

# WORLD TRADE ORGANIZATION

RESTRICTED

**WT/DSB/M/59**

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**Dispute Settlement Body**  
**19 April 1999**

## **MINUTES OF MEETING**

Held in the Centre William Rappard  
on 19 April 1999

*Chairman: Mr. Nobutoshi Akao (Japan)*

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

#### **(a) Recourse to Article 22.7 of the DSU by the United States (WT/DS27/49, WT/DS27/ARB)**

The Chairman recalled that at the DSB meeting held on 25 January - 1 February 1999, the United States had requested the DSB to authorize suspension of the application to the European Communities and its member States of tariff concessions and related obligations under the GATT 1994. At that meeting, the EC had objected to the level of suspension proposed by the United States, and had requested that the matter be referred to arbitration by the original panel in accordance with Article 22.6 of the DSU. He recalled that the previous Chairman of the DSB, Ambassador Kamel Morjane, in his concluding remarks during the above-mentioned meeting, had stated the following: "...There remains the problem of how the panel and the arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU...". This had been achieved by the Arbitrators and the Panel which issued, simultaneously to the parties on 6 April 1999, both the decision of the Arbitrators and the Panel Reports on the recourse to Article 21.5 by Ecuador and the EC. He drew attention to document WT/DS27/ARB which contained the Arbitrators' decision and to the communication from the United States contained in document WT/DS27/49.

The representative of the United States said that the US request for suspension of concessions under Article 22.7 of the DSU was before the DSB for consideration. On 6 April 1999, the Arbitrators had determined, on the basis of the original US request (WT/DS27/43), that the nullification or impairment suffered by the United States as a result of the EC banana regime amounted to US\$191.4 million annually. The Arbitrator's decision had been circulated to Members in document WT/DS27/ARB on 9 April 1999. As required in Article 22.7, the United States had modified its original request in order to conform to that determination, which had been circulated on 9 April in WT/DS27/49. Under the DSU provisions, "the parties shall accept the arbitrator's decision as final and shall not seek a second arbitration". Furthermore, Article 22.7 provided 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 the United States would not consent to rejection of its request, the DSB had to grant authorization to suspend concessions. She noted that consideration of a request for suspension of concessions was before the DSB for the first time and should therefore be put in its proper context. The suspension of concessions under Article 22 was an essential element of an important objective of

the DSU, namely compliance with the WTO rules. The Arbitrators had recognized this and had agreed that the purpose of countermeasures was to induce compliance. After several rounds of litigation, almost all procedural options under the DSU had been exhausted. In order to ensure that the WTO rules were meaningful, it was necessary to bear the consequences in case of non-compliance. The DSU provided for such consequences, legal safeguards and guarantees, which the United States had fully followed. At the present meeting the United States only sought the required authorization from the DSB. Suspension of concessions under the DSU was only a temporary solution, and a mutually acceptable solution, consistent with the covered agreements, was preferred. This remained the preferred solution of the United States and, she believed, of all developing-country Members which exported bananas to the EC market. The United States was ready and willing to negotiate a solution to the banana dispute and to withdraw the suspension as soon as such a solution was implemented by the EC. The Arbitrators had found that the EC banana regime, in place since the beginning of 1999, remained inconsistent with its obligations under the WTO Agreement, and that the United States continued to suffer nullification or impairment of benefits. These findings demonstrated that the application of the DSU provisions was possible. The Arbitrators had demonstrated the viability and importance of the DSU and the WTO. It was now up to the DSB to take action.

The representative of the European Communities said that the EC accepted the level of nullification or impairment suffered by the United States as determined by the Arbitrators at US\$191.4 million per year. This was considerably less than the original US claim and confirmed that the EC was right to request arbitration. The EC would therefore not oppose a DSB decision at the present meeting. It was the EC's intention to bring its banana import regime into full conformity with the WTO rules as soon as possible. For this purpose, the EC would initiate discussions with all the parties concerned. He underlined that the main message was the EC's intention to comply. The EC was in the process of examining the report, in particular to determine what exactly was meant by compliance in the case at hand. This was a complex question since the guidance contained therein provided different options. The EC would first discuss within the Community how compliance could best be achieved, and then it would initiate discussions with its partners. He hoped that the EC's statement to the effect that it had to study the various options, would not be interpreted by the media that the EC was refusing or was unwilling to comply. Careful consideration of various options was required in any democratic and parliamentary system and could not be interpreted as a delaying tactic. Members should bear in mind that to bring the EC's banana regime into conformity with the WTO rules was not necessarily the same as satisfying demands of the complaining parties.

A complex matter such as the one at hand inevitably involved a number of options. The Panel, established at the request of Ecuador under Article 21.5, in its report<sup>1</sup> which was not under consideration at the present meeting, had also provided some alternative suggestions as to how conformity could be achieved. The Panel had not intended to be exhaustive and had not gone beyond mere suggestions because it had recognized that it was the sovereign right of a Member to take decisions. This traditional approach had also been taken by the EC with regard to the changes made to its banana regime in 1998. The Panel suggestions implied a new waiver or a modification of the present waiver or at least its renewal at the beginning of the year 2000. Therefore, while it was up to the EC to decide, these appeared to imply that conformity with the WTO rules depended upon a derogation rather than on the respect of the current rules. If one were to follow the reasoning of the Panel, sovereign rights would also be subject to agreement by Members, and therefore there would be a collective responsibility to arrive at a fair and balanced result rather than the one that would necessarily meet all the demands of the complaining parties. The principle of WTO-conformity required the EC to change its regime and not to adopt a new regime exactly on the lines of what other parties would prefer.

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<sup>1</sup>WT/DS27/RW/ECU.

The US measures, described as provisional or preliminary, had been in force since 3 March 1999. Their consequences and impact on trade were the same as if higher duties had been applied. The EC had requested consultations under the DSU provisions with regard to this matter. The decision to authorize these measures to be taken at the present meeting, could apply only from 19 April 1999. Members were allowed to start the suspension of concessions only after such suspension had been authorized. It was the EC's understanding that the United States was considering retroactive application of suspension of concessions. In the view of the EC, that approach was incorrect. It was necessary to clarify this issue and he hoped that the Chairman, in his conclusions, would clarify the question of the effective date for application of the US measures. The EC did not question the authorization to suspend concessions up to an amount determined by the Arbitrators. However, for transparency purposes, any authorization should be accompanied by a list of products that would be subject to increased duties. A list of products, published by the United States had not been circulated at the present meeting. The EC believed that the authorization by the DSB should be related to such a list in order for the EC and other DSB members to verify the amount. If that list were to be modified, or if certain items were to be replaced, this would substantially affect the amount of the retaliation that had been authorized. This would also create uncertainty, which would mean that the overall effect of the measures would be greater than the authorized amount. The EC believed that it would be appropriate, even though there was no specific requirement under the DSU, to authorize the amount determined by the Arbitrators together with a list of products. He asked whether the United States intended to provide a list of products to enable the DSB to take note of it as part of the authorization process.

The EC accepted the Arbitrators' determination at the level to which the measures could be taken. However, the EC had some questions about the process and the arguments contained in paragraphs 4.10 to 4.14 of the Arbitrators' report with regard to nullification and impairment. The EC continued to believe that the analysis contained in Section V of the report with regard to those issues were neither legally correct nor valid as an interpretation of the DSU provisions. However, at the present meeting, the DSB was not required to adopt or take note of the report, but to take a decision on the level of retaliatory action and therefore there was no need to continue to debate whether the Arbitrators were within or outside their mandate. Under the special circumstances of this case, the Arbitrators' report should not constitute a precedent for the future. The EC believed that it was not possible to undertake a procedure to determine nullification or impairment without the basis of a panel or an Appellate Body report adopted by the DSB. If implementing measures were taken and subsequently Article 22 authorization was claimed, a prior panel review under Article 21.5 was required. The EC would continue to strongly defend this view in the ongoing DSU review. He drew attention to footnote 10 in the Arbitrators' report which read as follows: "This by implication suggests that issues of violation and nullification or impairment can be determined by arbitration". He believed that that this was not a very strong argument and the implication drawn therein was incorrect. The EC accepted that the circumstances of this case, in which the Arbitrators had acted in parallel as panelists on the issue of violation under Article 21.5, were exceptional. Although the previous Chairman of the DSB had stated that this approach was the only logical one in order to move forward, the EC believed that this should not set a precedent for the future. The EC accepted the amount determined by the Arbitrators and did not oppose a DSB decision. It was the EC's intention to come into full conformity and to hold discussions with the parties concerned. He hoped that the secondary issues raised by him would be addressed by the Chairman in his conclusions.

The representative of the United States said that her delegation appreciated the comments made by the EC to the effect that it would not object to the US request. Most importantly, the United States appreciated that the EC, like the United States, wished to discuss on how to work out a WTO-consistent regime. The provisions of the DSU were silent with regard to the specific date for the suspension of concessions. There was only one requirement, namely, that such a request had to be consistent with the Arbitrators' decision. That decision was silent on the issue of the effective date for suspension of concessions and so was the United States in its request. The only reference with regard

to a time-frame in the Arbitrators' decision was in the paragraph quoted by the United States in document WT/DS27/49, that the suspension by the United States of concessions covering trade in the maximum amount of US\$191.4 million per year would be consistent with Article 22.4 of the DSU. The United States had requested a suspension in an amount up to US\$191.4 million per year. This authorization, once granted, would be effective in accordance with those terms. The United States was legally responsible for ensuring that the amount of the suspension each year was in accordance with the authorization granted by the DSB.

With regard to a list of products on which tariff concessions would be suspended, there was nothing in the DSU to the effect that such a list should be attached to a request for authorization to suspend concessions. To authorize a list of products as well as the amount would go beyond the Arbitrators' decision and would lead to an amendment of the DSU. The DSB's authorization of suspension of concessions was governed by the specific provisions of Article 22.7, which provided that arbitrators "shall not examine the nature of the concessions or other obligations to be suspended". An arbitrator was not supposed to examine particular products involved, but to examine and determine the amount of the suspension of concessions. That point was discussed at great length during the negotiations of the DSU by the Institutions Group at the end of 1993. The only relevant issue before the DSB was the amount of the suspension and whether the principles and procedures of Article 22.3 had been followed. The products in question were not important. Article 22.7 also provided that "The DSB shall be informed promptly of the decision of the arbitrator and 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". The requirement of consistency with the arbitrator's decision was the only condition imposed in Article 22.7. No additional conditions could be read into this provision. This was one of the most intensely negotiated provisions in the Uruguay Round negotiations which should not be revised. The DSB had been informed of the Arbitrators' decision and that the United States would request authorization. It was clear that the US request was consistent with the Arbitrator's decision and the DSB had to grant its authorization. If the Arbitrator did not have to examine the products involved in the proposed suspension, and the sole requirement was that the request had to be consistent with the decision, then there was no requirement for a Member to provide a list of products and the DSB could not choose on which products concessions had to be suspended. A list of products had been circulated in the press release that had already been published, and there would also be a modified list of products later in the day, in accordance with the US domestic procedures. The only decision for the DSB at the present meeting was to take action with regard to the US request contained in WT/DS27/49. There was no basis for the Chairman of the DSB to modify that request, as suggested by the EC. The United States could not agree with some comments made by the EC with regard to the substance of the Arbitrators' decision. The United States had maintained in all discussions that its intention was to ensure a WTO-consistent regime. The United States was not against preferences as it also maintained preference regimes for those regions. However, such preferences had to be WTO-consistent. The United States was ready to work with the EC on this issue and confirmed its support for the ACP countries. While it recognized that it was up to the EC to support the ACP countries' economies, it was equally important not to delay compliance. In particular, the EC should refrain from procedural tactics and enter into discussions with the United States.

The Chairman noted the statement made by the United States that the list of products subject to the suspension was in a press release and would be published in the Federal Register. Although the United States had referred to the requirements under Article 22.7 of the DSU, he noted that there was not much disagreement on this issue. He nevertheless asked the United States to circulate a copy of the press release containing the list of products at the end of the meeting.

The representative of the United States said that her delegation would circulate the list which would be officially published in the Federal Register Notice on 19 April.

The representative of the European Communities said that his delegation welcomed the statement by the United States with regard to the legitimacy of preferences consistent with the WTO. It was important not to give the impression that the tariff preferences given to the ACP countries were illegal. The media had given that impression and continued to claim that the EC was trying to find loopholes because it wished to continue preferences and to respect its Lomé commitments. The manner in which the preferences were given, not the principle, should be examined. He asked Members to comment on the question of the date for the suspension of concessions. The EC would pursue this issue in a different context, but normally decisions taken by the DSB applied from the date when such decisions had been taken and should not be applied retroactively, unless the Chairman so stated. Since there was no reference to retroactive application under the DSU provisions, the normal process would be that the DSB decision to authorize the suspension of concessions would apply as from 19 April. With regard to the list of products, it was surprising, and not in line with its insistence on transparency, that the United States had not circulated the list of products, except through the press. Although the DSU did not require the circulation of a list of products, it was not enough for the United States to indicate that it was responsible for not exceeding the amount. This was not an approach taken in the past since it had not been accepted by other Members that the EC was responsible for ensuring conformity of its regime. The EC was not in a position to verify the products included in the list. It was important for other Members to make comments on this matter since the DSU provisions were not clear.

The representative of Japan expressed his delegation's appreciation to the Arbitrators for their effort to find "a logical way forward" in this difficult case. As stated in paragraph 4.15 of the Arbitrators' report, this was a special case and there was no agreement on the proper interpretation of Articles 21.5 and 22 of the DSU. Therefore, the decision at the present meeting should not prejudge any position in the DSU review. Japan considered that even under the special circumstances of this case, it was not in the mandate of the Arbitrators under Article 22.6 to make a determination on the consistency of the EC's banana regime. It was rather in the mandate of the Panel established pursuant to Article 21.5 of the DSU. Japan would have preferred the members of the original Panel to first make their determination under the Article 21.5 Panel before deciding on the level of suspension of concessions as arbitrators. The Arbitrators' decision in this regard constituted a derogation from the normal procedure envisaged under the DSU provisions, and should be resolved in the DSU review. Japan also had a preference for the United States not to make its request for the authorization to suspend concessions until the DSB had adopted the report of the Panel under Article 21.5, and had taken a multilateral decision on the issue of consistency of the EC's implementing measures. Japan believed the maintenance of the sequence between Articles 21.5 and 22.6 or 22.7 was of key importance towards safeguarding the multilateral character of the dispute settlement mechanism and the WTO. Although Japan did not object to the discussion of the item requested by the United States, it considered that these special circumstances and the "logical way forward" proposed by the Arbitrators constituted in no way a precedent under the DSU. In Japan's view, the Arbitrators' interpretation outlined in Section IV of the report was not shared by many Members. Japan believed that this question should be resolved collectively from a systemic point of view in the DSU review. Japan supported the EC's view that the United States could only start the suspension of concessions from the date the DSB had taken its collective decision. When there was a disagreement among the parties, it was not for the prevailing party to interpret the starting date. Japan did not consider that a retroactive application of the suspension of concessions should be permitted.

Finally, although not in the context of the present discussion, Japan noted that the current language of the DSU did not prohibit parties from appealing an Article 21.5 panel ruling. However, from the political perspective, it was undeniable that this case was undermining the credibility and smooth functioning of the system. It would therefore be sensible not to prolong or complicate the matter further. The question of whether a party could appeal an Article 21.5 panel ruling remained to be resolved by consensus in the DSU review, and any decision taken in the context of the banana case

should not prejudge its future work. Many issues of systemic concern were still unresolved in this case. Even if the EC had decided not to appeal, this did not relieve Members of the responsibility to deal with these issues as expeditiously as possible and to achieve concrete results that would leave no room for ambiguity and unilateral interpretation or action. However, even in the DSU review, Members might not be able to come up with a language or solutions which could meet all possible circumstances in the future. He reiterated Japan's view that it was of primordial importance that Members acted in good faith reflecting the objectives and spirit of the WTO system that all defended. The representative of Japan also stated that, for the sake of transparency to the Members, the US should communicate as soon as possible all relevant information regarding the list of products which would be the subject of the suspension of tariff concessions.

The representative of Panama said that his delegation was pleased with the Arbitrators' report. The EC's banana regime had already been condemned seven times, first by the GATT and then by the WTO. Given the long history of this case in which victories had rapidly turned into frustrations, his delegation was cautious with respect to the EC rectifying the inconsistencies in its banana import regime. More than ever before, it was clear that unilateral actions and determinations by the EC would not resolve this conflict or prevent the retaliatory measures requested by the United States. As in the previous statements, Panama urged the EC to recognize the need to engage in discussions and negotiations with the countries affected by its regime in order to take account of their concerns and to bring this dispute to an end once and for all. In his first statement on this matter before the DSB, he had complained that this dispute had been represented in an unbalanced manner, as a conflict between "amoral" multinationals and those who merely sought to help developing countries. The EC banana regime affected the daily life of workers, families and traders in the developing countries on both sides of the dispute. Panama therefore invited the countries of the ACP and of the Framework Agreement to discuss their interests in order to find a way to indicate to the EC how best to respond to their development needs in line with the WTO Agreement. Panama hoped that it would soon be possible to find solutions rather than face delaying tactics. His delegation supported the US request for authorization of suspension of concessions.

The representative of Brazil said that his delegation did not wish to comment on the US request for authorization to suspend concessions, but to state that Brazil was still considering some elements of the methodology and the findings contained in the Arbitrators' report, which might have implications beyond the dispute at issue. His delegation fully shared the comments made by Japan that the Arbitrators' report did not and should not create any precedent. He reserved his delegation's right to revert to this matter.

The representative of India thanked the Arbitrators for their work and for reaching the decision contained in document WT/DS27/ARB. Irrespective of whether they agreed with all elements of that decision, Members recognized that the Arbitrators had had a very difficult and sensitive task. Members were still examining some elements of the report, but the fact that the implications of the report had not been fully absorbed did not preclude them from expressing gratitude to the Arbitrators for their task. It was not the intention of his delegation to take sides on the substantive issues related to the banana dispute. His delegation was interested in systemic implications of this dispute and the need to preserve the rule-based and the multilateral character of the WTO. India appreciated what had been stated by the Arbitrators in paragraphs 4.9 and 4.15 of the report to the extent that they had found a logical way forward to ensure a multilateral decision with regard to the level of suspension of concessions in the special circumstances of this case in which there was no agreement among Members on the proper interpretation of Articles 21 and 22. He supported the statement by Japan that the Arbitrators' report was very specific to the special circumstances of the banana dispute and should not be deemed to constitute a precedent. India recognized that the Arbitrators had found a creative solution with regard to the difficult situation faced by Members by pointing out in paragraph 4.8 that "since the level of proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our

examination as arbitrators focuses on that level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States". India continued to believe that the WTO-consistency or inconsistency of implementing measures should be determined by an Article 21.5 panel. However, in the special circumstances of this case, and keeping in view the need for a multilateral determination, India appreciated that the Arbitrators had reached a conclusion about the WTO-inconsistency of the EC's measures before determining the level of suspension of concessions. The Arbitrators' argument in paragraph 4.12 that "while the reference to arbitration in Article 23.2(a) may be inconclusive, it is clear that the goal of Article 23, multilateral determination, is achieved if the issue of nullification or impairment is considered in an arbitration before the original panel". India, like other delegations, had some concerns with regard to Section IV of the Arbitrators' report but recognized that in the extremely difficult situation, the Arbitrators had done their best to strengthen multilateralism. It was India's firm belief that Articles 21.5 and 22 were sequential and that the WTO-consistency or otherwise, of a measure taken by a losing party, had to be determined by a panel under Article 21.5, if there was a dispute about the WTO-consistency of such a measure. Therefore, India regretted that the DSB was required to grant authorization for suspension of concessions before it had approved a determination by an Article 21.5 panel about the WTO-inconsistency of the measure. The action to be taken at the present meeting should not constitute an awkward precedent for the future.

He noted the point made by delegations that the DSB did not have to adopt the Arbitrators' report, but to take a decision on the US request for authorization of suspension of concessions. However, it was important for delegations to express their views on the Arbitrators' report as in the case of the adoption of panel and Appellate Body reports. The Arbitrators' decision had to be accepted in accordance with the reverse consensus rule, and whenever that rule applied there was a provision allowing Members to express their views, even though Article 22.6 might not expressly state so. He considered some points contained in the report to be very useful. He drew attention to paragraph 3.7 of the report which read as follows: "We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule". In other words, cross-sectoral retaliation was an exception, not a rule. This was consistent with the provisions of the DSU and its negotiating history. He drew attention to paragraph 4.8 of the report which read as follows: "We cannot fulfil our task to assess the equivalence between the two levels before we have reached a view on whether the revised EC regime is, in the light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent". As he had already stated, within their constraints, the Arbitrators had found a creative way of upholding the multilateral determination. In paragraph 6.3, the Arbitrators stated: "In our view there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter measures of a punitive nature". This was an important principle. Paragraph 6.10 read as follows: "The *presumption* of nullification or impairment in the case of infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the dispute settlement system". He said that his delegation's approach was similar to that of the delegation of Japan. The point had been made about the date from which the suspension of concessions should become operative. Any action under the DSU, in particular that related to suspension of concessions, should be taken only on the basis of the DSB authorization, and the suspension of concessions should become effective from the date when multilateral authorization had been granted. Finally, he was glad that the atmosphere at the present meeting was more cordial than what it used to be when the banana dispute had been discussed. He thanked the United States and the EC for their constructive approach. They had a great responsibility and should not view the decision of the DSB at the present meeting as a victory or defeat for a particular delegation. Other delegations had a great stake in the multilateral trading system. Whatever happened in this case should be treated as specific to this dispute, and the review of the

DSU should be carried out in such a way as to strengthen the foundation of multilateralism. He said that he was obliged to make these remarks because some press reports after the circulation of the Arbitrators' report had implied that there was a particular level of suspension and that there was no problem because the DSU provisions were now clear. As pointed out by Japan, there were many areas which had to be revised and the DSU review provided a good opportunity to this effect. He hoped that both delegations, the United States and the EC, would approach these issues in the DSU review in a constructive spirit and would not allow themselves to be influenced by what they perceived as victory or defeat in this particular case. He supported the statement by Japan that ultimately, irrespective of what a particular Article stated, all Members had to act in good faith, if not the credibility of the dispute settlement system would be affected.

The representative of the United States referring to the statement by the EC with regard to transparency, said that her delegation more than any other delegation supported transparency and that the EC was mistaken. She had tried to clarify, in her previous intervention, that a list of products had been supplied in January. Following the Arbitrators' amount of US\$191.4 million, the United States had deducted from that list some items. This modified list had been in a press release and would be published by the Central Register. As a courtesy, her delegation would also provide the list to Members.

The Chairman said that it was his understanding that the United States would circulate the list of products subject to the suspension of concessions.

The representative of Mexico said that for the first time the suspension of obligations or concessions was being authorized in the WTO. This had happened only once in the history of the GATT in the early 1950s. The suspension of obligations or concessions (the expression "retaliation" did not exist in the WTO texts) was not a substitute for the need to comply with WTO obligations. In accordance with Article 22.8 this was a temporary situation. What was important was that obligations should be complied with. Mexico noted that the EC intended to hold consultations shortly with its trading partners in order to find a solution. Mexico hoped that these consultations would include all the complainants in the original Panel as well as those who could not complain in the original Panel because they had not been WTO Members at the time, but had subsequently become Members and were substantial exporters. He recalled that at earlier DSB meetings, Mexico had reserved its rights as a complainant in the original Panel, and that reservation remained valid. The present DSB meeting should be confined to authorizing the suspension of obligations or withdrawal of concessions as requested by the United States. However, the Arbitrators' report deserved further examination. Mexico agreed with the United States that the DSU did not contain any obligations to submit a list of products (or services) related to the suspension of obligations or withdrawal of concessions. Due to the importance of these issues for the system, the question of retroactive application of the suspension of obligations or concessions and the relationship of Articles 21.5 and 22 should be resolved by Members and not by the arbitration report. He had made the above comments without prejudice to the United States' right to seek the authorization.

The representative of Guatemala said that his country had invested a lot of effort in the banana case, which had once again led to the recognition and reaffirmation of Guatemala's rights as well as those of other complaining parties and Panama which were still, after all these years, the subject of discrimination by the EC. Guatemala was glad that it had repeatedly expressed its confidence in the dispute settlement system and, upon examining the report of the Arbitrators, reaffirmed that the DSU rules and provisions were achieving their objectives in spite of delaying actions used by certain Members. Guatemala was satisfied with the conclusions and main arguments presented by the Arbitrators in their report and congratulated them for completing their task in a satisfactory manner. Guatemala considered it appropriate for the DSB to authorize the suspension of the concessions as requested by the United States.



The representative of Côte d'Ivoire said that his delegation noted the statement made by the EC in which the EC had focused on three points. With regard to the first point, namely the application of sanctions, he did not wish to make any comments. With regard to the EC's intention to bring its regime into conformity with the WTO rules, he said that both the GATT and the WTO contained a series of rights and obligations. However, one could not overlook other international obligations, including those under the Lomé Convention. With regard to the third point, it was his understanding that the EC would hold discussions with its partners. His delegation wished to participate in such discussions. Finally, he noted that the United States recognized the existence of preferences granted to the ACP countries.

The representative of Jamaica believed that all Members wished to put to rest the banana case, and she hoped that the resolution of this issue would not become a "draconian" saga. Jamaica welcomed the statements by the United States and the EC. She drew attention to Jamaica's letter contained in document WT/DSB/W/100 in which a number of important points had been raised pertaining to the future functioning of the DSB and the dispute settlement mechanism. Her delegation shared the view expressed by Japan and supported some of the points raised by India and the EC. Jamaica believed that further consideration of these points was required in the context of the DSU review, and that there was a need for detailed examination of the Arbitrators' report. With respect to the date for authorization of suspension of concessions, Jamaica believed that date should be the one on which the DSB, as a multilateral authorizing body, granted such authorization and should not be retroactive.

The representative of the Philippines said that the DSB had before it the US request for authorization to suspend concessions in relation to the banana case. At the present meeting, he wished to comment on the question of suspension of concessions, and did not wish to address the issue of the banana dispute. He noted that the suspension of concessions was the ultimate remedy for Members in case their rights were not respected. In theory, this remedy was available to all Members from both developed and developing countries. However, as this dispute had demonstrated, while Members had equal rights and obligations, the ability to enforce the respective rights and obligations might not be the same. He considered that when one were to suspend concessions, one would punish not only the other Member but also oneself. The process would also be painful for a Member imposing concessions. It was obvious that the suspension of concessions was possible for countries developed economically and politically, but the question was what would be a remedy for small developing countries, if their rights were violated. His delegation would submit a paper on this issue in the context of the DSU review. This paper would deal specifically with the quality and opportunity to impose rights and obligations. It would be difficult to assume new obligations without rectifying first the quality of the opportunity to enforce one's obligations.

With regard to the banana case, after the present meeting, the suspension of concessions would be authorized. It might thus happen that in the future, the EC would change its regime in the manner that it believed was in compliance. However, there could be a disagreement as to whether or not that new regime was in compliance. The Philippines believed that in that case, Article 21.5 proceedings should be available to the EC to resolve that disagreement. Otherwise, the next dispute related to bananas would be how to resolve a disagreement on whether or not the new measure was in compliance, bearing in mind that the duration of suspension would depend on the settlement of that disagreement.

The representative of Egypt said that, like India, his country was also glad that the discussion at the present meeting was held in a more cordial climate. He also wished to reiterate what had been stated about the special circumstances of this dispute, and that the Arbitrators' report should not be considered as a precedent. Like Brazil, India, Mexico and other delegations, his country was also concerned about a number of systemic issues contained in the report and wished to further reflect thereon. His delegation shared the views expressed by Japan, in particular with regard to a number of

systemic issues concerning the relationship between Articles 21.5 and 22 and the issues related to compliance, arbitration and sequence. His delegation also shared the views expressed by the EC with regard to the question of preferences to the ACP countries, and hoped that both parties would be reflecting this in their statements to the press in order for this issue to be clarified in light of recent press reports. With regard to the date for the suspension of concessions, there were three options referred to by delegations: (i) retroactive application; (ii) the DSB decision to suspend concessions; and (iii) a date of a decision on compliance. His country preferred the third option, but would be willing to go along with the date of the DSB decision on the suspension of concessions. However, it would be quite dangerous to accept any retroactive implementation because if this was accepted then systemic implications might go far beyond the present dispute. This would encourage Members to start putting policies in place in anticipation of all kinds of decisions to be taken by the WTO bodies. Egypt considered that this was a very important issue that would have systemic implications for all Members, and hoped that this could be resolved in a manner that would not compromise the interests of Members.

The representative of Australia wished to associate his delegation with the views expressed by other speakers who had expressed appreciation with regard to the efforts of the Arbitrators towards a solution to this case. Australia also welcomed the statements by the United States and the EC indicating that they had been able to agree to resolve their differences in this dispute in the context of the multilateral rules. There had been however a number of issues referred to at the present meeting on which his delegation wished to further reflect. Australia considered that procedural approaches which had been followed in this particular case were without prejudice to the interpretation and application of the DSU procedural provisions to other disputes which might arise on implementation. Therefore, like Japan, Brazil, India and other speakers, Australia did not consider this case as setting a precedent. A number of issues had to be resolved in the context of the DSU review. Like other delegations, it was important to bear in mind that the reports of the Panels under Article 21.5, had not been adopted and that their legal status was a matter for Members acting collectively as the DSB, and in accordance with the DSU provisions related to the adoption of the reports. This authority could not be ceded. On another point, he noted that the Panel reports and the Arbitrators' report had addressed a number of significant policy issues with implications for commercial traders and not just in the field of bananas. Against this observation, he wished to make a broader point that policies and systemic policy issues raised in all these reports and other reports of panels should be debated constructively in the DSB, and it was therefore important that the placing of panel reports on the DSB agenda continued to provide the opportunity for full consideration with Article 16.2 and 16.3 of the DSU.

The representative of Mauritius said that her country fully endorsed the statement made by Japan, in particular with regard to the question of the sequence between Articles 21.5 and 22 as well as the date from which the suspension of concessions should be applied. She recalled that Mauritius had always favoured a solution based on consensus and agreement of all parties concerned. Her delegation noted the statements by the EC and the United States and looked forward to a permanent solution to be found which was based on consultations by all parties concerned. She noted the request for clarification by Jamaica, which she believed should be responded to, even though not necessarily at the present meeting. Her delegation welcomed the comments by the EC and the United States in respect of their commitments and support for the ACP countries and looked forward to this being translated into concrete terms.

The representative of Indonesia wished to join previous speakers who had expressed their appreciation for the work of the Arbitrators towards resolving this issue and welcomed the statements by the EC and the United States. As his country had stated on previous occasions, Indonesia was very concerned with the systemic implications of the present case. He wished his delegation to be associated with the statements made by other delegations to the effect that the part of the Arbitrators' report pertaining to the relationship between Articles 21.5 and 22 should not prejudice future cases and the ongoing work in the DSU review.

The representative of Norway welcomed the Arbitrators' report and appreciated the statements by the United States and the EC. Norway had only systemic interest in the banana case, and considered that this was a special case which should not create a precedent with regard to future cases, and the work in the DSU review. In the view of Norway, withdrawal of concessions could not be applied retroactively. The fact that the Arbitrators had not met the 60-day deadline should not change this principle. Norway believed that there was a need to await the DSB authorization before any counter-measures could enter into force.

The Chairman proposed that the DSB take note of the statements and, pursuant to the US request under Article 22.7 of the DSU, agree to grant authorization to suspend the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994, consistent with the decision of the Arbitrators contained in document WT/DS27/ARB.

The DSB so agreed.

The Chairman said that several points had been raised at the present meeting, but it was not a WTO practice for the Chairman to make a summary of the discussion. With regard to the list of products that would be subject to increased duties, he recalled that the United States had stated that it would circulate that list, which was satisfactory to delegations. Many delegations re-confirmed the importance of the ongoing work in the DSU review, in particular with regard to the relationship between Articles 21.5 and 22. He recalled that the discussion on this matter had already taken place in March 1999, but in light of the sensitivity of this issue for some Members, and before the work of the Arbitrators had been completed, it had been decided to take up the issue of implementation at a later date. He believed that it was not up to him to rule on the starting date for the suspension of concessions. However, on the basis of the statements made at the present meeting by many delegations, it was clear that the date of authorization of the suspension of concessions was the date of the present meeting, and he was not in a position to make additional comments.

The representative of the European Communities reiterated that the question of the date for the suspension of concessions would be pursued by the EC in another context, if the United States applied its measures retroactively. A large number of Members expressed their opinion that there should be no retroactive application of the US measures.

The DSB took note of the statements.

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