WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
7 April 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 7 April 2000

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

Prior to the adoption of the Agenda, the Chairman announced that due to his personal involvement in the arbitration proceedings in relation to item 3 of the Agenda, he would excuse himself from presiding over the proceeding of item 3. In accordance with the Rules of Procedure, he would invite the Chairman of the General Council, Mr. Kåre Bryn, to take over from him for that item.

Subjects discussed:

1. Surveillance of implementation of recommendations adopted by the DSB.....1
(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities 2
(b) Japan - Measures affecting agricultural products: Status report by Japan 4
2. United States – Tax treatment for "Foreign Sales Corporations" 5
(a) Implementation of the recommendations of the DSB.....5
3. European Communities - Regime for the importation, sale and distribution of bananas - Recourse to arbitration by the European Communities under Article 22.6 of the DSU - Decision by the Arbitrators.....6
(a) Statement by Ecuador 6
4. Nicaragua - Measures affecting imports from Honduras and Colombia 12
(a) Request for the establishment of a panel by Colombia.....12
5. Canada - Patent protection of pharmaceutical products 15
(a) Report of the Panel 15
6. Appointment of Appellate Body members 16

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.7)

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/Add.3)

1. 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 two sub-items be considered separately.

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities

2. The Chairman drew attention to document WT/DS27/51/Add.7 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana regime.

3. The representative of the European Communities said that the Chairman's decision in relation to item 3 of the Agenda was wise and prudent. He believed that in the situation at hand the way of proceeding proposed by the Chairman was correct. The status report submitted by the EC at the present meeting was short since there was not much to report. He confirmed that the EC continued its ongoing bilateral discussions with the concerned Members and that it was always its intention to find a solution which would be accepted by all stakeholders in this case. He regretted that it was not yet possible to bridge the very divergent positions expressed by the main parties concerned. He noted that those who urged the EC to implement were, in practice, urging it to decide on one side or the other of the argument which would leave half of the stakeholders unsatisfied.

4. The most difficult question faced by the EC was the distribution of licences in the context of a tariff-rate quota system. On this key issue, one of the EC's partners was claiming that, as a basis for issuing of licences, the only acceptable period to determine the operators' rights for licences was a pre-1993 period; i.e. before the completion of the internal market for bananas. This position was also reflected in the proposal of the Caribbean exporters. On the other hand, as indicated at the 20 March DSB meeting, Ecuador insisted on a diametrically opposed position, namely, that the reference period should be very recent and in all cases post-1993.

5. The EC was doing its best but there were very serious divergences of views. At the 20 March DSB meeting, the United States had claimed that the divergent views which caused problems were among the EC member States rather than among the supplying countries. It was disingenuous for the United States to claim that and to urge the EC to "assume responsibility for its own failure to comply with its WTO obligations, and not try to shift it to others". The EC was facing major divergences on all sides. It was not trying to shift the responsibility but to reach an agreement acceptable to all the parties. This was a classic case where difficulties were being experienced at the implementation stage. In order to try to find a basis for an acceptable solution it was necessary to discuss with the parties concerned. In view of the divergent positions on how to manage a tariff-rate quota system another solution might have to be envisaged. The EC would keep the DSB informed of any further developments.

6. The representative of Ecuador said that his delegation noted the status report submitted by the EC. Since its previous report, the EC had requested the Council for Trade in Goods to extend the Lomé waiver. In the view of the EC, that waiver was necessary for the implementation of its new banana import regime. However, it was contradictory for the EC to request the extension of a waiver for a regime which had not yet been put in place.

7. The representative of Panama said that his delegation shared the view expressed by the EC with regard to the Chairman's decision in relation to item 3 of the Agenda. Panama believed that this was a correct approach. The status report submitted by the EC at the present meeting did not contain any new information. There were still differences of views as to why it had not been possible to reach an agreement and with regard to the nature of the differences amongst the parties. He reiterated his country's position stated at previous DSB meetings. Panama wished to make an appeal that the matter

be discussed with all the parties concerned, in particular in the light of the developments referred to by Ecuador.

8. The representative of Guatemala said that on the basis of the status report one could only conclude that no progress had been made that would demonstrate the EC's willingness to bring its banana import regime into conformity with its WTO obligations. Furthermore, even though the waiver covering the preferences under the Lomé Convention had expired and procedures for a new waiver had been initiated, no settlement had yet been found in the Bananas case. On the contrary, the waiver request contained no information with regard to the new banana regime. Instead, the result was left uncertain, putting not only the complainants but also the dispute settlement system at a great risk. That waiver request was closely linked to the status report; i.e. if both documents were to be read together, it was clear that the stalling tactics adopted thus far had a purpose. Guatemala hoped that the system would protect its rights and that, in the interest of the system, the EC's unwillingness to implement the DSB's recommendations would be brought to an end. The responsibility for the lack of progress was with the EC and should not be shifted to the complainants.

9. The representative of Honduras expressed his delegation's frustration at the lack of progress with regard to this matter. The Bananas case had been concluded almost three years ago with the adoption of the DSB's recommendations on 25 September 1997. He regretted that no genuine effort had yet been made to bring the regime into conformity with the WTO rules. His country's economy was extremely vulnerable with a lower GDP than in most countries in the western hemisphere. In 1999, Honduras had a negative GDP growth of 3 per cent. Honduras which was dependent on its agricultural exports, in particular exports of bananas, had been severely affected by the EC's banana import regime. His country had had recourse to the dispute settlement system in the hope that its rights would be restored, but despite winning the case Honduras was still waiting. Furthermore, new initiatives were being put forward which placed countries such as Honduras at a disadvantage, and were aimed at permanently shirking the responsibilities arising from the DSB's recommendations. These actions represented a clear message of non-compliance. He reiterated that since the 20 March DSB meeting no consultations had taken place between Honduras and the EC in order to seek a solution to the Bananas case. In the year 2000, only one meeting had been held to report on the discussions carried out with Ecuador and the United States. He wished to remind the EC that Honduras was a party to this dispute. His country was concerned about how much longer it would continue to lose millions of dollars a year. He asked whether it was fair that cases could be prolonged for such a long period of time since that jeopardized the results of the dispute settlement mechanism and the multilateral trading system.

10. The representative of the United States said that, as the EC had indicated, the status report was short because no new developments had taken place since the past couple of meetings. In the interest of resolving this dispute, the United States had demonstrated considerable flexibility in its bilateral discussions with the EC; the EC had not. As a result, there had been no movement toward a resolution. At the end of 1999, the United States, as well as most of the Latin American banana exporting countries, had endorsed a proposal put forward by Prime Minister Edison James of Dominica on behalf of Caribbean exporters. The EC had not accepted the proposal and continued to cite differences among the complaining parties, when that was not where the real differences lay. The United States asked that the EC refrain from blaming the complaining parties for its failure to implement a WTO-consistent banana regime. The EC's obligation was to come into compliance with the DSB's rulings and recommendations. The reason that the EC could not come into compliance was the divergent views among its 15 member States, some of which insisted on maintaining provisions that discriminated in their favour and benefited their interests. The United States hoped that it would be possible to hear positive results from the EC and that the next time the EC intervened on bananas, it would not continue to try to shift blame on others for its failure to comply with its WTO obligations.

11. The representative of Mexico said that in his delegation's view it was not necessary for the Chairman to decide not to chair the meeting in relation to item 3. No Member had ever questioned the impartiality and objectivity with which the Chairman had conducted the procedure initiated by Ecuador. In any case, Mexico welcomed transparency with regard to this matter. He recalled that it was not necessary for the complaining parties to agree to a new regime provided that such a regime was compatible with the EC's WTO obligations. He reiterated that Mexico's preference was a tariff-only regime with tariffs set at such a level so as to ensure Mexico's access to the EC's banana market.

12. The representative of Saint Lucia said that little had changed since the previous DSB meeting. It was still the case that one could be misled into assuming that there was no serious attempt to devise a new WTO-consistent banana import regime. However, the real obstacle to progress was a basic contradiction; i.e. many companies and countries wanted the new system to permit them increased sales of bananas, but should they all succeed there would be an oversupply of bananas leading to a collapse of prices. That would inevitably hurt all suppliers and would be a disaster to the weakest and most vulnerable. Saint Lucia urged an end to the acrimonious unhelpful bickering which, like the continuing trade sanctions, soured the atmosphere and undermined the prospects for an amicable and constructive approach to working out a compromise among the various parties. She expressed the hope that it would soon be possible to find a way out of this quagmire. Saint Lucia and other ACP countries certainly had the most to lose in this dispute. A bad result would not simply lead to a drop in the export tonnage of bananas, but rather the loss of the banana export industry with calamitous consequences for them. Her delegation welcomed the EC's statement promising continued consultations. Saint Lucia, too, had a right to participate in the consultations so as to contribute to the search for and the preparation of a new regime which would safeguard legitimate trading interests of all suppliers.

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

(b) Japan - Measures affecting agricultural products: Status report by Japan

14. The Chairman drew attention to document WT/DS76/11/Add.3 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations with regard to its measures affecting agricultural products.

15. The representative of Japan said that his country and the United States continued to consult with a view to reaching an agreement. These consultations were being held in a constructive manner and Japan believed that the parties would be able to resolve any remaining technical issues in the very near future.

16. The representative of the United States said that her country was continuing to work with Japan to resolve the differences with regard to the remaining technical issues on implementation. The United States hoped to be able to do so in the very near future.

17. The representative of Brazil said that his country had a particular interest in Japan's fruits market. Brazil and Japan had held extensive consultations regarding certain products. Brazil hoped that the results of the Panel might serve as an incentive to conclude its consultations with Japan in a satisfactory manner.

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

2. United States – Tax Treatment for "Foreign Sales Corporations"

(a) Implementation of the recommendations of the DSB

19. The Chairman recalled that in accordance with the DSU provisions, the DSB kept under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the Panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 20 March 2000, the DSB had adopted the Appellate Body Report on United States – Tax Treatment for "Foreign Sales Corporations" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

20. The representative of the United States said that at the 20 March DSB meeting, her country had indicated that it disagreed with the Reports of the Appellate Body and the Panel with regard to the FSC provisions of the US Internal Revenue Code. At that meeting, the United States had not engaged in a detailed critique of those Reports and did not wish to do so at the present meeting. As previously indicated, the United States suspected that scholars would have much to say about the analysis of the Reports of the Appellate Body and the Panel in this case. Instead, in recognition of the fact that the Reports had been adopted, it was now the responsibility of the United States under Article 21.3 of the DSU to inform the DSB of its intentions in respect of the implementation of the DSB's recommendations and rulings. She said that it was the intention of the United States to implement the DSB's recommendations and rulings in a manner which respected its WTO obligations and was consistent with the goal of ensuring that US exporters were not placed at a disadvantage *vis-à-vis* their foreign competitors.

21. The representative of the European Communities said that his delegation welcomed the US statement to the effect that the US intention was to put its tax regime into full conformity with the WTO obligations. That was a basic obligation of any losing party which was found to be in violation of its WTO obligations. However, the United States had not referred in its statement to a time-period for implementation. He recalled that the Panel had recommended that the United States had to implement in this case by 1 October 2000. Article 4.7 of the SCM Agreement, which was the main agreement in question in this case, provided that prohibited export subsidies had to be withdrawn "without delay". That had been interpreted by different Panels as being not more than 90 days. The date of 1 October 2000 set by the Panel for the implementation was much longer and took into account the fact that a tax regime could only be changed in consistency with the US fiscal years which started on 1 October of each year. Therefore the EC understood why the Panel had chosen that date and expected the United States to comply with the Panel's recommendations by 1 October 2000.

22. The representative of the United States said that her delegation had no obligation at the present meeting to commit to any time-frame. The United States was aware of the DSB's recommendations and rulings in this case. The United States had always complied with its WTO obligations, had always met its obligations and had always respected the DSB's decisions.

23. The representative of the European Communities reiterated that the Panel Report had been adopted by the DSB at its meeting on 20 March 2000. That Panel had recommended that the United States bring its measures into compliance by 1 October 2000.

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

3. European Communities - Regime for the importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU - Decision by the Arbitrators (WT/DS27/ARB/ECU)

(a) Statement by Ecuador

25. The Chairman invited Mr. Kåre Bryn, the Chairman of the General Council, to come to the podium and to preside over the proceedings of item 3. Mr. Kåre Bryn said that the item had been placed on the Agenda at the request of Ecuador and invited the representative of Ecuador to speak.

26. The representative of Ecuador said that due to the importance of this case his country wished to make a statement reaffirming its commitment to the multilateral trading system. Ecuador was aware of the systemic implications of its recourse to Article 22.2 of the DSU and, therefore, wished to make its position clear with regard to the result of the arbitration requested by the EC, as well as to hear views of other Members before requesting authorization from the DSB to suspend concessions and obligations pursuant to the Arbitrators' decision contained in document WT/DS27/ARB/ECU.

27. Four years ago, Ecuador had initiated its complaint with regard to the EC's banana import regime, only one month after its accession to the WTO. His country had hoped to obtain a swift resolution to a situation which was causing a great deal of damage to Ecuador's banana industry and its economy. After it had gone through all the stages of the dispute settlement procedures during which the EC had been found to be in breach of its WTO obligations, Ecuador had begun to lose faith that the EC would implement the DSB's rulings and recommendations. In those circumstances, Ecuador had decided to make use of its rights under Article 22 of the DSU and to seek authorization from the DSB to suspend concessions and obligations under the WTO Agreement. The sole objective of Ecuador's action was to restore the balance of rights and obligations under the WTO Agreement and to induce the EC and its member States to meet their WTO obligations. He underlined that Ecuador's action to exercise its right under Article 22 of the DSU should not be viewed as a move to sanction or punish the EC.

28. The DSB members should ask the question that Ecuador had asked when it had decided to invoke Article 22 of the DSU, namely, how could the balance of rights and obligations be restored in a situation in which a relatively small country was confronted with a trading partner such as the EC? The answer to this question was by making the EC amend its banana import regime in a WTO-consistent manner. However, that was not the EC's immediate plan. Ecuador recognized that some of the EC's member States had made significant efforts to resolve this problem. Although the EC had to implement the DSB's recommendations by 1 January 1999, a decision on this matter was not a priority for the EC. The DSB's recommendations had been adopted more than 30 months ago and now the Arbitrators had estimated that the damage caused by the EC's non-compliance cost Ecuador US$201.6 million a year. If all the time during which the EC had been in breach of its WTO obligations were to be taken into account as well as the damage caused to other countries involved in the Bananas dispute, the total amount would be exorbitant. It would not be difficult to calculate the overall damage but, at present, it was sufficient to know that the overall value of the damage was shocking, particularly since that damage was being caused by the world's richest economic bloc to a number of developing countries.

29. Ecuador was patient and had exhausted all bilateral and multilateral channels to find a fair settlement to this dispute with the EC and other Members. The aspirations and hopes of Ecuador's banana producers had been frustrated. Ecuador had tried to reach an agreement with the EC on suitable compensation in accordance with Article 22.1 of the DSU. The EC's response to Ecuador's request had not been favourable. Furthermore, the EC had not encouraged Ecuador to continue to seek such compensation. At the present meeting, he wished to make it clear that not only was

Ecuador ready to enter into a dialogue with the EC, but would prefer compensation over the suspension of concessions.

30. Ecuador understood the spirit in which the DSU had been negotiated during the Uruguay Round. It was clear that the negotiators had sought to ensure greater participation of developing countries in the multilateral trading system. Article 22.3 of the DSU was viewed as an opportunity to guarantee the necessary balance of rights and obligations to ensure such participation. During the proceedings, Ecuador had confirmed that Article 22.3 of the DSU was clear and precise: its reasoning was simple and it contained all the procedural steps which should be followed if a decision were to be taken to suspend concessions or obligations under other covered agreements. Article 22 were to be invoked in cases of non-compliance, such as the Bananas case. That Article made it clear that it was the complaining party which had the prerogative to select the nature of the concessions to be suspended. Likewise, it was clear that it was up to the complaining party to decide whether the suspension of concessions was practicable or effective, particularly if the circumstances were serious enough. There was no doubt that the EC's non-compliance was extremely serious for Ecuador. The banana trade was vital for an extremely large sector of Ecuador's population. The number of people in his country which was dependent on the banana industry was considerably greater than in any of the other countries involved in the Bananas dispute.

31. The Arbitrators had estimated that the damage caused by the EC's banana import regime to Ecuador was US$201.6 million. However, that amount only covered the direct damage of Ecuador's banana trade, and did not take into account a greater amount of the damage caused to other sectors of the economy such as unemployment, the displacement of rural population and other social conditions and effects which were extremely serious and very difficult to quantify. The Arbitrators had concluded that US$201.6 million was the value of the damage suffered by Ecuador every year. That figure had been determined by comparing the situation of the EC's banana trade during 1999 with a counterfactual regime that would be WTO-consistent. Ecuador considered that the counterfactual regime used by the Arbitrators was not appropriate, since it was the same as in the US/EC Banana III Arbitration.[1] As such it had not taken into account developments from the past year. For example, the counterfactual assumed the existence of a waiver for unlimited tariff preferences for ACP bananas, which did not correspond to the waiver in force during 1999, nor with a waiver which Ecuador was prepared to accept. The waiver referred to in the counterfactual was neither consistent with the latest reforms proposed by the EC nor with the fact that the EC envisaged a transition period towards a tariff-only system.

32. Despite the fact that Arbitrators had used what Ecuador considered a mistaken counterfactual, the total damage was considerable and it had serious effects for a developing country. He was aware that the EC might now indicate that the figure determined by the Arbitrators was less than the claim initially put forward by Ecuador. If the Arbitrators had determined the value of the damage at only US$1, that dollar would have been sufficient to show that 15 of the world's richest countries harmed a developing country's economy, despite the fact that they were aware that they were in breach of their obligations under the multilateral trading system.

33. Ecuador was confident that once the proceedings had reached a stage where the serious harm caused by the EC's banana import regime had been quantified, even partially, the EC member States would meet their commitments in a responsible manner without further delay and would clearly show their good faith and political willingness to proceed to a swift settlement of the dispute. Ecuador hoped that those presiding over the proceedings of the EC Council would show their leadership to ensure that this situation did not continue beyond the current Presidency of the Council.

[1] WT/DS27/ARB, dated 9 April 1999.

34. He recalled that at the April meeting of the Council for Trade in Goods, Ecuador had expressed its appreciation with regard to the EC's commitment to grant preferential treatment to developing countries. However, there could be no such treatment when the cost substantially outweighed the benefit that was supposed to be bestowed. The EC could not defend its protectionist practices by giving preferential treatment to some developing countries at the cost of others which were equally poor. The social cost of the EC's protectionist policies extended beyond its borders and caused serious and irreparable damage to countries which were not fortunate enough to be as advanced as those of the EC member States. Ecuador would now identify with the EC how to settle this dispute in order to bring the banana import regime into conformity with WTO rules. If the EC's response was not satisfactory, Ecuador would proceed to request authorization from the DSB to suspend concessions or obligations in line with the Arbitrators' report.

35. The representative of the European Communities said that his delegation had noted Ecuador's statement. The EC recognized, in particular, that Ecuador, unlike other Members, had followed all the correct steps under the DSU in order to defend its rights. At the present meeting, the representative of Ecuador had correctly recalled some of the problems involved in this complex case. Ecuador had initiated its action four years ago after joining the WTO. One of the complexities involved in the Bananas case, which could have been avoided, was that banana exporters with interest in goods had acted together with service exporters who did not grow bananas. That introduced a series of different elements into this complex case. At present, there were two arbitration cases and authorization had been granted in one case in the amount of US$201.6 million and in the other case in the amount of US$191.4 million. The EC had a choice either to satisfy Ecuador and to remain under sanctions of US$191.4 million or to satisfy the United States and to remain under sanctions of US$201.6 million. The EC was trying to reach agreement with both parties and to eliminate sanctions. Ecuador had not yet applied any measures but had the right to do so. The EC was not questioning that right. He reiterated that the EC was committed to implementing a new WTO-compatible banana regime as soon as possible. Its commitment was not affected by the retaliation that could be taken by either a big or small partner. If a party obtained authorization to retaliate it was free to do so, but the EC would prefer to find a solution to this problem.

36. At the present meeting, he wished to refer to a number of systemic issues with regard to the process and the arbitration procedure. Three arbitration cases, the reports of which had been issued thus far, could help to focus on problems and address ways in which similar cases could be dealt with in future. The matter under consideration was not only of interest to the EC, but was also of interest to the entire membership of the WTO. For that reason, he wished to express the EC's concerns with regard to the systemic deficiencies resulting from the ruling in this case. He started with the way the basic tasks of an arbitrator under Article 22.7 of the DSU had been performed in this case; i.e. to verify the level of nullification and impairment. The EC had carefully considered the Report and had found that the only justification for US$201.6 million was a vague reference in one paragraph to the Arbitrators' assumptions. It could not find any objective factual element supporting the determination of this amount. Unlike the Hormones case, the ruling in the present case did not contain any reasoned response to the lengthy submissions by both the EC and Ecuador.

37. This was no longer a situation of "discovering" the question, as in the EC/US Arbitration case which was the first case. At that time, it had been stated that Members were entitled to clearer and more transparent indications with regard to the reasons that had led the Arbitrators to their decision. Furthermore, the EC was concerned by the fact that it did not know whether it had been made liable twice for the same nullification and impairment since the Arbitrators had not justified their computations. Although the EC was confident that this was not the case, there was no indication to that effect in the Report. Ambiguity in this area was not the best way to improve the predicability of the multilateral trading system. Furthermore, the EC was very concerned by the fact that private parties who were or would be affected by retaliation remained uninformed about the way the WTO had decided on the level of the suspension of concessions. The EC was not in a position to respond to

their queries. This created a real problem of legitimacy for the dispute settlement system *vis-à-vis* the constituents. This matter was being currently addressed by Members in other fora.

38. Another problem was related to the rather flexible interpretation of the procedural provisions of the DSU, in particular, with regard to due process considerations. The EC had some concerns about the way the Arbitrators had addressed the possible use of cross-retaliation in general and its application to the TRIPS, in particular, when taking into account the specific nature of intellectual property rights. This was even more regrettable since this was the first application of cross-retaliation and should have been addressed more squarely. One would have expected to have a stronger reasoned argument as a basis for authorizing retaliatory measures under one agreement when the violation occurred under another. The important issues that he had just underscored were linked to the absence of a detailed methodology for calculating the level of nullification and impairment and to the question of equivalence of the level of suspension of concessions, i.e. the core task of Arbitrators under Article 22.7 of the DSU. Members should be concerned about this since the credibility of the dispute settlement system was at stake. There was a need to reflect on this matter and to consider ways to overcome the current deficiencies by developing a sufficiently detailed methodology. This could be undertaken in the context of a more general reflection on the implementation of panel reports. The EC did not expect any reaction to this issue at the present meeting. He believed that Members should seriously reflect thereon and consider it in the context of implementation questions during the DSU Review.

39. The representative of Guatemala said that his delegation welcomed the result of the Arbitration's Report. He regretted that, for the second time, one of the countries which had initiated the Bananas dispute had to have recourse to Article 22 of the DSU, and that the EC had not yet implemented the DSB's recommendations. In the view of those developing countries which had spent time and effort in order to restore their rights, the procedure showed that the system had provided another way of making the EC bring its banana import regime into conformity with its WTO obligations. In particular, the possibility to retaliate in other sectors than in those in which the violation had occurred removed the obstacles faced by small and weak economies such as that of Guatemala. His country was glad to note that not only the dispute settlement procedure was available to developing countries, but that the drafters had considered the need for a suitable and effective solution to ensure that the results of such proceedings were not merely theoretical. Countries such as Guatemala were therefore indebted to Ecuador for having restored their faith in the dispute settlement system. Other developing countries which had witnessed frustration and had serious doubts about the effectiveness of the dispute settlement mechanism could now be certain that their efforts would bring results.

40. The representative of Honduras said that this was the first time in many months that Members had received an encouraging sign as a result of the Arbitrators' decision. Even those Members who could not withdraw tariff concessions because of their weak economies could take measures in other sectors. This had given some breathing space to the multilateral trading system. However, it would be a shame if, despite the recent ruling in favour of a developing country, the EC did not bring its regime into conformity with the WTO rules. Ecuador's success in this case should be seen as a great achievement for all developing countries. Ecuador had shown them the way and now, depending on the EC's actions, Honduras would decide whether to follow in Ecuador's footsteps.

41. The representative of Saint Lucia said that her delegation complimented Ecuador for its respect for proper procedure and its scrupulous adherence to the DSU. The Arbitrators' Report would undoubtedly attract much analysis and comments given the imbalance between the parties, the request for cross-retaliation and suspension of TRIPS obligations. The discussion on the nature of a "practicable or effective" remedy in the context of Article 22.3, subparagraphs (b)-(e) of the DSU was a significant feature of the Report. In paragraph 27 of the Report the Arbitrators stated that "the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is

strong and has the desired result, namely to induce compliance by the Member who failed to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time." The primary logic for sanctions was, therefore, to penalise a country, thereby pressuring its government into removing the offending measure or otherwise conforming with the Panel's ruling. This case, however, was not straightforward and did not lend itself to such treatment for a number of reasons. Indeed, the Arbitrators appeared, to some degree, to acknowledge this as well. They conceded in the final paragraph: "The present text of the DSU does not offer a solution ...". Retaliation even when authorized was not always practicable. The concept of cross-retaliation, particularly involving the TRIPS Agreement was clearly not a straightforward process. The complicated nature of implementing a suspension of TRIPS obligations pursuant to the DSB authorization was illustrated in the Report.

42. This case was not straightforward for still other reasons with possible systemic implications. In a dispute with several interested parties, according to the Arbitrators, the DSU "empowers the party seeking suspension to ensure that the impact of that suspension ... has the desired result" (paragraph 72). The desired result was naturally that which was most advantageous to the complainant. This had certain practical implications to circumstances of the present dispute. The EC was to formulate a new WTO consistent regime which for practical purposes should be negotiated with the parties concerned and be acceptable by them. Consequently, the imposition of sanctions first by the United States and now the possibility of sanctions also being imposed by Ecuador complicated the negotiating process. It gave to those countries an inordinate influence over the process which was not necessarily related, in any way, to their relative underlying right or interests in the dispute. In other words, the EC, given its understandable anxiety to get the sanctions lifted, would inevitably pay undue deference to the preferences of those countries which imposed and could terminate the sanctions. These countries could even wield a de facto veto in the search for a replacement regime since, for fear of the measures not being immediately lifted, the EC would be unlikely to risk settling on any new arrangement which did not have their support unless it was obviously and unimpeachably WTO consistent. Furthermore, sanctions in this case had the perverse result of giving to the country authorised to impose them, an actual potential stake in the continuation of the dispute since that Member continued to enjoy a benefit whilst the dispute remained unresolved. Given the number of parties involved in this dispute, such a situation of one or two Members which did not necessarily have a real interest in ending the dispute, enjoying overwhelming influence over its progress even to the extent of a veto did not promote a positive solution to the dispute, at least not one which was mutually acceptable to all the parties.

43. The peculiar circumstances of this case rendered the application of sanctions counterproductive as rather than facilitating and expediting the resolution of the dispute, such sanctions merely complicated and possibly would retard the process. Her delegation was anxious for early resolution of the dispute and urged those parties which had the right to impose sanctions to exercise restraint or, in case they were already in place, to suspend them. That would certainly make for a more conducive atmosphere for the negotiations which would only make progress if undertaken in good faith. In this regard, her delegation was encouraged by press reports attributed to the Ecuadorian authorities indicating that Ecuador would not actually impose trade sanctions against the EC.

44. The representative of the United States said that her delegation was not surprised that the Arbitrators had found that the EC was nullifying or impairing Ecuador's rights under the WTO in the amount of US$201.6 million annually. The finding underscored the damage that the EC's failure to comply was causing to developing country exporters of bananas. One of the central elements of the Uruguay Round package was the ultimate right of a Member to cross-retaliate when it considered it necessary under Article 22.3 of the DSU. However, the United States had some concerns about the Arbitrators' reading of their mandate under the DSU, and the development of their reasoning, in particular as it was reflected in the portion pertaining to retaliation on trade in goods. That raised

broader issues beyond this immediate dispute. Ecuador had stated that first it had sought to suspend concessions in the same sector, namely, trade in goods, but considered that it would be neither practicable nor effective. Ecuador had thus applied the principles and procedures of Article 22.3 of the DSU. Therefore, it was not appropriate for the Arbitrators to second-guess Ecuador's considerations in reaching their conclusions. It was clear that the Arbitrator's mandate was to determine whether the Member had followed the principles and procedures, not to examine the nature of the concessions. This meant its task should have been limited to examining whether Ecuador had in fact considered the principles set forth in Article 22.3, not whether its considerations were "plausible". The Arbitrators had purported to adopt a standard of "plausibility" to review Ecuador's own considerations. But a reading suggested that a harsh choice could be imposed on countries seeking to take measures that produced the greatest likelihood of compliance with minimal damage to their own economies. Ecuador had only to show that it had considered whether retaliation in trade in goods was practical or effective, and had concluded that it was not, before seeking to suspend concessions beyond trade in goods. Among the reasons accepted by the Arbitrators with respect to some non-consumer goods was that the small amount of retaliation would not have any significant effect on the EC, and therefore would not be "effective" (paragraph 95). Then, despite the fact that the same concern arose in the context of consumer goods, the Arbitrators' report inexplicably had ignored this factor, cited the absence of further argumentation and concluded that Ecuador could not plausibly have concluded that it would be ineffective to retaliate on consumer goods (paragraph 100).

45. That approach not only went beyond the mandate of the Arbitrators, it also risked tipping the balance in favour of the Member that has not complied with its obligations. The practical result seemed to be that if a country wished to use the maximum leverage with the EC, i.e. to cross-retaliate to the full extent of its nullification or impairment, it would be asked to cut off or impair the importation of each and every consumer good imported from the EC, in Ecuador's case its full US$60 million annually. The practical and political difficulties that this kind of option could present in many countries was obvious. The only alternative would be to forgo some or all of the retaliation. There were also other concerns raised by the reasoning in this Report which she did not wish to raise at the present meeting. But in terms of the overall result, given the continued absence of a solution to the Bananas dispute, the United States welcomed any new developments that would lead the EC to comply with its WTO obligations. The important thing was that the DSB had to authorize Ecuador to suspend concessions. With regard to the EC's statement that it had a choice between one country or another namely, the United States or Ecuador, this was a flawed conclusion. The EC did not have a choice and the answer to the questions of sanctions was the EC's compliance.

46. The representative of Panama said that his country recognized the efforts made by Ecuador. One would now have to see whether this result would help to reach a solution to the Bananas dispute or would restore the balance sought by Ecuador. With regard to the issue referred to by the EC that private parties were not aware of the reasons for which sanctions were or would be imposed, it was neither the responsibility of the Arbitrators, nor the DSB or the WTO to inform them. That responsibility was on governments. In the case at hand, the EC could inform private parties that sanctions were imposed due to continued non-compliance with the WTO obligations. Panama also noted other points raised by the EC and would give them due consideration. With regard to the concern that the two arbitrations would complicate the process of negotiations, he underlined that this did not mean that there was no obligation to comply. If the EC believed that the measures were not compatible with the WTO obligations, it could request the establishment of a panel to examine such measures.

47. The DSB took note of the statements.

4. Nicaragua - Measures Affecting Imports from Honduras and Colombia

(a) Request for the establishment of a panel by Colombia (DS188/2)

48. The Chairman drew attention to the communication from Colombia contained in document WT/DS188/2.

49. The representative of Colombia said that on 7 December 1999, Nicaragua had enacted Law 325, "Establishing a Tax on Goods and Services Coming from or Originating in Honduras and Colombia". Article 1 of that Law had established a tax applicable to any good or service imported, manufactured or assembled, coming from or originating in Honduras or Colombia. The tax of 35 per cent had been calculated on the basis of the sum of the c.i.f. value plus pre-existing tariffs. On 13 December 1999, Nicaragua had issued Decree 129/99 establishing the regulations to Law 325, and on 15 December 1999, it had issued Ministerial Order 041/99 cancelling the fishing licences of all fishing vessels under Colombian and Honduran flags.

50. Given the discriminatory nature of Nicaragua's measures and their inconsistency with multilateral disciplines, on 17 January 2000 Colombia had requested consultations with Nicaragua. These consultations, which had been held on 4 February 2000, had not resulted in a satisfactory settlement of the dispute. Colombia considered that Nicaragua's measures were incompatible with its WTO obligations, in particular with Articles I and II of GATT 1994 and Articles II and XVI of GATS, and had nullified or impaired benefits accruing to Colombia under these Agreements. Colombia was therefore requesting that a panel be established to consider and find that: (i) Law 325 of 1999 and Decree 129/99 were inconsistent with Articles I and II of GATT 1994, and that they, together with Ministerial Order 041/99, were inconsistent with Articles II and XVI of GATS; (ii) these measures nullified or impaired benefits accruing directly or indirectly to Colombia under the GATT 1994 and the GATS; (iii) Nicaragua should bring these measures into conformity with its WTO obligations. Furthermore, Colombia was requesting that a panel be established with the standard terms of reference as set out in Article 7 of the DSU.

51. The representative of Nicaragua said that on 2 August 1986, in the world marked by the cold war, Honduras and Colombia, motivated by the situation in the Central American region as a result of the East/West conflict, had signed a Treaty on Maritime Delimitation in the Caribbean Sea (the Ramírez – López Treaty). The Treaty was signed immediately after Nicaragua had brought a case[2] against Honduras before the International Court of Justice. From the outset, Nicaragua had protested vigorously against the signing of the Treaty between Colombia and Honduras because it had considered that the Treaty violated its sovereign rights. With the peace process in Central America, a new phase had begun in the region. Nicaragua, affirming its strong desire for peace, and as an indication of its good faith, had initiated a dialogue with Honduras and had agreed to withdraw its case against Honduras at the International Court of Justice. At the same time, Honduras had undertaken not to ratify the Treaty with Colombia. However, on 30 November 1999 the Honduran authorities, and then Colombia's authorities had announced the ratification of the Ramírez – López Treaty. That Treaty infringed Nicaragua's sovereign rights in the Caribbean Sea by imposing limits unilaterally, illegally and arbitrarily through reciprocal recognition by Honduras and Colombia of their expansionist aims in the Caribbean Sea to the detriment of Nicaragua's territorial rights. The aim was to try to deprive Nicaragua of over 130,000 kilometres of the maritime shelf in the Caribbean Sea particularly rich in fish, hawksbill turtles, shrimps and lobsters, and with an important hydrocarbons potential. The Treaty totally disregarded the rights of a third country, namely Nicaragua, and constituted what in legal terms was defined as "*res inter alios acta*". In other words, the Treaty had not provided any right in respect of Nicaragua. It was a rule of customary international law and the

[2] Case concerning Border and Transborder Armed Actions.

law of treaties that a legal instrument should not create any obligations or rights for a third State without its consent.

52. Nicaragua considered and reaffirmed that the ratification of the Ramírez – López Treaty had violated its sovereignty and political independence, and had created serious international tension in the form of: (i) immediate despatch of Honduran troops and military equipment to the northern border of Nicaragua; (ii) the complaints made by Miskito communities bordering Honduras; (iii) the increase in the defence budget of Honduras adopted by the Congress of the Republic; and (iv) the military manoeuvres carried out in the region by war planes and by a Colombian corvette on Nicaragua's continental shelf. Implementation of the Treaty had created a highly complex maritime situation as Nicaragua regularly sent out maritime patrols to control the drugs traffic and to preserve its fisheries resources. It meant that, if Colombia and Honduras tried to impose a naval presence in the region, there could be regrettable incidents of unpredictable scope that might jeopardize peace and stability in the region.

53. Accordingly, using the mechanisms provided by international law, Nicaragua had brought the matter up and had denounced the situation in the appropriate fora. The serious international tension had been recognized, and had led to a decision to appoint a special envoy approved by consensus at an emergency meeting of the Permanent Council of the Organization of American States (OAS) with a special mandate to: "to assess the situation, facilitate dialogue and make recommendations to eliminate tension and prevent acts that might affect peace in the Americas". In that way, the OAS had recognized the state of serious international tension.

54. In such a situation and bearing in mind the serious international tension caused by the above-mentioned facts, Nicaragua had been obliged to adopt the measures it deemed necessary to safeguard its security. These measures included Law No. 325 of 6 December 1999, published in *La Gaceta*, Official Journal No. 237 on 13 December 1999, establishing a tax calculated on the sum of the c.i.f. value plus pre-existing tariffs amounting to 35 per cent on all goods or services imported, manufactured or assembled, coming from or originating either in Colombia or Honduras, and Ministerial Order No. 041/99 of the Ministry of Development, Industry and Trade (MIFIC), dated 15 December 1999, which cancelled fishing licences for vessels under Honduran and Colombian flags operating under any commercial fishing authorization granted by that Ministry. Nicaragua considered that its measures were consistent with the international, regional and trade law and were based on Article XXI of GATT 1994 and Article XIV *bis* of GATS, which reflected a State's inherent right to protect its security, and therefore constituted a general exception to multilateral trade rules.

55. Nicaragua considered that the Ramírez – López Treaty, by seeking to encroach on Nicaragua's maritime areas - the continental shelf and its exclusive economic zone as well as islands, cays, banks, reefs and other geographical features situated therein or emerging from them - and by claiming that some of these belonged to another country, had violated the rules of international law and had constituted a threat to Nicaragua's sovereignty. For that reason, Nicaragua had turned to the Permanent Council of the OAS. Nicaragua had not adopted the measures in question for trade purposes. The measures were not intended to protect domestic industry but to safeguard the essential interests of Nicaragua's security. In addition, when applying Article XXI of GATT 1994, Nicaragua had taken into account the provision in the Decision of 30 November 1982 on Article XXI, the preamble of which stated that " the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the right of contracting parties when they consider that reasons of security are involved" and that "in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected".

56. He emphasized that, despite the scope of such exception, Nicaragua had exercised its right with prudence and responsibility. The measures did not affect trade with third parties nor did they

impede the transit of goods through Nicaragua. With regard to products coming from or originating in Honduras and Colombia, the measures were of limited scope as the tax imposed did not exceed the ceiling bound by Nicaragua in the WTO, taking into account the reasonable expectations of the countries concerned in conformity with the GATT 1994. Moreover, the tax did not apply to imports amounting to less than US$500 and goods such as medicines, inputs and raw materials for educational and cultural activities, which were exempt from tax as stipulated in Nicaragua's Constitution.

57. It was premature to draw conclusions concerning the impact of the measures adopted by Nicaragua on Colombia's trade flows. However, the figures available for December 1999, January and February 2000, appeared to indicate that trade remained at the previous level. Nicaragua's imports from Colombia during those months had amounted to a total of US$1,800,000, a figure that was comparable with the total imports in the previous two years, which was about US$8 million.

58. Colombia was requesting the establishment of a panel to examine the measures adopted by Nicaragua. His country recognized Colombia's right to do so. However, it was not clear what the panel could do. It was not the first time that Article XXI was applied. That general exception had been included in the provisions of the Havana Charter and since its inclusion as Article XXI in the GATT 1947 it had been the customary practice in the WTO that the contracting party applying the measure should be the sole judge in matters that concerned its essential security interests, in particular if such interests could be threatened by any actual or potential danger.

59. In addition, case law on measures adopted for reasons of security was virtually non-existent. The only panel[3] established under the GATT that finished its work and submitted a report, which had not been adopted, had referred to the case on the trade embargo imposed on Nicaragua in 1985 and its mandate did not allow it "to examine or judge the validity or motivation for the invocation of Article XXI". In paragraph 5.2 of its report, the Panel had indicated that "both by the terms of Article XXI and by its mandate, it was precluded from examining the validity of the United States' invocation of Article XXI". In paragraph 5.18 of its report, the Panel had also noted that "… in 1982 the CONTRACTING PARTIES had taken a 'Decision Concerning Article XXI of the General Agreement' which refers to the possibility of a formal interpretation of Article XXI and to a further consideration by the Council of this matter (BISD 29S/23-24)". Nicaragua considered that the General Council should make such an interpretation. A panel established with standard terms of reference as requested by Colombia could only conclude that Colombia's rights under Article I of GATT 1994 and Article II of the GATS had been curtailed as a result of the measures applied by Nicaragua. If the panel gave itself powers that belonged to political fora that could result in a dangerous and unacceptable precedent.

60. Nicaragua considered that: (i) the measures had been adopted for reasons of national security and were fully justified under Article XXI(b)(iii) of GATT 1994 and Article XIV *bis*, paragraph 1(b)(iii) of GATS; (ii) Article XXI constituted an exception to the provisions in the GATT with global effect that measures taken under Article XXI could, under no circumstances, constitute a violation of GATT 1994; (iii) there had been no nullification or impairment of Colombia's rights under Article II of GATT 1994 because the measures applied by Nicaragua did not exceed the tariff ceilings bound in its schedule of concessions and did not violate Article XVI of the GATS as fisheries did not form part of the Nicaragua's specific WTO commitments; and (iv) before establishing a panel to examine this matter, the General Council should take a decision on the competence of panels to deal with highly political issues and should make a formal interpretation of Article XXI of GATT 1994.

61. The representative of Honduras said that initially his delegation did not wish to make a statement on this matter, but in light of Nicaragua's statement it had decided to do so. First of all,

[3] Panel Report on "United States - Trade Measures Affecting Nicaragua" (L/6053).

Honduras wished to urge Nicaragua to reconsider its measures affecting imports from Honduras and Colombia in the hope that a mutually satisfactory solution could be found. Second, the subject of maritime limits did not fall within the WTO mandate, and should be dealt with by the competent forum such as the International Court of Justice. Third, there had been no movement of troops or military equipment by Honduras or Nicaragua, as its press correspondents showed. Nicaragua was trying to find an excuse to continue to apply its discriminatory measures against Honduras and Colombia. His delegation noted Nicaragua's statement and pointed out that the dispute settlement system and the DSU provided Honduras with the possibility of restoring its rights.

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

5. Canada - Patent protection of pharmaceutical products

(a) Report of the Panel (WT/DS114/R)

63. The Chairman recalled that at its meeting on 1 February 1999, the DSB had agreed to establish a panel to examine the complaint by the European Communities and their member States. The Report of the Panel contained in document WT/DS114/R had been circulated on 17 March 2000, and it was now before the DSB for adoption at the request of Canada. In accordance with Article 16.4 of the DSU, the adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

64. The representative of Canada said that his delegation thanked both the Panel and the Secretariat for their work in preparing the Report. Canada was generally pleased with the conclusions reached by the Panel in its Report. The Panel had confirmed that the early working exception in Canada's patent law was fully consistent with its obligation under the TRIPS Agreement. Canada's early working exception allowed manufacturers of competing products to begin the process of seeking regulatory approval for competing versions of patented products prior to the expiration of the patent term. In the Panel's proceedings Canada had argued that the early working exception was a limited exception to the rights of patent holders, and as such was permitted under the TRIPS Agreement. Canada was pleased that the Panel had confirmed the consistency of this exception with the TRIPS Agreement. The Panel's ruling had affirmed Canada commitment to a sound and healthy environment for innovation, investment and growth. His country was disappointed with the Panel's ruling on the stockpiling exception, but nevertheless was prepared to join in a consensus to adopt the Panel Report at the present meeting.

65. The representative of the European Communities said that the Panel Report under considerations was one of a few reports which, to some extent, satisfied and dissatisfied both parties to the dispute. The EC was disappointed that the Panel's the conclusions only partially recognized the EC's rights. However, the EC could not disregard the fact that the Panel, to some extent, had endorsed the reasoning developed by the EC. The Panel had thus clearly established that the short period of exclusive rights after the expiry of patents was part of protection. Furthermore, the sale of products made at the end of that period was not compatible with the obligations under the TRIPS Agreement. Finally, the limited exception permitted under Article 30 of the TRIPS Agreement did not make it possible to sidestep the obligation not to discriminate in different areas of technology. The above-mentioned elements provided some degree of satisfaction to the EC. The EC considered that the Panel Report provided useful clarifications and for that reason it was joining in a consensus in favour of the adoption of the Panel Report.

66. The representative of Switzerland said that her delegation noted the Panel's decision in relation to the case under consideration. In the view of Switzerland, the patent term of 20 years was the result of a very careful balance between various interests, and should not be undermined by exceptions which were not minor in terms of principle and results. As a country with an industry very

actively engaged in highly expensive research and development of new and innovative pharmaceuticals, Switzerland noted with concern that the Panel had found the "regulatory review exception", as contained in the Canadian patent legislation, to comply with the three conditions for an exception under Article 30 of the TRIPS Agreement and therefore to be in conformity with the Agreement. Switzerland was concerned that, in practice, the decision of the Panel might have prejudicial effects on research and development of new pharmaceuticals. Despite the fact that Switzerland would have preferred this case to have another outcome, there were at least some positive elements in the Panel's decision. Namely, it seemed that one of the major steps leading to the conclusion that Canada's regulatory review exception was not contrary to the TRIPS Agreement had been the Panel's refusal to decide, through adjudication, a normative policy issue that was a matter of unresolved political debate (paragraph 7.82, last sentence). It should not be the task of panels to resolve open policy issues that Members were unable or unwilling to agree upon. Nevertheless, Switzerland considered that Article 30 of the TRIPS Agreement was sufficiently clear to have led to a different result in this particular case. Switzerland welcomed the Panel's conclusion that the stockpiling exception of the Canadian Patent Act was inconsistent with the TRIPS Agreement. Switzerland shared the view that such an exception unjustifiably violated the basic concept and idea of exclusive rights conferred by a patent to its owner during the 20 years term of protection.

67. The representative of India said that his country had participated in this dispute as a third party. India welcomed the Panel Report and noted with appreciation the Panel's decision that the regulatory review exception rule was permissible under the TRIPS Agreement. This would end the monopoly of the patent holder and enhance the competition in the market after the expiry of patent term. His country welcomed the Panel's refusal to equate the concept of "legitimate interests" with legal rights as a third condition of Article 30 of TRIPS Agreement. India appreciated, in particular, the Panel's statement that, "legitimate interests concept should not be used to decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate". India noted the Panel's interpretation of the related stockpiling exception rule as not qualifying to be a "limited exception" under Article 30 and thereby conferment of the privilege of extended period of market exclusivity/monopoly, how so ever short it might be, on the Patent holders after expiry of their patents (paragraph 7.35). His country continued to reflect on this interpretation.

68. The representative of Malaysia said that the outcome in this case had important systemic implications for all Members. This was notwithstanding the fact that the Panel's decision should not be considered as precedent setting. Malaysia welcomed the decision of the Panel that Section 55.2(1) of Canada's Patent Act was not inconsistent with Canada's obligations under Articles 27.1 and 28.1 of the TRIPS Agreement. Malaysia had closely followed this case and would have liked to participate as a third party in the Panel's proceedings, but could not have done so due to the lack of resources.

69. The DSB took note of the statements and adopted the Panel Report contained in WT/DS114/R.

6. Appointment of Appellate Body members

70. The Chairman said that it was a matter of urgency that the Appellate Body be strengthened. Currently, only four members of the Appellate Body remained in office; i.e. one division of the Appellate Body with one member left over. On the other hand, the workload of the Appellate Body continued apace and was gathering pace. It was therefore necessary to exercise the utmost responsibility and care in order to ensure that the operation of that vital body of the WTO was not disrupted. He proposed to give his overview on how to conduct consideration of this item at the present meeting. That would help to avoid any confusion in a resulting debate. He proposed that first it was necessary to proceed reasonably quickly to a decision on the recommendations of the Selection Committee which were set out in the fax circulated by the Council Division on 3 April 2000. Secondly, he could give some ideas for consideration on the relationship between those proposed

appointments and the question of how to proceed on filling the remaining vacancy in the Appellate Body. Subsequently, he would invite delegations wishing to make statements or comments on both the appointments which had been recommended and/or the filling of the remaining vacancy. Finally, he would sum up based on the discussion and the comments received. Those elements would enable delegations to organize the discussion in the most efficient way. He asked whether the way of proceeding just outlined by him was acceptable to delegations.

71. The DSB so agreed.

72. He recalled that Members had received the fax from the Council Division, dated 3 April 2000, which conveyed the Selection Committee's recommendations on filling the vacancies left by the departures of Messrs. Said El-Naggar and Mitsuo Matsushita. That fax contained a proposal that those recommendations be approved by the DSB at the present meeting. He then drew attention to the text of the fax:

> "The Chairman of the Selection Committee established by the DSB, Ambassador Kåre Bryn, wishes to notify Members of the following conclusions which have been reached by the Committee.
>
> "The Selection Committee was established by the DSB with a view to making recommendations on appointments to replace Messrs. Said El-Naggar and Mitsuo Matsushita, whose (extended) terms of office expired on 31 March 2000. The Selection Committee conducted thorough interviews with the seven candidates nominated, and made itself available to hear the views of Members. Throughout the process, the Committee had constantly in their minds the guidelines, rules and procedures in the DSU and WT/DSB/1 governing the selection and appointment of Appellate Body members. The Committee also had regard to the (then) Chairman of the DSB's statement in November 1995 to the effect that composition of the Appellate Body could vary over time, that no rights should be derived from the initial composition, and that initial appointments did not compromise the scope for different regional or national compositions in future (WT/DSB/M/9). The Committee's task was far from easy, owing to the excellence of the candidates. In the Committee's view, the DSB should extend its appreciation and gratitude to all the individuals who came forward, and to their respective governments. The Committee has now reached firm recommendations that the following persons be appointed (in alphabetical order):
>
> Professor Georges Abi-Saab
>
> Mr. A. V. Ganesan
>
> "The Committee is of the view that these outstanding individuals are highly qualified for appointment to the Appellate Body.
>
> "In the light of the foregoing, the Chairman of the DSB proposes that, at its meeting on 7 April 2000 under Item 6 of the Agenda, the DSB decide to appoint Messrs. Abi-Saab and Ganesan as members of the Appellate Body for four years as from the date, to be fixed in the near future, on which their contracts commence."

73. The Chairman further stated that the reasons for not fixing the date for the appointments at this stage was that the Appellate Body Secretariat would need to have some discussions with the appointees with a view to fixing a mutually agreeable date for the start of their contracts. Therefore, at this stage, it was necessary to leave a degree of flexibility as to the exact date.

74. As he had indicated in his introductory remarks, the Chairman would later provide more information about the exercise and how it related to the filling of the remaining vacancy. He was also aware that some Members were keen to express their views on the appointment. Before doing that however, he suggested that the DSB first address the formal decision. He accordingly proposed that Prof. Georges Abi-Saab and Mr. A.V. Ganesan be appointed as members of the Appellate Body for four years from the date to be fixed in the near future on which their contracts were to commence.

75. The DSB so agreed.

76. Subsequently, the Chairman expressed gratitude and appreciation for the excellent service rendered by Mr. El-Naggar and Mr. Matsushita who had played a vital part in establishing the Appellate Body on a sound basis. Members owned them a debt of gratitude for that. He congratulated Prof. Abi-Saab and Mr. Ganesan on their appointments. Members were confident that those two appointees would apply their expertise and experience to very good effect. He thanked all the candidates and their sponsoring Governments for coming forward and enriching the process. The members of the Selection Committee found the whole exercise and, in particular, the interviews both educational and inspiring. He recalled that, in presenting the conclusions of the Selection Committee, Amb. Kåre Bryn, the Chairman of the General Council had stressed that the Committee's task had been far from easy owing to the excellence of the candidates. This was one of those situations in which there were more qualified candidates than vacancies. In the circumstances, it should be left open for those candidates who wished to do so to carry their names forward into any new exercise to select Mr. Beeby's replacement. In that case, they should be considered on an equal footing with any new candidates.

77. The Chairman then commented on the relationship between the appointments that had just been made and the next exercise to select Mr. Beeby's replacement. He proposed that a new Selection Committee be formed and that Members be invited to submit or re-submit candidatures to the Selection Committee for its consideration no later than 5 May 2000. This seemed to be an appropriate period of time. One had to bear in mind that there was an Easter break. The Selection Committee would then go through its considerations, interview any candidates that it felt it needed to see and would present its proposal to the DSB at the earliest possible opportunity thereafter.

78. He recalled that at the informal DSB meeting on 30 March 2000, this matter had been discussed and a number of delegations had stated that, for the sake of maintaining continuity and of simplifying procedures, the same Selection Committee which had just finished its exercise on the appointment of the previous two vacancies be reappointed to examine the candidatures for the third vacancy. At that meeting, it was his impression that there was no objection to that proposal. He therefore proposed that the DSB agree along those lines in order to preserve full continuity and the maximum of coherence in the conduct of the whole selection process. This would involve the present Selection Committee which was composed of the 1999 Chairpersons of the General Council, DSB, Councils for Trade in Goods, Services, TRIPS and the Director-General. The Committee was chaired by Amb. Kåre Bryn, the 1999 DSB Chairman. He then invited delegations wishing to comment either on the appointments that had just been made and/or on his proposal concerning the procedure for replacement of Mr. Beeby.

79. The representative of Egypt expressed her delegation's gratitude to the members of the DSB for the decision taken by consensus to adopt the recommendations of the Selection Committee concerning the appointment of two members of the Appellate Body, Prof. Abi-Saab and Mr. Ganesan. In particular, she wished to express Egypt's gratitude to all delegations who had supported the candidature of Prof. G. Abi-Saab, the Selection Committee and those who had supported the recommendations and had joined in the consensus at the present meeting. There was no doubt that all candidates had excellent credentials and merits. Egypt recognized and appreciated an excellent work done by the Selection Committee in a thorough, objective and profound manner which had

commended the consensus of the DSB at the present meeting. Egypt felt particularly privileged that the DSB had found two of its nationals: Prof. El-Naggar and Prof. Abi-Saab perfectly qualified and enjoying outstanding qualities to merit selection and appointment consecutively to this very important and vital body. She was confident that the appointment of Prof. Abi-Saab together with Mr. Ganesan would bring to the Appellate Body the necessary balance, expertize and confidence needed to further strengthening of the objectives of the WTO to the benefit and in the interest of its membership. Egypt fully supported the Chairman's proposal on the procedure concerning the filling of the remaining vacancy in the Appellate Body.

80. The representative of Japan expressed his delegation's appreciation to the Selection Committee for having conducted the difficult task of selecting the new Appellate Body members. He also wished to congratulate Prof. Abi-Saab and Mr. Ganesan for their appointment. He had had the pleasure to meet with them and found that both were very impressive persons and would make a valuable contribution to the dispute settlement mechanism. It should not come as a surprise that Japan was disappointed with the recommendations of the Selection Committee because it had put forward Prof. Y. Taniguchi as a candidate for a member of the Appellate Body since it believed that he was as well qualified as the other two who had just been recommended by the Selection Committee both in terms of competence and personality. In this connection, it was reassuring to hear the Chairman's comment that the selection process was a difficult one because there were more qualified candidates than the seats available. Japan continued to believe that if Prof. Taniguchi were to be selected as a member of the Appellate Body, he would make a valuable contribution to an effective and a fair functioning of the dispute settlement mechanism and to the strengthening of the WTO. The Chairman had just announced that a new deadline for the third vacancy was 5 May 2000. It was the intention of Japan to register Prof. Taniguchi for the vacancy left by Mr. Beeby. He also wished to thank those Members who had supported Prof. Taniguchi in the previous selection process and hoped that there would be renewed and wider support for him in the new selection process.

81. The representative of the Philippines, speaking on behalf of the ASEAN Members, expressed gratitude to the Selection Committee for its thorough work. In view of the excellent qualifications of the candidates the task of the Selection Committee was not easy. He thanked all the candidates and their respective Governments for their readiness and willingness to come forward at the time when the organization urgently needed highly qualified individuals for this important positions. In that sense they had showed their firm commitment and belief and had contributed to the cause to which all were adhering, namely, the strengthening of the multilateral trading system. He congratulated Prof. Abi-Saab and Mr. Ganesan for their appointment as members of the Appellate Body. The ASEAN Members were convinced that the knowledge and wisdom of the two appointees would benefit the organization and its Members. He wished them success in their new function. The ASEAN Members fully supported the Chairman's proposal that the Selection Committee be retained and that the deadline for submissions be no later than 5 May 2000.

82. The representative of Israel said that his delegation congratulated the selected candidates and wished them all success in their task. Israel accepted the recommendations of the Selection Committee. He said that his country fully respected the WTO principle of decision-making by consensus. He thanked the Selection Committee and Members for considering the candidature of Prof. Weiler who had been put forward by Israel. He informed the DSB that his authorities had decided not to resubmit the candidature of Prof. J.H.H.Weiler for the third vacancy in the Appellate Body.

83. The representative of Poland, speaking on behalf of the CEFTA Members, Estonia and Latvia, said that the above-mentioned countries were joining in the consensus on the recommendations of the Selection Committee and congratulated the selected candidates, Prof. Abi Saab and Mr. Ganesan. They believed that the selected individuals would contribute substantially to the functioning of the dispute settlement mechanism. The Appellate Body was a

particularly sensitive organ of the multilateral trading system. It was therefore essential that in addition to the criteria of substance, its composition reflected a broad representation of the WTO membership. It was in that context that the above-mentioned countries had met with sympathy the candidate from their region who was highly qualified and who met all the criteria set out in the DSU. In this context, they would have been very pleased if that person had been selected and it was to their disappointment that he had not been selected. With respect to the new selection process for the third vacancy, the above-mentioned countries recognized the difficulty and complexity of that process but still hoped that they would be able to identify themselves in the practical reflection of the principle of a broad representation of the WTO in the Appellate Body. The countries in question encouraged the candidate whom they supported to continue. They supported the Chairman's proposal with regard to the procedure on the Selection Committee and believed that it should be as easy and efficient as possible to allow the candidates wishing to maintain their candidatures to do so.

84. The representative of the European Communities said that the question of appointment of the Appellate Body members was one of the most important things that Members had to consider from time to time. During the selection process, the EC had had a number of concerns aimed at ensuring that this exercise was conducted with due care and attention. He was glad that all these concerns had been practically resolved. Although in another context he had stated that there was a need for more transparency in terms of methodology and calculation, he would abstain in this context from making such remarks. He congratulated the successful candidates who were supported by the EC. He welcomed the Chairman's proposal on the procedures. He recalled that the EC had expressed a view that for reasons of dispatch there was an urgent need to fill all the posts that were vacant. It had also expressed the preference for using the present process to recommend all three names with a little delay for any new candidates. The EC could go along with the Chairman's proposal and believed that the primary criterion which would guide the selection process was merit, experience and skills of candidates. The EC also believed that a certain balance in terms of their experience would be desirable: there were now six members of the Appellate Body and the balance was two and four. This situation should also be kept in mind by the Selection Committee in its deliberations. The EC supported the idea that the present Selection Committee should continue since it had a considerable advantage of having seen all the present candidates. The EC did not wish to be isolated in opposing the deadline of 5 May but at the same time it would prefer to proceed more quickly. This matter had been under discussion for some time and new candidates, if any, could be quite rapidly available. He therefore proposed to set a deadline of 15 days or by Easter so that the Selection Committee could begin its work in early May which would save a considerable amount of time.

85. The representative of the United States said that her delegation thanked the Selection Committee for its work in relation to this task which was of utmost importance to her country. This was a difficult task since all the candidates were highly qualified. The United States also wished to congratulate the new members of the Appellate Body and believed that they would make a valuable contribution. The United States supported the Chairman's proposal concerning the next selection process. She recalled that at the informal meeting on 30 March, the question of the terms of appointment of new members of the Appellate Body had been raised. The United States believed that it would be preferable to avoid separate nomination processes to be carried out in a short period of time. To this end, she proposed to hold informal consultations on the question of how to restore the situation with a view to ensuring that the terms of the three members expired at the same time and that the terms of the other four members expired together. She sought clarification as to whether it would be possible to ensure that the starting date for the two new members was the same.

86. The Chairman said that it would be the intention to fix one date for the appointments of Prof. Abi-Saab and Mr. Ganesan.

87. The representative of India said that his delegation thanked the Selection Committee for completing the task of recommending two names for the two vacancies in the Appellate Body. He

praised the Selection Committee for accomplishing this difficult task of choosing two names from the slate of excellent candidates from different countries. He congratulated the Selection Committee for making its recommendations in a timely fashion. As indicated by the Chairman, all Members were aware of how important it was to fill the post in the Appellate Body at the earliest possible date. India thanked the Selection Committee for making its recommendations in accordance with Article 17 of the DSU and the guidelines for selection contained in document WT/DSB/1. India was grateful to Members for approving the recommendations of the Selection Committee by consensus. He congratulated Prof. Abi-Saab on his appointment. With regard to the process for filling the remaining vacancy, India supported the procedure outlined by the Chairman and believed that the process could be expedited subject to the convenience of all the delegations who might be interested in submitting new names. India supported the US proposal to hold informal consultations in order to ensure that the terms of members expired at the same time and wished to participate in any such informal consultations.

88. The representative of Mexico thanked the Selection Committee and congratulated Members for reaching the consensus on the appointment of two excellent individuals as members of the Appellate Body. This was of particular importance since it was currently difficult to reach consensus in certain bodies of the WTO. Under the current circumstances it would be useful for the existing Selection Committee to carry out the process of selection for the third vacancy in the Appellate Body. Mexico welcomed the Chairman's proposal. However, since this was a special situation no precedent should be set with regard to future selections. His delegation expressed its intention to participate in the informal consultations proposed by the United States on the term of contracts of members of the Appellate Body, should such consultations take place.

89. The representative of Australia wished to join other Members in congratulating the selected candidates for the Appellate Body vacancies. He noted that Australia consistently supported a merit-based selection process with due regard for the diversity of the legal systems represented by Members, and did not support a rigid system of regional seats. Australia welcomed the work undertaken by the Selection Committee in reaching its conclusions and recommendations. Australia supported the Chairman's proposal with regard to the procedures for the replacement of Mr. Beeby and would strongly prefer the deadline proposed by the Chairman.

90. The representative of Canada thanked the Selection Committee for its work and congratulated the two successful candidates: Prof. Abi-Saab and Mr. Ganesan. Canada considered that the US proposal to hold informal consultations on possible harmonization of the terms of the Appellate Body members was useful and wished to participate in such consultations. With regard to the date for nominations to fill the remaining vacancy Canada, supported the deadline of 5 May as proposed by the Chairman.

91. The Chairman said that the DSB should take note of the statements, which were magnanimous. It was quite clear that Members' self-interest was being subordinated in this exercise for the good of the system and this was very encouraging. He noted that many delegations had supported the US proposal to hold informal consultations on the question of possible harmonization of the terms of office of the Appellate Body members. Accordingly, he would undertake such consultations and would be in touch with delegations on this matter. On the date of any nomination period, based on the discussions on 30 March and at the present meeting, with all due regard to the EC, he sensed that most delegations would be more comfortable with a slightly longer nomination period although not too long. Therefore, if the EC could go along, he would propose 5 May as the deadline for submission of candidatures. He proposed that the DSB authorize the previous Selection Committee to continue its work in relation to the selection of an additional candidate to fill the vacancy left by Mr. Beeby. He also proposed that the DSB agree to invite Members wishing to do so to submit or resubmit candidates to this third vacancy by no later than 5 May 2000.

92. The DSB took note of the statements and agreed to the Chairman's proposal.

93. The Chairman said that the appointments made at the present meeting resulted in some subtle shift in the representative balance in the composition of the Appellate Body. He asked delegations to reflect on how to bring the Appellate Body up to full strength in accordance with all of the relevant guidelines and provisions of the DSU and document WT/DSB/1.

94. The DSB took note of the statement.