand. Members were faced with a dilemma: the EC could have been more forthcoming in this dispute, but the issue of inconsistency in the implementation of the DSU provisions should not be decided unilaterally. Like other delegations, Egypt recognized that the provisions were not clear. However, this lack of clarity should not be misused to the detriment of the system. He called on the United States and the EC to show their leadership with regard to safeguarding and preserving the system.

The representative of Mauritius regretted that the two trading partners could not find a negotiated settlement. Her country also believed that both parties, as important Members, had a special responsibility in preserving the credibility of the system and in fostering the spirit of conciliation. Her delegation also regretted that the issue of competence of the DSB had not been

addressed. A number of delegations had highlighted the issue of sequence in law which her delegation considered to be important. The law was always sequential. The DSU rules were sequential: panels were first established thereafter a matter might be referred to the Appellate Body and only then were decisions adopted. The DSB had never taken a decision prior to a panel being established. As pointed out by many delegations, Article 22.6 followed the logical sequence of Article 22 conditions being fulfilled. The question was who should decide whether Article 22 conditions had been fulfilled. Her delegation believed that this was up to a panel. The Chairman had indicated that he would not take a position that could be considered to be an interpretation of Article 22. In her view it was Article 22 which was the root of the problem. Her country would favour seeking an interpretation of Article 22 by the General Council. However, if the two Members could discuss anew and could show a spirit of leadership, then she would urge that the Japanese proposal be seriously considered.

The representative of the United States thanked the Chairman and the Director-General for their efforts in trying to help the United States and the EC. The proposal by the Director-General had given both the EC and the United States their rights in the way of proceeding. The United States appreciated Japan's efforts but could not agree to its proposal. This approach to the issue was an amendment to Article 22. The procedure for amending the DSU was provided for in Article X:8 of the WTO Agreement and required a consensus. The United States did not join such a consensus because it had the right under the DSU and it did not wish to waive that right. This approach was one-sided. In the Autumn of 1998, the United States had asked the EC to postpone the implementation of its modified banana regime in order to be able to reach a solution. However, this was not possible and on 1 January 1999 the EC had put in place its new regime unwilling to consider postponing its action. At present, the EC had asked the United States to postpone its action which was within its WTO rights.

The DSB could not amend the terms and conditions of a panel request, nor was it authorized to alter the US request under Article 22. That request had to be approved in accordance with the negative consensus rule. To impose conditions on Article 22 would imply an amendment of the DSU. The proceedings under Article 21.5 could not be obligatory before the invocation of Article 22 rights without ruining the entire dispute settlement system leading to a futile exercise in endless litigation that would encourage countries to avoid their WTO obligation. She had taken note of the statements made at the present meeting, including the comment to the effect that the relationship between Articles 21.5 and 22 had to be examined in the DSU review. The United States had also made it clear that the DSU provisions on implementation had to be modified and made operational in the course of the DSU review. At present these provisions operated well only when Members were making special efforts to reach a mutually acceptable solution.

The representative of the European Communities thanked the Chairman and the Director-General for their efforts. He wished to draw attention to two points. India had referred to the case with regard to the EC's trade description of scallops, which was pertinent to the case at hand. In that case a conditional right to a panel was involved and the procedure had not been satisfied because the consultation period had not been terminated. That case had been withdrawn after the request for a panel had been contested by a number of delegations, including the United States. In that case a condition had not been satisfied and on that basis, delegations had contested the request for a panel.

The argument of the United States to defend its claim was that it was entitled to receive authorization and it had interpreted Article 22.6 in the manner that the DSB could no longer grant authorization through negative consensus if the 30-day period referred to in that Article had passed. This was not a correct argument. No Member had argued that the time-frames indicated in the DSU would not preserved. There were many such provisions but no argument had been made that the rights of Members would be altered. These periods were of an organizational nature to help structure the work of the DSB or panels. The US interpretation would mean that a Member such as Ecuador which had invoked the Article 21.5 procedure would not be granted authorization to retaliate if it won

the case because it had not made a request for authorization to suspend concessions at the present meeting. This could not be the case. The same would apply to the other complainants. Therefore, if the US request were to be approved at the present meeting, this would deny the requests of other complainants at a later stage with regard to both retaliation and compensation. The EC was willing to accept the proposal by Japan and was not happy that the United States had considered that this would amount to an amendment. This could be an *ad hoc* decision of the DSB or a conclusion limited to this specific case given the exceptional circumstances that one party was insisting on its rights and on the letter of the law while a large number of delegations believed that this was not the right way. Some delegations had stated that this was not legally founded because the conditions did not exist, others that this was not appropriate. There was a real problem when one country insisted on exercising its rights which in the EC's view were conditional rights and that such conditions did not exist.

The Chairman said that he had made a ruling which had been challenged by the EC. To this effect he drew attention to Rule 18 of the Rules of Procedure which read as follows: "During the discussion of any matter, a representative may raise a point of order. In this case the Chairperson should immediately state the ruling. If the ruling is challenged, the Chairperson shall immediately submit it for decision and it shall stand unless overruled." It was therefore clear that his ruling, in spite of the EC's statement would be maintained unless there was a consensus to reject it.

Referring to Rule 18, the representative of the European Communities said that that Rule did not specify how this decision were to be taken. The EC believed that this decision was not required to be taken by consensus. This was not a substantive but procedural matter. It could therefore be put to a vote. He asked the Chairman that this be done without delay.

The representative of the United States regretted that the EC had requested a vote and said that there was no legal basis for a vote on the Chairman's ruling. Rule 33 of the Rules of Procedure provided that, "the General Council shall take decisions in accordance with the decision-making provisions of the WTO Agreement, in particular Article IX thereof". Footnote 3 to Article IX provided that "Decisions by the General Council when convened as a Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Body". Furthermore, Article 2.4 provided that "where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". The United States believed that in the case at hand the provisions of Article 2.4 regarding consensus applied, not the provisions of Article IX with regard to a vote. The EC had argued that Article 2.4 was not applicable in this case because the Chairman's ruling was not part of decisions under the DSU. However, this argument was incorrect. Article 2.4 applied because the Chairman's ruling was a decision which the DSB administered in accordance with Article 2.1 and which required the DSB to carry out its functions in line with the time-frame provided therein. Therefore, the Chairman's ruling was a decision required under the DSU rules and procedures to ensure that the functions of the DSB were administered and carried out in order to apply Article 22.6 within the time-frames contained therein. In accordance with the terms of Article 2.4, a decision by the DSB to overturn the Chairman's ruling had to be taken by consensus. Thus, there was no basis for a vote. She requested the Chairman to make such a ruling.

The representative of the European Communities said that his delegation had reached the opposite conclusion with regard to the interpretation of the provisions referred to by the United States. Article 2.4 provided that where the DSU rules and procedures provided for the DSB to take a decision this should be done by consensus. The matter at hand was not specifically regulated by the DSU provisions. This was a procedural matter and as such it was regulated by the Rules of Procedure for meetings of WTO bodies related to Chapter VI of the Rules of Procedure: "Conduct of Business". The EC believed that this matter did not fall within the framework of the DSU as claimed by the United States. Since this was a procedural matter under Chapter VI of the Rules of Procedure it was correct to proceed to a vote.

The representative of the Philippines said that the procedural matter at hand was related to the United States' substantive right under Article 22. It was the Philippines' position that when a Member exercised its guaranteed rights under the DSU provisions this could not be subject to a vote. The DSB's objective was to preserve the rights of Members.

The representative of St. Lucia said that in the context of this issue, the legitimacy of the rule of law had been raised. It was necessary to read the DSU provisions in their context. She underlined that the phrase, "rules and procedures of this Understanding" referred to the Understanding on Rules and Procedures Governing the Settlement of Disputes. It referred to the rules and procedures contained in the DSU's appendixes with regard to panels and working procedures dealing with substantive issues. The DSU was not dealing with procedural rules governing the DSB's day-to-day practices. Rule 33 of the Rules of Procedure referred to the WTO's decisions. Footnote 3 to Article IX:2 referred to Article 2.4 of the DSU. Article 1.2 stated that the rules and procedures of this Understanding shall apply subject to special or additional rules of procedures on dispute settlement contained in the covered agreements as identified in Appendix 2. From the legal point of view, Article 2.4, as referred to in footnote 3 of Article IX:2, was inapplicable in the present circumstance.

The representative of the United States drew attention to Rule 1 of the DSB Rules of Procedure which stated that "When the General Council convenes a Dispute Settlement Body (the DSB) it shall follow the rules of procedures for meetings of the General Council, except as provided otherwise in the Dispute Settlement Understanding (DSU)". It was the responsibility of the DSB members and the Chairman to ensure that the DSB functioned in a way which would faithfully administer the DSU. This was contained in the first sentence of Article 2.1 which enumerated the DSB's functions, including administrative actions in accordance with the negative consensus rule, panel establishment, adoption of panel and Appellate Body's reports and the authorization of compensation pursuant to Article 22.6 and 22.7 of the DSU. It was the responsibility of the Chairman to ensure that the DSB complied with Article 2.1 to administer and take decisions required by the DSU within the time-frames contained therein. In accordance with Rule 1 of the Rules of Procedure, when the General Council convened as the DSB, it followed the rules of procedure for the General Council except as provided otherwise in the DSU. Thus, the General Council's Rules of Procedure, including Rule 18, had to be read in the context of the substantive requirements of Article 22.6 of the DSU and the Vienna Convention pursuant to Article 3.2 of the DSU. Where the procedures of the DSU required that the DSB take action, the rules procedure of the DSB including those relating to Rule 18 had to be interpreted in such a way that the substantive DSU provisions were not diminished, in this case Article 22.6. Such a result would also be inconsistent with the requirements of the Vienna Convention. As frequently stated by the Appellate Body, an interpretation had to give meaning and effect to all the terms of the treaty and an interpreter was not free to adopt a reading that would render whole paragraphs of a treaty meaningless and this would be the result of a vote. It would nullify the negative consensus provisions of Article 22.6 by seeking to prevent the DSB from holding its meeting. The language of Article 22.6 provided that the DSU automatically granted authorization if the Member requesting it maintained its request. It was therefore the responsibility of the Chairman to take a decision to ensure that the DSB functioned properly. The DSB had to exercise its responsibilities as specified in Article 2.1 to ensure that the DSU rules and procedures were properly administered. The Chairman had to exercise the responsibility to ensure that the DSB carried out its functions within the time-frames provided for in the DSU. She requested the Chairman to take a decision on the question of vote.

The representative of Canada said that the WTO was not an organization in which Members had had recourse in the past to rules of procedure. Decisions in the WTO were taken by consensus. This was one of the most important rules. The WTO operated on the basis of consensus and therefore many Members were not very familiar with the Rules of Procedure. At the present meeting, the Rules of Procedure were being considered and there was a call for a vote. Therefore, this was no longer a discussion on bananas. It was important to keep this in mind. She wished to bring this matter to the attention of her authorities. Before the meeting, she had informed her authorities of the items on the

agenda and of a possible course of action. However, with regard to the item at hand a number of messages had been sent. She had informed her authorities of the US request to suspend concessions and of the possibility that there might a call to block the agenda. However, she had not informed them that a question could be raised as to whether the DSB operated by consensus or by vote. The situation was uncomfortable, i.e. first, she was not sure how to vote in the WTO -- by secret ballots, by raising flags or by postal ballots. She urged delegations to reconsider whether the proposed course of action was correct.

The representative of India said that the issue at hand required to be carefully examined. At the present meeting, he did not wish to take a particular position but as pointed out by the Philippines, if this matter were to be treated as a procedural issue, the Chairman's ruling could lead to a nullification of the substantive rights of a Member. He therefore wished to draw attention to possible implications if the Chairman's ruling were to be accepted. India was concerned that the Chairman's ruling could amount to an interpretation of Article 22.6. This in turn could imply that a Member were to be deprived of its right. He was not concerned about the rights of the United States and the EC but the Chairman's ruling could have implications for other Members in future. It was necessary to reflect carefully on this matter before any decision were to be taken. At this stage, the discussion constituted a political process and he was concerned that if the DSB authorized the US request, regardless of whether or not it was legal, this decision would have long-term implications and would legitimize unilateral action. He therefore appealed to the United States to consider this issue in a broader context.

He recalled that major trading partners had, in the past, pushed other trading partners to take certain decisions before it had been known whether that would lead to an amendment or not. For example, in the context of the Agreement on Information Technology, all Members had cooperated with major trading partners. At that time one could have raised many procedural and legal questions. However, all Members had wished to move the process forward. In order to reach a consensus, countries had not raised procedural obstacles. At that time, the major trading partners had been interested in reaching a consensus and no argument had been made to the effect that this would lead to an amendment. Furthermore, during the 1998 Ministerial Conference, an item had been added to the agenda after the Conference had already started. At that time, all delegations had helped the United States to include the issue of electronic commerce on the agenda and to take a decision thereon in spite of political problems. Therefore, the two major trading partners had a responsibility towards all Members. He only wished to indicate that, in some cases, it was necessary to go beyond the narrow confines of legal provisions. The issue under consideration required time to allow Members to reflect thereon and since this was a political process it had to be examined from a broader prospective.

The representative of the European Communities said that the United States had referred to the difference between the substantive and procedural provisions. The DSB was dealing with a point of order which had been challenged and the Chairman had made a ruling. This was a question of procedure not linked to any substantive provision in the DSU. The United States had stated that Rule 18 should not be read in isolation. Therefore, Articles 21, 22 and 23 should also be read together. The WTO did not normally operate on the basis of rules of procedure, as referred to by Canada. However, at the present meeting a point of order had been challenged and the majority of delegations did not support the Chairman's ruling. It was therefore necessary to find a way that would reflect this position.

The representative of Brazil supported the statement by Canada and said that his authorities were also not aware of the issues discussed at the present meeting. It was the first time that the question of voting was being considered in the WTO. He was concerned about the course of action proposed by the Chairman. He proposed to suspend the meeting and asked the Secretariat to prepare a written guideline on this matter.

The Chairman said that he could not take a decision immediately because the positions of delegations on the question of voting were divided. He proposed to adjourn the meeting for a short while in order to allow time for examination of the issue at hand.

The representative of Turkey believed that it would not be sufficient to adjourn the meeting for a short period of time. He was concerned that due to the ambiguities contained in Articles 21 and 22, a decision had to be taken at the present meeting which could set a dangerous precedent. It was necessary to examine what the course of action should be in this case. He believed that a decision should not be taken immediately and that unilateral action would endanger the institution. It was his understanding that the majority of delegations considered that Article 22.6 should not be applied immediately. The banana dispute has lasted for six years and therefore in an effort to preserve the integrity of the WTO, the proceedings of the meeting could continue for a few more days. He appealed to the EC that it was imperative to solve this matter as soon as possible in an amicable fashion because a multilateral solution was the preferred outcome. If the panel established to examine the matter ruled against the EC there would be no winner and for that reason the meeting should not be closed. At the same time, the United States could report to its capital that the general position of delegations was to avoid unilateralism. Time was required to solve this problem in an amicable fashion and there should be no vote on this matter. He proposed to adjourn the meeting with a view to reconvening later at an appropriate date.

The representative of Malaysia said that his delegation was concerned with the proposal to put this matter to a vote and would not be in a position to join such a proposal. Malaysia wished to be associated with the view expressed by Canada in this respect.

The representative of India supported Turkey's proposal to adjourn the meeting and considered that any break should not be shorter than 12 hours. He believed that in order to be productive, a half an hour break would not be very useful.

The representative of the United States said that delegations had waited a long time and the meeting had been postponed several times during the week. She therefore suggested that the meeting be adjourned for a short period of time.

The representative of Australia said that if the meeting were to be adjourned and delegations were to come back to vote, then, like Canada, her delegation was not in a position to vote, one way or the other, without seeking guidance and instructions from capital.

The representative of the European Communities supported the proposal by the United States that the meeting be adjourned for a short time. In accordance with the Rules of Procedure, the Chairman had to submit a decision to a vote immediately. Therefore there was no need for any further delay. Those delegations who did not have instructions could confirm their views expressed at the present meeting and those who were not in a position to vote could abstain. However, those who had a view on the question of the competence of the DSB would know how to vote. The EC had no choice but to put the Chairman's ruling to a vote because that ruling was incorrect in light of the discussion.

The representative of Japan said that his delegation had noted that the majority of delegations had not been in favour of invoking the procedures under Article 22.6. Therefore, the Chairman's ruling might not reflect the position of the majority of delegations. In his view, a short break at this crucial procedural stage would not be sufficient.

The representative of Norway said that the WTO and DSB rules of procedure for the conduct of business were clearly defined. The question of the correct procedure for the conduct of business at the present meeting was of key importance. He therefore sought legal advice from the Secretariat on this matter.

The representative of the United States said that her delegations did not expect to vote but had asked the Chairman to make a decision with regard to the question of voting.

The representative of Brazil said that in light of the statement by the EC he, like Canada, wished to know how to vote, if such a procedure were to be carried out. He asked what would constitute a majority. The EC had referred to three options, i.e. in favour, against or abstention. However, it was also necessary to indicate that some delegations might not participate in the vote. This had to be taken into account. His delegation would not participate in such a vote.

The meeting was adjourned.

Upon the resumption of the meeting on 29 January, the Chairman said that the meeting had been delayed due to the consultations held by him and the Director-General with the parties to the dispute aimed at finding a solution. He believed that the discussion at the 28 January meeting had revealed that delegations wished to avoid both a vote on the Chairman's ruling and recourse to unilateral action. At that meeting, delegations had underlined the need to take into account the interest of all parties concerned and to separate the issue at hand from the banana case as well as to consider proposals made to this effect. At the present meeting, he wished to make a proposal which was taking into account the proposals made and some views expressed in the discussions. Since the draft text of the proposal had not yet been approved by the parties concerned, he would first read out the text of the proposal and then the meeting would be adjourned in order to hold consultations on that text. He then read the following statement: " I have reviewed carefully the statements and the discussion made yesterday in the DSB. Having heard the discussion yesterday, having reflected at length overnight, and taking into account the long-established practice of consensus in the GATT and WTO, I have decided that it would not be appropriate to allow a vote in the DSB on this matter which affects the fundamental operation of the DSU. However, in reviewing the statements made at the meeting last night and after consulting with a number of Members I believe that we must find a compromise solution to the problem we now face. In that spirit and keeping in mind the proposals on the table, including those of Japan, a number of developing countries, the European Communities and the Director-General, I would suggest the following:

"First, a number of delegations have highlighted the lack of clarity in how Articles 21.5 and 22 should be interpreted and the sequence in which they should be applied. I believe that many of these concerns are legitimate, but we face the problem of how to solve our problem in this dispute today, without undermining the spirit and letter of the DSU and, in particular, its provisions on consensus, automaticity and time-limits. I think that the best approach is to proceed by separating the banana case from the more general systemic issues. The solution to the banana matter *would be totally without prejudice* to future cases and to the question of how to resolve the systemic issue of the relationship between Articles 21.5 and 22 of the DSU.

"Second, the two parties will agree to proceed immediately to consultations under Article 4 of the DSU in an effort to find a mutually agreed solution to their problems. That result is always the aim of the DSU and I am convinced that negotiations in good faith could resolve all problems.

"Third, as to bananas, the original panel is now engaged in two Article 21.5 proceedings. In light of the request by the United States under Article 22.2 the same individuals could be given the task of arbitrating the level of suspension. Let me be absolutely clear - request for arbitration under Articles 22.6 and 22.7 will mean that the DSB will not authorize the suspension of concessions at today's meeting. After the arbitrator's award is circulated, a new request for suspension of concessions could be made to the DSB at that time, and the DSB would be required to grant authorization, consistent with the decision of the arbitrator, unless there is a concensus against it. There remains the problem of how the panel and the arbitrators would coordinate their work, but as it will be the same individuals, the reality is that they will find a logical way forward in consultation

with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute while recognizing the rights of both parties and respecting the integrity of the DSU. To assist the arbitrators, I will make sure that the minutes of this meeting are made available to them to take into account as they deem appropriate.

"Fourth, as to the systemic issues concerning the relationship of Articles 21.5 and 22 they must be resolved expeditiously. A number of Members have proposed that the issue of this relationship should be referred to the General Council. I will propose to the Chairman of the General Council that this matter be taken up by that body and that it inform the DSB of the results of its discussions as soon as possible. Secondly, I will make this a priority issue for discussion in the DSU review, and I am prepared to conduct informal consultations on this matter at an early date".

The Chairman proposed to adjourn the meeting in order to hold consultations with the United States and the EC on the text of the proposal. He hoped that it would be possible to reach an agreement which would lead to the resolution of the problem at hand.

The representative of Turkey welcomed the Chairman's proposal and considered that the proposal constituted a step forward towards resolution of this matter.

The meeting was adjourned.

Upon the resumption of the meeting, the Chairman said that after the consultations with the two parties, he wished to present the text of the proposal which contained a few changes. He then read the following: " I have reviewed carefully the statements made and the discussion which took place yesterday in the DSB and I can therefore state the following. Having reflected at length overnight and taking into account the long-established practice of concensus decision-making in the GATT and WTO, I am convinced that it will not be appropriate to vote on this matter which affects the fundamental operation of the dispute settlement understanding. However, in reviewing the statements made at the meeting last night and after consulting a number of Members, I believe that we must find a solution to the problem we now face. In that spirit and keeping in mind the proposals on the table, including those of Japan, a number of developing countries, the European Communities and the Director-General, I would suggest the following:

"First, a number of delegations have highlighted the lack of clarity in how Articles 21.5 and 22 should be interpreted and the sequence in which they should be applied. I believe that many of these concerns are legitimate, but we face the problem of how to solve our problem in this dispute today, without undermining the spirit and letter of the DSU and, in particular, its provisions on concensus, automaticity and time-limits. I think that the best approach is to proceed by separating the Banana case from the more general systemic issues. The solution to the banana matter *would be totally without prejudice* to future cases and to the question of how to resolve the systemic issue of the relationship between Article 21.5 and 22 of the DSU.

"Second, the two parties will agree to proceed immediately to consultations under Article 4 of the DSU in an effort to find a mutually agreed solution to their problems. That result is always the aim of the DSU and I am convinced that negotiations in good faith could resolve all problems.

"Third, as to bananas the original panel is now engaged in two Article 21.5 proceedings. In light of the request by the United States under Article 22.2 and assuming the EC make a request for arbitration under Article 22.6, the same individuals could be given the task of arbitrating the level of suspension. Let me be absolutely clear - a request for arbitration under Article 22.6 will mean that the DSB will not authorize suspension of concessions at today's meeting. After the arbitrator's award is circulated, a new request for suspension of concessions could be made to the DSB at that time, and the DSB would be required to grant authorization, consistent with the decision of the arbitrator, unless there is a concensus against it. There remains the problem of how the panel and the arbitrators would

coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all the remaining issues in this dispute while, recognizing the rights of both parties and respecting the integrity of the DSU. To assist the arbitrators, I will make sure that the minutes of this meeting are made available to them to take into account, as they deem appropriate.

"Fourth, as to the systemic issues concerning the relationship of Articles 21.5 and 22, they must be resolved expeditiously. A number of Members have proposed that the issue of this relationship should be referred to the General Council. I will propose to the Chairman of the General Council that this matter be taken up by that body and that it inform the DSB of the results of its discussions as soon as possible. Secondly, I will make this a priority issue for discussion in the DSU review, and I am prepared to conduct informal consultations on this matter at an early date".

The representative of the United States thanked the Chairman for his proposal and his effort towards seeking a solution to this problem. While the United States could not accept all elements contained therein, it was ready to move the process forward and to enter into consultations under Article 4 with the EC. Her delegation appreciated the Director-General's effort and thanked the Secretariat for its work. Finally, she thanked the EC for its cooperation in reaching the current text.

The representative of the European Communities said that the present meeting had been delayed in order to allow more time for consultations with the parties who had genuinely tried to narrow their differences. He regretted that some differences still existed. The solution to the current problem was based on the proposal made by the Director-General at the beginning of the meeting. At that time, the parties had not been in a position to accept that proposal but now they had reached an agreement to this effect in order to solve the immediate problems. He thanked the Chairman and the Director-General for their effort in bringing the parties together and the Secretariat for its role in the process. He wished to comment on the procedural point raised by the Chairman at the 28 January meeting and to make six points on the Chairman's proposal. The EC, like the United States, could not agree with all elements contained in the proposal, which remained the Chairman's text.

With regard to the Chairman's position that it was not appropriate to vote, the EC agreed that this was not WTO practice. However, a vote was not excluded since at the end of the discussion at the 28 January meeting, the majority of delegations had supported the argument that the DSB, at this stage, was not competent to take a decision on the US request, and that there should be a sequence between the Article 21.5 process and the Article 22.6 process. He recognized that the Chairman's task was difficult and supported his objective of preserving the interest of the multilateral trading system. The Chairman had been confronted with two different and conflicting positions. On the one hand, the United States had claimed that its rights under Article 22 had to be protected and that if the DSB did not take a decision these rights would be lost. He recognized that it was important to preserve these rights. On the other hand, many delegations believed that if the DSB were to decide on this matter it would encourage unilateral actions, which was also a very important point.

He drew attention to six points concerning the Chairman's proposal. First, the EC considered that the first sentence in the first paragraph, namely the reference to the lack of clarity concerning Articles 21 and 22, was a considerable understatement. A number of delegations had referred to this issue during the discussion in a more precise manner and many delegations had expressed their views thereon. He was concerned that this paragraph did not provide any details on various positions expressed by delegations. The EC would have liked to have such details. Second, in the same paragraph, the phrase, "to proceed by separating the banana case from the more general systemic issues", was interpreted by the EC as a statement concerning the Chairman's intention to conduct the present meeting, not an approach to the question of substance. This was because the EC had requested the General Council to make an interpretation and, if such an interpretation was made, some references to the banana case would have to be made. The EC considered that this phrase concerned

the Chairman's intention regarding his proposal and the conduct of the meeting. With regard to the point that this solution would be without prejudice to future cases, he said that although this was a fairly opaque phrase it met the needs of a number of delegations. The EC's agreement to request arbitration should be without prejudice to its position on the Article 21.5 process, and in that sense, the EC would agree with the Chairman's point. Third, with regard to paragraph 3, the idea that the arbitration would be carried out by the same panel was a key one. The original panel was now engaged in the Article 21.5 proceedings and the same panel could also be given the task of arbitrating, which was in accordance with the provisions of Article 22.6. Fourth, the proposal indicated that the arbitrators would find a logical way forward. The EC's expectation was that the logical way to proceed would be that the issue of conformity was examined first and then, if rulings went against the EC's regime, the issue of retaliation could be considered. Fifth, a suggestion had been made to use the dispute settlement mechanisms to resolve the remaining issues while recognizing the rights of both parties. He reserved all the EC's rights, despite its request for arbitration and, in particular, its right to appeal the panel's findings, if necessary. Sixth, as indicated in the fourth paragraph, the EC had requested the General Council to make an interpretation of some controversial issues. Although the EC had not asked the General Council to convene a special meeting, its intention was to deal with this matter expeditiously. He welcomed the Chairman's intention to propose to the Chairman of the General Council to do that. The EC wished that the matter be dealt with quickly enough in order to obtain results by the time the arbitrators had taken a decision. With regard to the DSU review, if the General Council were to make an interpretation then this would have to be considered in the review as a priority matter. However, this did not mean that there was a need for an amendment since an interpretation of the relationship between the disputed Articles would be sufficient. He thanked the United States for its willingness to cooperate, and expressed satisfaction that the parties had arrived at a solution. He would shortly introduce the EC's formal request for arbitration.

The representative of the United States said that her country could not agree with all elements contained in the Chairman's proposal and in the EC's statement concerning this proposal. The US request should not be viewed as unilateralism since the United States was applying the rules in the best possible way in the face of the difficulties with the DSU text. At the 28 January meeting, she had made detailed comments on this matter and therefore did not wish to enter into discussion at the present meeting. She only wished to point out that Article 22.6 referred to by the Chairman in paragraph 3 of his proposal expressly provided that the arbitration had to be completed within the 60 days after the expiry of a reasonable period of time. In this case, the deadline for completion of the arbitration was 1 March. She stressed that Article 22.6, unlike other DSU provisions, did not specify that the time-frame contained therein could be extended.

The representative of Saint Lucia thanked the Chairman for his attempts to move the process forward. She appreciated his effort and intention to seek a long-term resolution of this issue that would preserve the rule of law and the fundamental basis of the multilateral system, namely, the functioning of the DSB. Therefore, in spite of some reservations with regard to the proposal, she thanked the Chairman for his effort in this regard.

The representative of India thanked both the United States and the EC for their leadership in arriving at a solution in an effort to preserve the system and to move the process forward. He also thanked the Director-General and the Secretariat and, in particular, he thanked the Chairman for his leadership towards finding a solution which would strengthen the rule-based multilateral trading system. His delegation agreed with the Chairman's proposal which was a transparent and sincere attempt to capture the discussion in the proceedings of the 28 January meeting. The proposal, which had been carefully drafted, recognized the inherent problems involved in the current situation and pointed in certain directions in an effort to find a solution.

The representative of Dominica joined previous speakers who had expressed gratitude to the Chairman for his effort aimed at trying to bring a conclusion to the problem at hand. While it was necessary to preserve the WTO rules, the exercise of some rights by certain Members could cause

anxiety in some countries. For that reason, he welcomed many aspects of the Chairman's statements and, in particular, the fact that the banana case had been separated from the more general systemic issue and had been given special consideration. He was concerned that beyond the legal and constitutional issues discussed in the course of the meeting, real people and countries were being affected. In particular, those countries with vulnerable and fragile economies, small populations and limited production capacities. In those countries, the production of bananas was the main economic activity. Although their total production and share of world trade in bananas were small, without the arrangements provided by the EC under the Lomé Convention, which was consistent with its WTO obligations, these countries could not compete on the international level. Therefore, WTO rules should not be interpreted in a manner that would not allow to accommodate a small quantity of bananas exported by countries such as Dominica in order to guarantee the rights of multinationals and so-called efficient producers to export freely irrespective of consequences. This would deny the opportunities provided to vulnerable and small countries in order to enable them to have a decent standard of living. The result of the past week was less satisfactory than many delegations had expected. However, the immediate problem had been resolved. Further work was still required in trying to reconcile the ambiguity in Articles 21.5 and 22. He believed that under the Chairman's leadership and with the same cooperation and understanding shown by various delegations, in particular the major ones, a system was evolving that would take into account the vital interests of all countries irrespective of their size and contribution to world trade.

The representative of Egypt said that, like previous speakers, his delegation supported the Chairman's proposal. Like many other delegations, Egypt had called upon the United States and the EC to demonstrate their leadership and therefore welcomed the fact that the parties had made some progress. His delegation would have preferred to see this problem resolved, but recognized the sensitivities and the complexity of the issue and hoped that the consideration of the matter would continue and that its outcome would remain balanced and would take into account the interests of all parties concerned.

The representative of the European Communities said that his delegation wished to make a request for arbitration. At the present meeting, he was submitting this request orally but a written request would be provided immediately thereafter. In application of Article 22.6, the EC challenged the level of suspension of concessions proposed by the United States in WT/DS27/43. The EC was requesting that the matter be submitted to arbitration in order to determine whether the level of suspension proposed was, in accordance with Article 22.7, equivalent to the level of nullification and impairment of benefits accruing to the United States, in light of the fact that the EC's measures considered to be WTO-inconsistent had been withdrawn, and had had no effect since the expiry of the reasonable time. At the same time, it had not yet been determined whether the new EC's banana regime was in violation of the EC's obligations or whether the US benefits were being impaired. Furthermore, the EC affirmed that the principles and procedures of Article 22.3 had not been applied. The EC was also requesting the original panel to ensure the arbitration of matters contained in paragraphs 1 and 2 of its request. The EC's request was without prejudice to its position of principle concerning the conditions of application of Article 22.6, namely, that the DSB was not in a position to authorize the United States to suspend concessions before a determination under Article 21.5 had been completed. This matter would also be submitted to the General Council for interpretation.

The representative of the United States noted the EC request for arbitration. She underlined that the United States, in making its request, had fully and faithfully complied with the procedures set forth in Article 22.3. Therefore, the only issue to be examined in arbitration was whether the level of suspension of concessions proposed by the United States complied with the requirements of Article 22.4.

The Chairman proposed that the DSB take note of the statements made and agree that the matter be referred to arbitration by the original panel in accordance with Article 22.6 of the DSU.

The DSB so agreed.

The Chairman proposed to adjourn the meeting until 1 February in order to consider the remaining items on the agenda.

The DSB so agreed.

The meeting was resumed on 1 February.

2. Surveillance of implementation of recommendations adopted by the DSB

(a) India - Patent protection for pharmaceutical and agricultural products: Status report by India (WT/DS50/10/Add.1)

(b) European Communities - Measures concerning meat and meat products (hormones): Status report by the European Communities (WT/DS26/17-WT/DS48/15)

(c) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina. (WT/DS56/5)

The Chairman recalled that Article 21.6 of the DSU required that "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 DSB consider the three items separately. First, he drew attention to document WT/DS50/Add.1 which contained India's second status report regarding its progress in the implementation of the DSB's recommendations concerning patent protection for pharmaceutical and agricultural chemical products.

The representative of India said that, as indicated in the status report, on 8 January 1999 his Government had promulgated the Patents (Amendment) Ordinance in order to amend the Patents Act in an effort to comply with the DSB's recommendations. In accordance with Article 123 of India's Constitution, an Ordinace ceased to operate at the expiration of six weeks from the re-assembly of Parliament or if. before the expiration of that period resolutions disapproving were passed by both Houses. India had proposed to introduce a bill to replace the Ordinance in the Budget Session of Parliament, to begin in the fourth week of February 1999. The matter would remain in the legislative domain until the legislation was approved by Parliament.

The representative of the United States said that her delegation appreciated India's status report but was disappointed that India had not consulted with the United States on its implementation measure since such consultations would have been helpful. The United States welcomed that fact that India had now agreed to meet next week in order to discuss this matter. The United States had serious concerns with regard to the new Ordinance and believed that certain aspects thereof did not comply with the TRIPS Agreement. India had agreed to consult on these issues and the United States hoped that these problems would be addressed in the permanent legislation to be considered by the Indian Parliament.

The representative of India said that his delegation had noted the statement by the United States which would be conveyed to the capital. India believed that the provisions of the Ordinance were in line with the DSB's recommendations. He confirmed that the parties to the dispute would soon enter into consultations and hoped that in the course of these consultations India would be able to put to rest any misgivings that the United States might have on this subject and to convince the United States that it was on the right track.

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

The Chairman drew attention to document WT/DS26/17 - WT/DS48/15 which contained the EC's first status report on its progress in the implementation of the DSB's recommendations on measures concerning meat and meat products.

The representative of the European Communities said that in light of the Appellate Body's ruling, the EC had initiated the process of implementing the DSB's recommendations. As a first step, the EC had decided to launch without delay a complementary risk assessment with a view to assessing the implications thereof for the EC's import prohibition. For this purpose, a number of scientific studies were currently underway. Furthermore, in April 1998, the Commission had formally requested the risk assessment data upon which the United States, Canada, New Zealand and Australia had based their decisions to authorize hormones for growth promotion purposes. Thus far, the authorities of the United States and Canada had declined to provide such data which, they had claimed, had been submitted to them in confidence. No reply had been received from other countries although the EC had urged them to reply in time. This data would enable the EC to draw conclusions with respect to its relevant legislations in order to fully implement the DSB's recommendations. In the meantime, the inter-institutional consultations continued.

The representative of the United States said that the dispute between the EC and the United States over hormone-treated meat had a long history. In January 1989, after several years of bilateral and multilateral consultations, the EC had formally implemented its import ban. From 1989 to 1995, the EC had blocked the US attempts aimed at resolving this dispute either through recourse to dispute settlement procedures or in bilateral consultations. In 1997/98, the Panel and the Appellate Body had ruled that the EC's import ban violated its WTO-obligations. Following the adoption of the reports, in accordance with the arbitrator's decision, the EC had been granted 15 months, until 13 May 1999, to bring its measures into compliance with WTO rules. Although not much time was left before the expiry of that deadline, the EC had not yet begun any legislative or administrative process to withdraw its measure. The EC had been given a reasonable period of time only for the purpose of bringing its measures into compliance. The United States had informally been informed that the EC would not be able to comply by 13 May. This would undermine the credibility of the system since it would imply that the EC had accepted the 15-month period without any intention to respect its WTO obligations. At the present meeting, the United States asked the EC to provide answers to the following questions: "(i) Does the EC expect to comply with the WTO rulings by 13 May?; and (ii) What specific steps has the EC taken to bring its measures into compliance?".

The representative of Canada thanked the EC for its status report and expressed disappointment that the report was less than satisfactory for the following reasons: (i) It indicated that the EC had started "a complementary risk assessment with a view to assessing the implications thereof for the EC's import prohibition" and that "inter-institutional consultations continue"; (ii) There was almost four months left before the expiry of the deadline for implementation but the EC had only initiated a number of scientific studies and had not yet considered or analyzed implementation options; (iii) The information provided by the EC at the present meeting was not new since in 1998, after the circulation of the Appellate Body report, the EC had announced that it would carry out a complementary risk assessment The same information had then been stated by the EC during the arbitration proceedings on a reasonable period of time for implementation. It therefore appeared that no changes had taken place over the past 10 months in terms of implementation; (iv) Although the EC acknowledged that it had initiated the studies "with a view to assessing the implications thereof for the EC's import prohibition", it had not provided any indication as to when one could expect the EC to reach a conclusion with respect to its import prohibition; (v) Canada was seriously concerned about this and believed that this should also be of concern to other DSB members, especially since the EC had informed the parties during the arbitration proceedings that its

legislative process to repeal or modify the EC's measures could take 15 months; (vi) in Canada's view, in order to comply with the rulings of the Panel and the Appellate Body, the EC had to remove its import ban on meat produced with growth hormones. Its expectation was that this be done by 13 May 1999, in accordance with the arbitrator's decision. She added that it would be in the interest of all Members to try to avoid another dispute over implementation. Canada asked the EC to provide answers to the following questions: "(i) What steps has the EC taken to-date to remove its import prohibition?; and (ii) When can we expect the prohibition to be lifted".

The representative of the European Communities said that, in accordance with the DSB's recommendations, the EC was not required to remove its import prohibition but to bring its measures in dispute into conformity with its WTO obligations. It was the EC's intention to do so. The EC had undertaken a complementary risk assessment with a view to assessing the implications thereof for its import prohibition. It believed that its preliminary conclusions would be ready in April, which should provide sufficient basis for a decision. In the meantime, the inter-institutional consultations leading to a new legislative process were underway and should be completed by 13 May.

The representative of the United States said that the information provided by the EC did not suggest that the EC would comply by 13 May. The United States wished to avoid another dispute over implementation. However, both parties had to be willing to work towards reaching a mutually acceptable solution. The United States urged the EC to engage in negotiations of a WTO-consistent solution to this dispute as soon as possible. The United States had responded to the EC's request made in April 1998 for risk assessment data. However, it was surprised that the EC had waited six months, from June 1998 when the data had been provided until recently, to inform the United States that additional data was necessary. The United States would provide this additional information which, it believed, would be more than adequate for the EC's purposes.

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

The Chairman drew attention to document WT/DS56/15 containing Argentina's information on its progress in the implementation of the DSB's recommendations on measures affecting imports of footwear, textiles, apparel and other items.

The representative of Argentina said that, as indicated in WT/DS56/15, the parties to the dispute had agreed that Argentina would provide its first status report on the implementation of the DSB's recommendations at the regular meeting of the DSB in February.

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

3. Canada - Patent protection of pharmaceutical products

(a) Request for the establishment of a panel by the European Communities (WT/DS114/5)

The Chairman recalled that the DSB had considered this matter at its 25 November meeting and had agreed to revert to it. He drew attention to the communication from the EC contained in WT/DS114/5.

The representative of the European Communities said that the EC supported the implementation of intellectual property (IP) provisions that provided for a fair and equal balance between the interests of right holders, research and development, and public health and nutrition. Any attempt to lower the existing minimum requirements under the TRIPS Agreement would distort this balance and result in an unclear innovative environment and impediments to innovation activity. This

would lead to a situation in which consumers and other users of new technology would lose. For these reasons, the EC was requesting the establishment of a panel to examine this matter. He recalled that at the 25 November meeting, the EC had outlined some technical reasons related to its panel request. Since this was the second time that the EC had made its request it was expected that a panel would be established at the present meeting.

The representative of Canada expressed his country's disappointment over the EC's decision to proceed with its panel request to challenge some aspects of Canada's patent laws and regulations with regard to pharmaceuticals. Canada was fully compliant with its international obligations and would vigorously defend its patent law. By requesting this panel, the EC was challenging the essential measures that many governments had in place to balance the interests of innovators with the interests of governments and consumers to ensure affordable public access to affordable products. Canada's patent laws encouraged risk-taking and investment, through rewarding innovation and promoting a fair, efficient and competitive marketplace. Its regulatory approval provisions were part of a balanced approach which provided effective enforcement of patent rights while allowing copies of products to reach the market immediately upon patent expiry. This was a reasonable exception to the rights of patent holders that was permitted under the TRIPS Agreement. Canada was convinced that this challenge was intended to strike out not only at the Canadian system of patent protection but also the system used by many other Members. This issue was of vital importance for Canada, but the panel's finding could have important implications for other Members, including the EC's member States.

Canada had long supported effective protection of IP rights and had been instrumental during the negotiations of the TRIPS Agreement, which laid down both substantive standards and effective enforcement procedures for the protection of IP rights. At the same time, the TRIPS Agreement recognized that individual Members could take measures so as to balance the application of IP rights against other important societal interests. The TRIPS Agreement created a framework to achieve these equally significant priorities. The EC, in bringing the matter to a panel, was sending a signal to other Members that, in its view, the negotiated result of the TRIPS Agreement was not satisfactory. Although the Canadian patent law was the only target, in fact, this was an attempt to go beyond the negotiated outcome. As a result, the panel could have a far-reaching impact for all. He therefore encouraged all Members concerned to participate in the panel's proceedings as third parties.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

The representatives of Australia, Brazil, Cuba, India, Israel, Japan, Poland, Switzerland and the United States reserved their third-party rights to participate in the Panel's proceedings.

4. United States - Anti-Dumping Act of 1916

(a) Request for the establishment of a panel by the European Communities (WT/DS136/2)

The Chairman recalled that the DSB had considered this matter at its 25 November meeting and had agreed to revert to it. He drew attention to the communication from the European Communities contained in document WT/DS136/2.

The representative of the European Communities said that the 1916 Act prohibited both the importation of goods and their sale on the US market when the price was lower than the one in the country of origin. The US government had claimed that the 1916 Act was an anti-trust statute. The EC believed that that Act was an anti-dumping statute which conflicted not only with Article VI of GATT 1994 but also with the provisions of the Anti-Dumping Agreement, namely, Articles 1, 2.1, 2.2, 3, 4 and 5 thereof. Furthermore, there were strong indications that the 1916 Act entailed

discriminatory treatment of imported products thus violating Article III of GATT 1994. At the 25 November meeting, the EC had already outlined its reasons for requesting a panel to examine this matter. Since this was the second time that the EC was submitting its panel request, it was expected that a panel would be established at the present meeting.

The representative of the United States said that her country regretted and was disappointed that the EC had taken the step of requesting a panel because the 1916 Act was an obsolete statute for all intents and purposes. In the past 82 years since its enactment nobody had recovered under the 1916 Act, and thus the trade effects thereof were *de minimis.* The United States believed that the 1916 Act was fully consistent with its WTO obligations and would vigorously defend its law.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

The representatives of India, Japan and Mexico reserved their third-party rights to participate in the Panel's proceedings.

5. Canada - Certain automotive industry measures

(a) Request for the establishment of a panel by Japan (WT/DS139/2)

and

6. Canada - Certain measures affecting the automotive industry

(a) Request for the establishment of a panel by the European Communities (WT/DS142/2)

The Chairman proposed that items 5 and 6 be taken up together since they pertained to the same matter. First he drew attention the communication from Japan contained in WT/DS139/2. He recalled that the DSB had considered this matter at the 25 November meeting and had agreed to revert to it.

The representative of Japan said that his country's request for a panel was fully described in document WT/DS139/2 and therefore at the present meeting he only wished to provide a brief explanation. Under the measures relating to the Agreement concerning Automotive Products between the Governments of Canada and the United States (Auto Pact), only a limited number of manufacturers were eligible to import vehicles duty-free into Canada and to distribute them in Canada's market at the wholesale and retail distribution levels. Japan considered that these measures were inconsistent with the relevant provisions of GATT 1994, the TRIMs Agreement, the SCM Agreement and the GATS. Since this was the second time that Japan was requesting a panel, it was expected that such a panel would be established at the present meeting.

The representative of the European Communities said that the measures at issue included the 1965 Agreement concerning Automotive Products between the Governments of Canada and the United States (Auto Pact) and the Motor Vehicles Tariff Order of 1998. Under these measures, certain manufacturers of motor vehicles (the beneficiaries) were being granted tariff exemptions for importing motor vehicles duty free into Canada. The granting of those exemptions were subject to two types of conditions: (i) the beneficiary's local production of motor vehicles, parts and components had to achieve a certain level of Canadian Value Added; and (ii) the value of the beneficiary's sales of motor vehicles in Canada had to keep a certain proportion with the value of its local production of motor vehicles of the same category (ratio requirement). The EC considered that the current regime violated several provisions of the WTO Agreements. First, by allowing duty-free imports of cars based on local content, the regime granted less-favourable treatment to the use of foreign parts and components than that granted to domestic products, thus violating Article III:4 of

GATT 1994 and the TRIMs Agreement. In addition, the duty exemption appeared to be contingent upon the use of domestic over imported goods and was therefore prohibited under Article 3.1 (a) and (b) of the Subsidies Agreement. Finally, the tariff exemption was also deemed to be inconsistent with Articles II and/or XVII of GATS because it had granted more favourable treatment to the US and/or Canadian suppliers of wholesale trade services for motor vehicles than to like service suppliers of other Members. He noted that his delegation had no objections to Canada's proposal that a single panel examine both complaints.

The representative of Canada said that, on a number of occasions over the past six months, her country had held consultations with Japan and the EC on certain aspects of Canada's automotive trade regime. Canada believed that these consultations had been helpful in explaining its automotive trade regime to Japan and the EC. However, it was disappointed that neither party had fully explained the legal basis of their claims. The consultations had reinforced Canada's belief that its automotive trade regime was fully consistent with its WTO obligations and would stand up to these challenges. As the most recent Canadian statistics demonstrated, imports of vehicles from Japan had increased by 28 per cent in the past year and imports of vehicles from the EC had increased by 32 per cent. It was therefore clear that Canada's market was open and that Japanese and EC companies were enjoying great success in Canada. She regretted that Japan had made its second panel request and said that although the EC's request was on the agenda for the first time, in the interest of an efficient use of resources, Canada would agree to that request at the present meeting.

The Chairman said that pursuant to Article 9.1 of the DSU, "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 taking into account the rights of all Members concerned". He therefore proposed that the complaint by Japan contained in WT/DS139/2 and the complaint by the EC in WT/DS142/2 be examined by a single panel, provided that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaint were in no way impaired. The panel would have standard terms of reference.

The DSB took note of the statements and agreed to establish a single panel in accordance with the provisions of Article 9.1 of the DSU, with standard terms of reference.

The representatives of India, Korea and the United States reserved their third-party rights to participate in the Panel's proceedings.

7. United States - Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom

(a) Request for the establishment of a panel by the European Communities (WT/DS138 and Corr.1)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS138/3 and Corr.1.

The representative of the European Communities said that the issue at hand concerned the United States' refusal to take account of the privatization or change of ownership of the body receiving subsidies even if at a full market price, and to consider whether the subsidy provided a benefit when assessing or reassessing the countervailable subsidy. The EC considered that the subsidies granted to British Steel Corporation before its privatization had been eliminated following its privatization at fair market value. Such an open-market privatization or sale of a company had inevitably involved the repayment of all the outstanding amounts of subsidy by the purchaser; in view of the ensuing absence of benefit to the exporter, the subsidies were no longer countervailable. The United States had not taken into account of the fair market price paid for British Steel Corporation in

this case, but had simply assumed that a certain amount of subsidy "passed through" to the purchaser and had therefore failed to establish that there was a benefit. In the same way, the US had failed to establish the existence of a benefit by determining on the basis of a presumption, that the subsidies granted to British Steel Corporation before its privatization had passed through to the US following the latter's acquisition at an arm's length price of certain British Steel assets. The panel was requested pursuant to Article 30 of the SCM Agreement. From the EC's point of view, the countervailing duties imposed by the United States violated Articles 1.1 (b), 10, 14 and 19.4 of the SCM Agreement.

The representative of the United States said that her delegation was not in a position to consent to the establishment of a panel at the present meeting. However, she wished to make a few comments with regard to the EC's request. The United States recognized that the facts of this dispute were complicated. However, the EC's description of how the US countervailing duty authorities had taken into account the privatization of British Steel Corporation had distorted the real situation. She therefore wished to clarify this. The EC's request suggested that the US authorities, in dealing with the privatization of a government-owned company, had automatically allocated any and all subsidies previously received by the government-owned company to the successor privatized company. This was not accurate. A simple description of the US approach to privatizations was as follows. The United States considered that when a government was selling a government-owned company to a successor private company, the price paid by the private company returned part of the previously bestowed subsidies to the seller, i.e, to the government. The subsidies repaid in this manner were allocated to the government and were treated as expired. Only the remainder of the subsidies was ascribed to the privatized corporation. This was a general description. The concrete result in any particular case depended on the particular terms and conditions of the privatization in question, and every privatization had its own unique complexities. The United States believed that this approach was consistent with the fundamental principles stipulated in the SCM Agreement and did not conflict with any of the obligations in that Agreement. She drew attention to how the EC handled privatizations in the guidelines for the EC State Aids Code, which regulated subsidization by the member States. These guidelines directly contradicted the position of the EC taken in this dispute. The EC's State Aids guidelines automatically treated all of the prior subsidies as passing through to the privatized company.

She noted that the EC's corrigendum which contained a substantive change had been circulated at the last minute, after the agenda of the present meeting had been closed. Therefore the only document before the DSB at the present meeting was the EC's request contained in WT/DS138/2, which had been circulated on a timely basis on 14 January 1999. The fact that the EC had characterized this addition to its panel request as a corrigendum did not make any difference. It was an addition to the panel request. If a party could add material to a panel request at the last minute, this would nullify the advance notice requirements of the ten-day rule pursuant to the Rules of Procedure and the DSU requirement in Article 6.1 that a panel request had to be on the DSB's agenda twice. The material the EC had wished to add to its panel request did not relate to any late-breaking events. The EC had been aware of these issue for a long period of time. It was therefore not clear why the EC had decided to add this material at the last minute and thereby had not been able to comply with the ten-day rule for circulation of documents. Whatever the EC's excuse, the corrigendum was not before the DSB at the present meeting. If the EC wished to include this material in its panel request and its terms of reference, the corrigendum would have to be placed on the agenda of two subsequent meetings of the DSB. If the EC were to seek the establishment of a panel at the next meeting and if such a panel was established, then the only relevant document in this case would be that contained in WT/DS138/2 without the corrigendum.

The representative of the European Communities said that the corrigendum did not represent a substantive modification. However, he wished to know whether the United States had considered that the EC's request was not receivable and what procedure should be followed in this case. In his view, the US approach with regard to this matter was too rigid and formalistic.

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

8. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/89)

The Chairman drew attention to document WT/DSB/W/89 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 in document WT/DSB/W/89.

The DSB so agreed.

9. Rules of Conduct

(a) Statement by the Chairman

The Chairman recalled that at the DSB meeting on 25 November 1998, he had stated that in accordance with Section IX of the Rules of Conduct contained in document WT/DSB/RC/1 and adopted by the DSB on 3 December 1996, "the Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the DSB as to whether to continue, modify or terminate these Rules". At that meeting, he had also stated that he had not detected a particular desire among delegations to conduct a comprehensive review of these Rules and reach a decision in respect thereof prior to the end of 1998. In the light of this, he had proposed that, unless delegations had objections, the DSB could decide, at its next regular meeting, to continue to apply the current Rules of Conduct as contained in document WT/DSB/RC/1 and review them at a later stage, as necessary. Since thus far he had not received any objections from delegations on this matter, he wished to propose that the DSB decide to continue to apply the current Rules of Conduct as contained in document WT/DSB/RC/1 and review them at a later stage, as necessary.

The DSB so agreed.

10. European Communities - Measures affecting differential and favourable treatment of coffee: Request for consultations by Brazil

(a) Statement by Colombia

The representative of Colombia, speaking under "Other Business" wished to express his delegation's concerns with regard to Brazil's request for consultations with the EC on special preferential treatment granted under the EC's Generalized System of Preferences (GSP) scheme to products originating in Andean and Central American Common Market countries (WT/DS154/1). Colombia was concerned that Brazil had made its request for consultations under Article XXIII of GATT 1994, thereby preventing other parties directly concerned from participating therein. This matter had far-reaching political implications since it concerned tariff preferences granted to the above-mentioned countries in an effort to combat drug trafficking. It also involved important economic implications since tariff preferences covered a large amount of exports of those countries to the EC's market. Brazil had prevented them from participating in the consultations, even though the EC had not objected to their participation. Article XXIII had been designed to deal with bilateral matters. In cases in which the matter at issue directly affected the interests of other Members, such as the matter at hand, Article XXII procedures should be invoked. Colombia did not question the right of any Member to resort to dispute settlement provisions but believed that this should be done in conformity with the spirit of these provisions in order to preserve Members' rights to defend their interests.

The representative of Costa Rica associated his delegation with the statement by Colombia. Costa Rica was also concerned that Brazil had requested consultations under Article XXIII and had thus excluded interested third parties from participating therein. Andean and Central American Common Market countries had substantial interests in this matter. Since coffee was one of Costa Rica's main export products his government had notified the parties to the dispute of its desire to join these consultations. However, Brazil's reply was negative. His government was surprised at the manner in which Brazil had decided to exercise its rights. His delegation would continue to attach great importance to this matter and would closely follow the consultations between the parties. Costa Rica would continue to make use of its rights under the DSU in order to defend its interests.

The representative of Honduras supported and shared the views expressed by Colombia. His Government had an interest in this matter, which involved important political and economic implications. Honduras was concerned that Brazil had invoked the procedures of Article XIII. He recognized that Brazil was acting within its rights, but was concerned that it had deprived other countries that benefited from the GSP scheme of their rights to defend their interests.

The representatives of Guatemala and El Salvador supported the statements by Colombia, Costa Rica and Honduras.

The representative of Ecuador supported the statement by Colombia. Ecuador considered that this was an important issue which had political, commercial and social implications. He regretted that his delegation had not been able to participate in the recently held consultations between the EC and Brazil. Brazil had requested these consultations under Article XXIII which allowed a Member to exclude other Members with substantial interests in the matter from discussions. Ecuador did not question Brazil's right to request consultations, but was concerned about Brazil's decision to take steps which had appeared to have negative effects on the EC's system of preferences.

The representative of Venezuela associated his delegation with the statements made by Colombia, Costa Rica, Honduras and Ecuador. Venezuela was concerned that certain interested parties had not been allowed to participate in these consultations. The two parties should recognize the particular sensitivity and importance of tariff preferences for Andean and Central American Common Market countries. It was not appropriate to exclude important players from these consultations on the basis of a legal interpretation. The interests of those countries had not been taken into account by Brazil even though the EC had indicated that it had no objections to allowing them to join these consultations.

The representative of Bolivia said that Members were free to decide how to defend their trade interests within the WTO framework. However, Colombia had raised important concerns since it was possible that the GSP scheme could be impaired.

The representative of Brazil said that the language of Article XXIII was clear. Brazil had requested consultations with the EC pursuant to that Article. The text of Article 4.11 of the DSU was also clear. It stipulated third parties' rights and limits with regard to consultations. His delegation was therefore surprised with the claim made by Colombia that Brazil had invoked Article XXIII to prevent third parties from participating in the consultations. Brazil did not share Colombia's interpretation of Article XXIII and believed that this interpretation raised some questions concerning Members' rights under the DSU. First, should a government contact all Members before it decided to make a request for consultations under Article XXIII? Second, whether the sole purpose of Articles XXII and XXIII was to determine third-party participation? He reiterated what had been stated in another context, namely, that Brazil was always ready to discuss matters of mutual interest as it had done in the past, and would continue to do in future.

The DSB took note of the statements.

11. United States - Import prohibition of certain shrimp and shrimp products

(a) Statement by India, Malaysia, Pakistan and Thailand

The representative of India, speaking under "Other Business" and also on behalf of Malaysia, Pakistan and Thailand, recalled that on 6 November 1998, the DSB had adopted the Appellate Body Report and the Panel Report on this matter. Following consultations between the parties to the dispute, an agreement had been reached that the United States would have 13 months from the date of adoption of the Reports as a reasonable period of time under Article 21.3 of the DSU to comply with the DSB's recommendations. The parties had arrived at the agreement on the reasonable period of time on 21 January 1999.

The representative of the United States appreciated the cooperative manner in which the parties to the dispute had reached an agreement on a reasonable period of time. The United States hoped that this constructive dialog would continue throughout the implementing process.

The DSB took note of the statements.

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

(a) Statement by Panama

The representative of Panama, speaking under "Other Business", drew attention to the fact that the agenda of the present meeting - item 2 - did not contain a status report by the EC on its banana import regime. In his view, the DSU required the DSB to continue its surveillance function with regard to unresolved disputes. Since no solution had yet been reached in the banana dispute, he was surprised that this matter had not been placed on the agenda of the present meeting. He asked the Secretariat to provide an answer as to why this item had not been placed on the agenda and what would be done in future with regard to this matter.

The representative of the Secretariat, Mr. Davey, said that normally items were placed on the agenda by the Secretariat at the request of delegations. In this case, no status report had been received by the Secretariat in relation to this matter. He noted that on 12 January the DSB had taken a decision to refer this matter, under Article 21.5, to the original panel both at the request of Ecuador and the EC. Therefore, until that panel report, the DSB had taken a decision to refer the matter to another forum. However, if delegations wished to raise this matter it could always be placed on the agenda.

The DSB took note of the statements.