WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/80
26 June 2000

(00-2593)

Dispute Settlement Body
18 May 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 May 2000

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

Prior to the adoption of the agenda, the representative of the European Communities requested that the DSB agree to withdraw from the agenda the item concerning the adoption of the Panel Report on "United States - Anti-Dumping Act of 1916" (WT/DS136/R and Corr.1). The EC stated that the same matter was currently under examination by another panel established at the request of Japan (WT/DS162) and its report would be circulated shortly. Therefore, in case there was an appeal, it would be preferable to postpone consideration of this matter. The EC would request a special meeting for the adoption of the Report at the latest on 30 May 2000: i.e. the deadline for adoption of the Report. The representative of the United States said that her country would appeal the case.

Subjects discussed: Page

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.8)

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.4)

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.8 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that the EC continued its bilateral discussions with the parties concerned. On 5 May 2000, the EC Trade Commissioner had had a useful discussion with the Minister of Foreign Affairs of Ecuador. The EC thanked Ecuador for its constructive approach with regard to this complex matter. Both parties had concluded that their positions on the proposed modifications to the banana regime were very close. The EC wished to find a solution which would bring its banana regime into conformity with the WTO rules. The Bananas dispute involved many stakeholders but, thus far, it had not been possible to breach the very divergent positions of the parties concerned. The most difficult issue concerned the distribution of licences in case of a tariff-rate quota system. No concrete results had followed as a result of the EC's discussions with the United States.

4. The representative of Ecuador said that, as on previous occasions, the status report by the EC reflected its failure to meet its WTO obligations. It was necessary, each time a status report was presented, to have the possibility to verify the EC's progress in implementation. He reiterated his country's position that the EC could start to modify its regime immediately by removing the inconsistencies related to administrative decisions. He regretted that the EC did not seem to proceed in this way, nor to demonstrate its intention to resolve the dispute. Furthermore, the EC continued to state that the lack of agreement between the complaining parties was making it impossible to resolve the problem. This was merely an excuse because the differences between the complainants were not so great and it was not necessary for the positions to be the same in order to enable the EC to bring its banana import regime into conformity with WTO obligations.

5. Furthermore, the EC continued to state that due to the lack of agreement between the complaining parties, it would have to propose a tariff-only system. Such a statement was no more than a meaningless warning since the EC did not need the approval of the complaining parties to do so but the approval of its member States. The real cause of the problem and the reason for the EC's failure to meet its legal obligations was the lack of will of the EC member States to comply with their WTO obligations. The positions of the EC member States were different and the majority of them wished to resolve the dispute. However, those member States were blocked by the inability of all 15 member States to agree among themselves and not by the fact that the complaining parties could not agree. The situation was made worse as there was no proposal from the EC as to how to resolve the problem. This outcome was economically prejudicial to several developing countries and thus

losses were not just limited to those suffered by large companies trading in bananas. The real damage was caused to banana producers, which meant that several million people who relied on this agricultural activity were being driven deeper into poverty by illegal protectionist policies. The EC and its member States, who continued to present status reports containing nothing new, were responsible for this situation.

6. The representative of Panama said that his country's position on the EC's attitude with regard to the implementation of the DSB's recommendations was well-known. It was difficult to make the EC understand that its attitude had caused and continued to cause damage to Panama and other Latin American banana-producing countries. Many months had passed since the EC's banana regime had been ruled to be inconsistent with WTO rules and principles. On many occasions, his delegation had indicated that the EC had to meet its multilateral obligations with the same sense of urgency with which other Members were required to do so. On numerous occasions, and at all levels, his Government had tried to work constructively with the EC authorities in the search for acceptable options for all the interested parties. Many times the views expressed by Panama had not been taken into account by the EC and, he believed, other delegations had had exactly the same experience.

7. Thus far, the EC had not met its obligations. He asked how much longer the injured parties would have to wait? The numerous status reports presented thus far had given no indication with regard to this question. According to international press reports, the EC continued to maintain that discussions were being held with the interested parties. He noted that Panama had not been joined, in any capacity, in the discussions and negotiations conducted by the EC over the past few months. Most of Panama's contacts, either bilateral or plurilateral, had been made on its own initiative. Panama, like some other countries, had been relegated to the position of an observer of the discussions held by the EC with the United States and, more recently, to those held with Ecuador.

8. Panama believed that it was the EC's policy not to take affected countries into account unless they requested authorization to suspend concessions. Panama had indicated its commitment to achieving a WTO-consistent solution, which would be satisfactory to all concerned. It believed that the multilateral trading system would allow it to hold constructive discussions with the EC without further recourse to dispute settlement procedures, in particular since the Bananas dispute had already been the subject of a number of DSB rulings.

9. As he had just indicated, Panama had not been included by the EC in its substantive discussions with the United States and Ecuador. It had been made clear to his country that the EC had nothing to negotiate with Panama and, like other Members, it had been accused of intransigence and of preventing the EC from meeting its obligations. He reiterated that the EC had an obligation to make its regime WTO-consistent. At present, the situation was difficult as a result of two authorizations of retaliatory measures. The EC could only blame its own delay and not the victims of its illegal regime. The more time the EC took, the more complicated this situation would become and for this too the EC must shoulder the blame. However, as indicated in the status report at the present meeting as well as in previous reports, the EC continued to deny everything and to blame the banana-producing countries of Latin America instead. It was hard to believe that his country was being accused of intransigence while it had made constructive efforts, had sent Ministers, Vice-Ministers, Ambassadors and negotiators and had devoted its scarce resources only to be told that the EC had nothing to negotiate with Panama.

10. He reiterated that his Government remained determined to seek a consensus-based solution, which would guarantee to all the interested parties, real, effective, improved access as well as consistency with the DSB's recommendations. However, the EC should show a greater willingness for dialogue. A lot of difficult work had to be done and Panama had shown its willingness to hold negotiations. The solution to this problem would not be found by negotiating behind closed doors with the United States and now Ecuador. Other parties were involved and solutions could only be

found by holding discussions with all parties involved in the dispute. A policy of silence did nothing to improve trading relations between Members, nor to resolve disputes. Thus far, the EC in the Bananas dispute had simply not lived up to the DSB's objectives.

11. The representative of Honduras said that since 25 September 1997 his country had continued to reiterate its view that the EC did not wish to comply with the DSB's recommendations to bring its banana regime into conformity with the WTO rules. In Honduras' view, that lack of willingness demonstrated the EC's disregard of the multilateral trading system. Countries like Honduras, seeking to apply the DSU rules in the firm belief that their rights would be restored, were confronted with big trading partners such as the EC who evaded their responsibilities. If the situation was reversed, either Honduras would have come into compliance or the EC would have found a way to make Honduras comply. He wished to know how much longer his country had to wait for the EC to comply. He was concerned that the EC had decided not to comply. He recalled the statement made by Honduras at the 7 April DSB meeting in which a reference had been made to an initiative which could place countries such as Honduras at a disadvantage as steps were taken to evade the responsibilities resulting from DSB's recommendations. Such attempts should not be allowed. He noted that no consultations had taken place between his country and the EC with a view to seeking a solution to the banana problem.

12. The representative of the United States considered that the EC's status report was a non-report. It contained the same information which had been submitted over a considerable period of time. The US position with regard to the EC's lack of compliance was well-known. The United States regretted that the EC continued to blame other Members for its failure to comply while it was in fact disagreement among its member States and not among the complaining parties that was preventing the EC from complying. The United States had met with the EC and subsequently had informed all the parties of those discussions. She noted that in the course of those discussions the EC's position had moved backward. The EC had an obligation to comply with the WTO rules. Like previous speakers, the United States continued to hope that the EC would stop blaming others for its failure to comply with the WTO obligations.

13. The representative of Colombia said that his delegation supported the statements made by previous speakers. A solution to the Banana dispute should be found promptly. Colombia reiterated the need for the EC to fully and immediately implement the DSB's recommendations and rulings.

14. The representative of Guatemala said that, as indicated in the EC's status reports, no new developments had taken place. The lack of will on the part of the EC to modify its banana regime continued to affect banana producers and undermined the credibility of the multilateral trading system. Already 32 months had passed but the EC had not yet complied with the rulings. Guatemala, like other small developing countries, had confidence in the multilateral trading system and believed that the only way to preserve its rights was to respect the WTO Agreement. She wished to know how much longer it was necessary to wait before a WTO-consistent banana regime were to be put in place. Guatemala hoped that a solution would be found in the very near future since other binding decisions had to be taken which were linked to the banana problem.

15. The representative of Mexico said that his country's position on this matter was well-known. He noted that Mexico had not been invited to participate in the consultations referred to at the present meeting. He reiterated that the EC did not need approval from other parties to the dispute in order to bring its regime into conformity with the WTO rules. It should only comply with its WTO obligations. As already stated on previous occasions, Mexico's preference was a tariff-only system with adequate market access.

16. The representative of Saint Lucia said that her delegation thanked the EC for its status report and its recent consultations with Ecuador. She recalled the statement made by her delegation at the 7 April DSB meeting (WT/DSB/M/78, para. 12). It was her intention to reiterate the same statement

at the present meeting. She added that if all parties to the dispute were to be given what they wanted then, as a result, all parties would lose. While Saint Lucia hoped for a quick resolution of the dispute, it called upon the parties to exercise a maximum of reasonableness to this end.

17. The representative of the European Communities said that his delegation noted the statements made at the present meeting. The EC's reports continued to be the same because there were still great difficulties in satisfying all the parties. The EC was aware of its obligations and the matter was being raised in the DSB on a monthly basis to enable delegations to express their views. At the time the matter had been launched in the WTO, the complaining parties were aware that even if they won, it would be extremely difficult to resolve the case. Statements had been made to the effect that the EC, in putting in place a new regime, should favour developing countries. He noted that one of the original purposes of the banana regime was to favour the ACP countries. Now, the EC was being asked to favour both the ACP countries and the Latin and Central American countries, which meant that it should not favour the interest of the US multinational companies.

18. The representative of Panama referred to the statement made by the EC to the effect that when the complaining countries had brought the case into the WTO they were aware that it would be difficult to resolve. In his view, the EC was suggesting that the complaining parties should not have even tried to restore their rights. He hoped that the EC was not implying that such efforts should be discouraged.

19. The representative of the United States said that, over a considerable period of time, the EC had continued to submit the same progress reports, which had been justified on the grounds that the complaining parties had nothing to offer. However, it was the EC who had lost the case, not the complaining parties and it should now come into compliance in order to meet its WTO obligations. The EC was fully aware that it was failing to meet its WTO obligations. The United States considered that the remarks made by the EC at the present meeting were neither appropriate nor helpful towards further efforts aimed at reaching a solution to this dispute.

20. 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 (WT/DS76/11/Add.4)

21. The Chairman drew attention to document WT/DS76/11/Add.4 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.

22. The representative of Japan said that, as indicated in the status report, since the 7 April DSB meeting, his country had held consultations with the United States in a constructive manner. Although some progress had been made it had not been possible to conclude those consultations. Japan hoped that the parties would be able to find a mutually satisfactory solution in the near future. His country would make its utmost efforts towards that end.

23. The representative of the United States said that her country continued to work with Japan in an effort to resolve the remaining technical issues on implementation. The United States hoped to be able to resolve those issues shortly.

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

2. Nicaragua - Measures affecting imports from Honduras and Colombia

(a) Request for the establishment of a panel by Colombia (WT/DS188/2 and Corr.1)

25. The Chairman recalled that the DSB had considered this matter at its meeting on 7 April and had agreed to revert to it. He drew attention to the communication from Colombia contained in document WT/DS188/2 and Corr.1.

26. The representative of Colombia said that, on 17 January 2000, his country had requested consultations with Nicaragua concerning its Law 325 and Decree 29/99 establishing a 35 per cent tax on goods and services from Colombia and Honduras. Since the consultations had not led to a satisfactory settlement, on 28 March 2000, Colombia had requested the establishment of a panel to examine this matter. Colombia's request had been considered by the DSB at its meeting of 7 April. However, it had not been possible to establish a panel at that meeting because Nicaragua had objected to Colombia's request. Therefore, his country was requesting the establishment of the panel for the second time. In accordance with Article 6.1 of the DSU such a panel would have to be established at the present meeting.

27. The representative of Nicaragua said that his country recognized Colombia's right to request the establishment of a panel. At the present meeting, his delegation wished to raise two issues of fundamental importance for the dispute settlement system. The first issue related to the procedures for the establishment of panels and the second concerned the institutional aspect of the WTO. Nicaragua considered that Colombia's panel request contained some procedural and substantive defects and did not meet the requirements of Article 6.2 of the DSU. First, Colombia's request at the present meeting was different from that submitted at the 7 April DSB meeting. Therefore, the present meeting constituted the first consideration of Colombia's request. Accordingly, he requested that the establishment of a panel be deferred until the next meeting.

28. Second, in its panel request, Colombia based its claim on certain provisions which had not been referred to during the consultations. Therefore, Nicaragua considered that a panel should examine Law No. 325 and its regulations only in the light of the provisions of Article I and II of GATT 1994, as indicated in document WT/DS188/1. In document WT/DS188/2/Corr.1, Colombia was requesting that the panel should have the standard terms of reference set out in Article 7 of the DSU. Nicaragua's position was that the provisions of Article XXI of GATT 1994, which confirmed the inherent right of a State to protect its security and constituted an exception to the multilateral trade rules, could not be subjected to an examination by a panel. That principle had been endorsed by GATT practice and was enshrined in the Decision of 30 November 1982 by the CONTRACTING PARTIES concerning Article XXI of the General Agreement. The Understanding reached by the Council on 10 October 1985 that the Panel could not examine or judge the validity of, or the reasons, for the invocation by the United States of Article XXI(b)(iii) should be considered as normative since that decision had been endorsed by the CONTRACTING PARTIES.

29. Article XVI:1 of the WTO Agreement and Article 1(b)(iv) of Annex 1A thereof incorporated the past legal experience acquired under the GATT 1947 into the WTO in such a way as to guarantee continuity and coherence in a smooth transition from the GATT 1947 system. In this way, the importance of the experience acquired by the CONTRACTING PARTIES for the WTO had been confirmed and recognized. The Decision of 30 November 1982 concerning Article XXI of the GATT recognized the exclusive authority of the CONTRACTING PARTIES to interpret Article XXI of the GATT, as reaffirmed in Article IX:2 of the WTO Agreement which provided that "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." That Article also provided that such decisions "shall be taken by a three-fourths majority of the Members". The fact that the WTO Agreement had

specifically established this "exclusive authority" to interpret the Agreement was sufficient to conclude that this authority had not been given implicitly or inadvertently to any other Body.

30. Therefore, unless and until there was a formal interpretation of Article XXI of GATT which would invalidate the understanding reached by the Council in October 1985, the standard terms of reference provided for in Article 7 of the DSU would have to exclude the possibility of examining and/or judging the validity of, or the reasons for, Nicaragua's resort to Article XXI(b)(iii) of GATT. Nicaragua was requesting that the panel should not be established at the present meeting and that the terms of reference should prevent it from examining and/or judging the validity of, or the reasons for, the resort by Nicaragua to Article XXI(b)(iii) of the GATT 1994. His country was also requesting that its statement made at the 7 April DSB meeting be circulated as a WTO document together with the text of the statement made at the present meeting.

31. The representative of the United States said that in her delegation's view, Article 6.1 of the DSU required the DSB to accept a panel request that appeared on the DSB agenda for the second time. Such a request, however, should be the same each time. It was the US understanding that although Colombia had a right to a panel, its request before the DSB at the present meeting was not the same as the one which had been considered for the first time. Therefore, it would be appropriate for the DSB not to establish a panel at the present meeting. The parties to the dispute could use this additional time to try to solve the dispute.

32. The representative of Japan said that that Members should be extremely cautious with regard to any measure justified under Article XXI of GATT 1994. A dispute of political nature could seriously compromise the credibility of the dispute settlement system. Japan, therefore, strongly urged the parties to seek any possible means in an effort to settle this dispute in other fora outside of the WTO.

33. The representative of Canada said that her delegation wished to echo the position expressed by Japan. Canada had no views on the specific matter in the dispute and she did not wish to comment on the argument with regard to Article 6.1 of the DSU. Canada supported the view that issues related to national security should be addressed with great caution and, like Japan, also called upon the parties to resolve the matter through other means. In this respect, she noted that a reference had been made that if a panel were to be established such a panel might have special terms of reference. In her view, that could be a way of dealing with this important issue.

34. The representative of Honduras said that, like Japan, his country believed that Members should be cautious when invoking security provisions because such actions might undermine the multilateral trading system and could be viewed as unilateral. Honduras believed that Colombia was within its rights in requesting that a panel be established at the present meeting, as provided for in Article 6.1 of the DSU.

35. The representative of the European Communities said that the argument had been made to the effect that Colombia's request at the present meeting was not the same as the one considered for the first time and, therefore, the present meeting did not constitute the second consideration of that request. In his view, this was not a strong argument. The corrigendum to the panel request, which had been circulated at a later stage, referred to two elements. The first element concerned a factual issue and the second one did not alter the basis of the legal complaint. It would be preferable to establish a panel at the present meeting and the parties could continue to seek a solution. Matters related to national security issues were sensitive, but there was nothing in the DSU to the effect that such issues were exempt from dispute settlement proceedings. In the EC's view, the panel could examine the facts to determine whether the matter at hand concerned a national security issue or whether the measure in question constituted a trade policy measure. There were some precedents and one well-known case which had been launched in 1997 had been examined by a panel but had been

resolved by the parties before the panel had started its deliberations. He believed that the case to which he had just referred constituted a good precedent.

36. The representative of United States said that the corrigendum to Colombia's request was not only factual since it had modified the measures to be examined by the panel.

37. The representative of Colombia said that the corrigendum had been circulated following the request by Nicaragua. That corrigendum narrowed the scope of the panel request in WT/DS188/2, which had already been considered by the DSB at its previous meeting.

38. The representative of Nicaragua said that, on 14 April 2000, her country had sent a letter to Colombia indicating that its panel request contained some procedural defects: i.e. the scope of the request was broader and covered the issue which had not been raised in the consultations. In other words, its legal basis were different. For example, Colombia had requested that the measure be examined in the light of the GATS while no reference had been made to that Agreement during the consultations. Colombia's request was before the DSB for the first time because that request was different from the one submitted at the 7 April DSB meeting: i.e. it referred to different measures and its scope was broader than the scope of consultations. There was a distinction between procedural issues for consideration by the DSB and substantive issues for examination by the panel. Nicaragua could not accept two different requests, namely one referring to two regulations and the other referring to just one regulation.

39. The Chairman said that the issue at hand was very sensitive. Some procedural points which had substantive implications had been raised by Nicaragua, and had received a degree of support. The DSB could only be guided by Article 6.1 of the DSU which read as follows: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB agenda, unless at that meeting the DSB decides by consensus not to establish a panel." It was his understanding that, at the present meeting, there was no consensus not to establish a panel. As indicated on previous occasions, a complainant had the right to have a panel established upon the second consideration by the DSB. He was not sure that there was a consensus that the issue of the corrigendum would be sufficient to undermine that right when the matter was on the agenda for the second time. There were also other procedural issues with substantive implications which had been raised by Nicaragua. For example, whether or not all of the points raised in the panel request had been covered in consultations. It was not the first time that such problems had been raised before the DSB and the normal procedure on those occasions had been to indicate that it would be for the panel to decide whether all the matters raised had been properly put before it. In this particular context, it would be for a panel, when established, to decide whether the issues raised by Colombia had been properly consulted upon. He proposed that the DSB take note of the statements and agree to establish a panel in accordance with the provisions of Article 6 of the DSU.

40. The DSB so agreed.

41. The Chairman said that the other important issues which had been raised by Nicaragua related to the terms of reference of the panel. A number of delegations had expressed views on this matter. He drew attention to Article 7.3 of the DSU which read as follows: "In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1". Therefore, one possible course of action would be for the DSB to authorize him as Chairman of the DSB to take action under Article 7.3 of the DSU. It was clear that that procedure was subject to paragraph 1 which read that "panels will have the standard terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of a panel". It was necessary to read those two provisions together. This was just one possible way of trying to move forward and it was not his intention to impose this course of

action on the parties. He proposed that the DSB authorize the Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute subject to the provisions of Article 7.1 of the DSU.

42. The DSB so agreed.

43. The representative of the European Communities drew attention to the last sentence of Article 7.3 of the DSU which read as follows: "If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB." The EC wished to reserve the right to make use of that provision, if necessary.

44. The DSB took note of the statement.

45. Canada, Costa Rica, European Communities and Honduras reserved their third-party rights to participate in the Panel's proceedings.

46. The Chairman said that, at the request of the European Communities, he wished to propose that the item concerning Ecuador's recourse to Article 22.7 of the DSU be considered first. He said that under Rule 7 of the Rules of Procedure, the DSB could agree to change the order of business at any time, if necessary. He therefore asked if any delegation would object to the proposed order of business.

47. The DSB agreed to the proposed order of business.

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

(a) Recourse to Article 22.7 of the DSU by Ecuador (WT/DS27/54)

48. The Chairman invited Mr. K. Bryn, Chairman of the General Council, to preside over of the proceeding of item 3. The Chairman of the General Council recalled that at the DSB meeting on 19 November 1999, Ecuador had requested authorization from the DSB to suspend the application to the European Communities and its member States of tariff concessions or other related obligations under the TRIPS, GATS and, contingently, under the GATT. At that meeting, the EC had objected to Ecuador's request and had requested that the matter be referred to arbitration pursuant to Article 22.6 of the DSU. He drew attention to document WT/DS27/ARB/ECU which contained the Arbitrators' decision on this matter as well as to the communication from Ecuador contained in document WT/DS27/54.

49. The representative of Ecuador said that, in accordance with Article 22.7 of the DSU, his country was requesting authorization from the DSB to suspend concessions or other obligations to the EC. On 17 March 2000, the Arbitrators had determined, on the basis of Ecuador's initial request (WT/DS27/52), that the nullification or impairment of benefits suffered by Ecuador as a result of the EC's application of its illegal banana regime amounted to US$201.6 million per year. The Arbitrators' decision had been circulated on 25 March 2000 in document WT/DS27/ARB/ECU. In accordance with Article 22.7, Ecuador had brought its initial request into conformity with the Arbitrators' conclusions and recommendations. The new request had been circulated on 8 May 2000 in document WT/DS27/54. Article 22.7 of the DSU provided that: "The parties shall accept the arbitrator's decisions as final and the parties concerned shall not seek a second arbitration." That Article further stipulated that the DSB "shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request". Since Ecuador would not join in a consensus to reject its request, the DSB would have to grant authorization to suspend concessions.

50. At the 7 April DSB meeting, Ecuador had made a statement with regard to the scope of the Arbitrators' decision concerning the EC's failure to comply with its obligations. At the present meeting, he wished to draw attention to that statement contained in WT/DSB/M/78. He also wished to draw attention to the statement made by the EC at the 7 April DSB meeting that "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". In commenting on the Arbitrators' decision, the EC had also pointed out that Ecuador had "correctly recalled some of the problems involved in this complex case", adding that, while Ecuador "had not yet applied any measures it had the right to do so. The EC was not questioning that right".

51. Ecuador, which closely followed the DSU procedures, had accurately incorporated the criteria contained in the Arbitrators' decision. Furthermore, in suspending concessions it would take into account the terms contained therein, namely, the amount of US$201.6 million in the sectors indicated in its request. Ecuador was willing to continue to negotiate with the EC the terms for the application of a new banana regime. He also wished to reaffirm his country's position already stated during the discussions with the EC at the beginning of May that it would prefer compensation over retaliation. He reiterated that at the present meeting, Ecuador was requesting authorization from the DSB to suspend concessions or other obligations in accordance with the terms set out in document WT/DS27/54.

52. The representative of the European Communities said that the situation faced by the EC was not satisfactory and raised some serious systemic problems. The EC had held discussions with Ecuador and had taken the position that it would not oppose the request although it would have strongly preferred to have had further opportunity to review the facts and the measures to be taken by Ecuador. However, the case at hand should not become a precedent. He drew attention to paragraph 171 of the Arbitrators' report which read as follows: "… Ecuador's request under Art. 22.2 …. has not followed … the principles and procedures set forth in Art. 22.3, especially regarding the suspension of concessions with respect to goods destined for final consumption. Moreover, the level of suspension requested by Ecuador exceeds the level of nullification and impairment suffered by it ... ." Subsequently, in paragraph 172 of the report, the Arbitrators quoted Article 22.7 of the DSU, namely, that the DSB "… shall grant authorization to suspend concessions where the request is consistent with the decision of the arbitrator". In paragraph 173 of the report, the Arbitrators stated the following: "Consequently, … we suggest to Ecuador to submit another request ... consistent with our conclusions set out in the following paragraphs: (a) Ecuador may request … and obtain authorization by the DSB to suspend concessions ... at a level not exceeding US$201.6 million per year ...; (b) Ecuador may request ... and obtain etc. ... on certain categories of goods; (c) Ecuador may request ... and obtain authorization by DSB ... to suspend commitments under GATS; and (d) to the extent that suspension requested under the GATT and the GATS .... is insufficient to reach the level … indicated … Ecuador may request … and obtain authorization by the DSB … to suspend obligations under the TRIPS Agreement ... ." On the basis of the above paragraphs, the EC retained that: (i) the original Ecuador request was not correct in its form, and that the DSB should authorize a different request as long as it was consistent with the Arbitrator's conclusions; (ii) the present revised request was thus different and, in this sense, constituted a new request; and (iii) Ecuador was clearly under an obligation to limit the effect of any measures that might be taken up to US$201.6 million.

53. Furthermore, Ecuador had to take measures affecting first consumer goods, and then its GATS commitments, and to suspend TRIPS obligations only if the first two kinds of measures were not sufficient. This was a very important condition in the Arbitrator's conclusions. The EC considered a number of difficulties arising from the very imprecise nature of Ecuador's current request. For example, the original request, considered by the Arbitrator to be excessive, had been totally maintained, in its entirety, and the suspension of concessions on certain goods had been added to that. That meant that the current request was still excessive, and that the only way that Ecuador

could remain within the ceiling of US$201.6 million would be to apply measures with great care to ensure that they remained below that level.

54. Another example was that the current request provided no indication of the level of extra duties that might be applied. In the absence of such indications there was no way that the DSB or the EC could calculate, with any certainty, the impact of measures to be taken. The third example was that the value assigned to suspension of concessions on goods was based on Ecuador's own data provided to the Arbitrator and on the single year 1999, whereas the EC had provided data showing imports much higher than that and believed that such calculations should, according to earlier precedents, be based on a three-year average.

55. He regretted that the revised request by Ecuador did not enable the EC, nor the DSB, to reach a conclusion as to whether the requirement that the request be consistent with the Arbitrator's report had been met. This created a serious systemic problem since there would be no chance of any multilateral control or verification of the measures to be taken which was out of line with the intention of Article 22 of DSU. That represented another defect in the DSU rules in cases where a first request under Article 22.6 went to arbitration and following that it was revised and represented in a manner which did not allow a proper verification of the facts. In the case under consideration, the EC would have expected that Ecuador would have been willing to join in an exercise of verification of the data. He regretted that the EC's efforts to seek Ecuador's cooperation in this sense had been denied.

56. In this case it was impossible for the DSB to know the value to be assigned to any measures that Ecuador might take on consumer goods. In addition, the value to be assigned to any measures under GATS was notoriously difficult to calculate, and in consequence the need for any measures to be taken under TRIPS was impossible to estimate. If in doubt, Ecuador should abstain from such measures. He underlined that the fact that this request would be approved by the DSB at the present meeting should not be interpreted as a recognition or an acceptance that it was consistent with the Arbitrator's conclusions.

57. The EC reserved its rights to monitor the impact of any measures that might be taken once the DSB had authorized such action, and to challenge such measures if it appeared that they were excessive in relation to the figure established by the Arbitrators. He wished to make his statement for the record since the EC did not wish that this case create a precedent for future cases. The EC understood that there had been problems in terms of the Arbitrator recommending a different approach to the original request and the EC did not wish this case to become an example which leaves the parties affected unable to see what the impact of the measures envisaged would be.

58. The DSB took note of the statements and, pursuant to Ecuador's request under Article 22.7 of the DSU, as revised in the light of the Arbitrators' decision, agreed to grant authorization to suspend the application to the European Communities and its member States of tariff concessions or other related obligations consistent with the Arbitrators' decision contained in document WT/DS27/ARB/ECU.

4. United States – Transitional safeguard measure on combed cotton yarn from Pakistan

(a) Request for the establishment of a panel by Pakistan (WT/DS192/1)

59. The Chairman drew attention to the communication from Pakistan contained in document WT/DS192/1.

60. The representative of Pakistan said that since his country's request for a panel was contained in document WT/DS192/1, he did not need to go into details thereof at the present meeting. He recalled that in December 1998, the United States had requested consultations with Pakistan, pursuant

to Article 6.7 of the ATC concerning a restraint on imports of combed cotton yarn - category 301 - from Pakistan. These consultations, however, had not resulted in a mutually satisfactory solution. To Pakistan's regret, the United States had decided unilaterally to impose a restraint, effective from 17 March 1999. In accordance with the requirements of the Agreement on Textiles and Clothing (ATC), the Textiles Monitoring Body (TMB) had examined the restraint and had concluded that: "the United States had not demonstrated successfully that combed cotton yarn was being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products". The TMB had therefore recommended that the United States withdraw its restraint. The United States, however, had not accepted the TMB's recommendation and had informed it accordingly. Consequently, the TMB had examined the reasons given by the United States for its inability to comply with the TMB's recommendation. Following the re-examination of the case, the TMB had again recommended that the United States rescind the restriction forthwith.

61. Unfortunately, despite the TMB's recommendations on two occasions, the United States continued to maintain its unilateral restriction on combed cotton yarn from Pakistan. The matter remained unresolved. Therefore, Pakistan was obliged to request a panel to examine the matter. His country believed that the restraint imposed by the United States on imports of combed cotton yarn from Pakistan was inconsistent with United States' obligations under the ATC; i.e. it was inconsistent with Article 2.4 of the ATC, and was not justified under Article 6 thereof as it did not meet the requirements for transitional safeguards set out in paragraphs 2, 3, 4 and 7 of Article 6 of the ATC. He requested that the DSB establish a panel at the present meeting.

62. The representative of the United States said that her delegation noted the statement made by Pakistan at the present meeting. However, the United States would not be in a position to join in the consensus to establish a panel at the present meeting.

63. The representative of Pakistan said that his country respected its WTO rights and obligations and had due regard to the rights of other Members. It was in this spirit that Pakistan recognized that the United States had a right to block the establishment of a panel upon the first consideration of the panel request. However, his delegation was disappointed that the United States had not provided any sound reason for its decision and believed that there was none. His country's disappointment resulted from the fact that its exports continued to remain under restriction. As a result, the benefits accruing to Pakistan under the WTO Agreement were being nullified or impaired. He said that Pakistan's request for a panel would be included on the agenda of the next DSB meeting and that a panel would be established at that meeting.

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

5. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/130)

65. The Chairman drew attention to document WT/DSB/W/130 which contained an additional name proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. Unless there was any objection, he proposed that the DSB approve the name contained in document WT/DSB/W/130.

66. The DSB so agreed.

6. Australia – Measures affecting importation of salmon

(a) Statements by Canada and Australia

67. The representative of Canada, speaking under "Other Business", said that his country was pleased to announce that it had concluded an agreement with Australia to resolve this long-standing dispute. The text of the agreement was in plain language and in the form of an exchange of two letters between the parties. The agreement boded well not only for this important sector of Canada's economy, but also for its relationship with Australia. Canada would monitor closely Australia's commitment to implement the agreement by 1 June 2000. It also hoped that shortly thereafter the parties would be in a position to notify the DSB of a mutually agreed solution.

68. The representative of Australia said that his country wished to confirm that on, 16 May 2000, it had reached a mutually agreed solution with Canada on the implementation by Australia of the conclusions and recommendations adopted by the DSB in the dispute on "Australia - Measures Affecting the Importation of Salmon" (WT/DS18). The text of the agreed solution - in the form of an exchange of letters - was publicly available and would be formally notified to the DSB. The letters had been signed on 16 May 2000. On 17 May 2000, Australia had introduced amendments to its quarantine policies on fresh, chilled or frozen salmon, with effect from 1 June 2000. The relevant document, the Animal Quarantine Policy Memorandum, dated 17 May 2000, was also publicly available. Australia had, therefore, given effect to the terms of the mutually agreed solution within one day of confirmation of the terms of the agreement. The amendments in question implemented the DSB's recommendations and rulings on the "consumer-ready requirements", consistent with the terms agreed by Canada. These amendments were fully consistent with the covered agreements. Canada and all other salmon exporters could avail themselves of the new arrangements now in place.

69. The representative of the United States said that her country welcomed the agreement between Canada and Australia. The United States also welcomed the statement that the improved access to the Australian market would be available to all Members. The United States had participated as a third party in the case under consideration and had requested a panel on the same matter (WT/DS21). Subsequently, the work of that panel had been suspended. The United States looked forward to further information and details regarding the above-mentioned market access. It would examine the matter carefully with a view to taking a decision on how to proceed in the suspended case. The United States hoped that the dispute in question would serve as a good example of how the dispute settlement system could ensure compliance with the WTO rules.

70. The delegation of Norway said that his country, which had participated as a third party to this dispute, welcomed the agreement on implementation reached by Canada and Australia. Norway was pleased that Australia had modified its quarantine policy and hoped that the changes made were consistent with the Panel's recommendations. Norway had not had the opportunity to examine the agreement and the changes to the Australian quarantine policy. Norway looked forward to a notification from the parties in this respect and commended the parties for resolving their differences.

71. The DSB took note of the statements.