

# WORLD TRADE ORGANIZATION

RESTRICTED  
**WT/DSB/M/48**  
20 October 1998

(98-4073)

**Dispute Settlement Body**  
**22 September 1998**

## MINUTES OF MEETING

Held in the Centre William Rappard  
on 22 September 1998

*Chairman: Mr. Kamel Morjane (Tunisia)*

<u>Subjects discussed:</u>	<u>Page</u>
<b>1. Surveillance of implementation of recommendations adopted by the DSB.....</b>	<b>2</b>
(a) Canada – Certain measures concerning periodicals; Status report by Canada .....	2
(b) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities.....	2
<b>2. United States -Tax treatment for "Foreign Sales Corporations" .....</b>	<b>3</b>
(a) Request for the establishment of a panel by the European Communities.....	3
<b>3. United States – Measure affecting government procurement.....</b>	<b>4</b>
(a) Request for the establishment of a panel by the European Communities.....	4
(b) Request for the establishment of a panel by Japan .....	4
<b>4. European Communities – Regime for the importation, sale and distribution of bananas .....</b>	<b>5</b>
(a) Recourse to Article 21.5 of the DSU by Ecuador, Guatemala, Honduras, Mexico and the United States .....	5
<b>5. India – Patent protection for pharmaceutical and agricultural chemical products .....</b>	<b>14</b>
(a) Panel Report.....	14
<b>6. Proposed nominations for the indicative list of governmental and non-governmental panelists .....</b>	<b>19</b>
<b>7. United States – Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea.....</b>	<b>20</b>
(a) Statement by Korea.....	20
<b>8. Indonesia – Certain measures affecting the automobile industry .....</b>	<b>20</b>
(a) Statement by the European Communities.....	20
<b>9. Review of the DSU .....</b>	<b>22</b>

Prior to the adoption of the agenda, the representative of the European Communities thanked the Chairman for holding consultations in an attempt to resolve certain issues concerning item 4 of the

agenda and inquired whether this item had been included on the agenda for information only. Depending on the answer he would indicate whether he could accept item 4 to remain on the agenda. The representative of the United States also thanked the Chairman for organizing the consultations held early in the morning and in the afternoon. She responded that item 4 was on the agenda for information purposes only. The representative of the European Communities welcomed the US response and asked whether the United States had also spoken on behalf of Ecuador, Guatemala, Honduras and Mexico. The representative of the United States confirmed that she had also spoken on behalf of the above-mentioned countries.

## **1. Surveillance of implementation of recommendations adopted by the DSB**

- (a) Canada – Certain measures concerning periodicals; Status report by Canada (WT/DS31/9/Add.4)
- (b) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/17/Add.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. First, he drew attention to document WT/DS31/9/Add.4 which contained Canada's fifth status report regarding its progress in the implementation of the DSB's recommendations.

The representative of Canada said that her country was pleased to present its fifth status report on the implementation of the DSB's recommendations on this matter. As noted in its report, Canada would comply with the DSB's recommendations by the expiry of the reasonable period of time. Currently, her Government was seeking approval for the Executive Order in Council to repeal the existing customs tariff code item and its intention was to eliminate this item by 30 October 1998. Changes to the postal subsidy programme and the harmonization of the domestic and foreign rates would also be in place by 30 October 1998. With regard to the elimination of Part V.1 of the Excise Tax Act, Canada would table a Ways and Means motion containing the legal text revoking the tax before 30 October. Because it was not expected that the actual legislation to amend the Excise Tax Act would be tabled and passed until after 30 October 1998, the Ways and Means motion would enable Revenue Canada to administer the amendment. Therefore, Part V.1 of the Excise Tax Act would no longer be enforced after 30 October 1998.

The representative of the United States said that Canada's status report described the changes to its WTO-inconsistent magazine regime announced on 29 July 1998. However, there was an important omission. On the date that Canada had announced the plans outlined in the report it had also announced its intention to introduce legislation that contained the same discrimination against imported magazines. In describing this proposed legislation, Canadian officials had made it very clear that their intent was to continue Canada's long-standing policy of banning from its market competitive foreign-produced magazines. Although the legislation had not yet been introduced in Parliament it was clear that it would simply carry forward the same discrimination already condemned by the Panel and the Appellate Body. Canada's planned legislation raised a question of whether Members considered that the dispute settlement system was effective in resolving disputes or whether it only served as a means of prolonging and deepening such disputes. Canada's plan to replace one WTO-inconsistent regime with another WTO-inconsistent legislation suggested an answer that was not expected from one of the major architects of the system. The United States was particularly concerned because this was the first case in which Canada had to respond to the Panel and the

Appellate Body reports and many Members would closely watch the actions taken by Canada. Therefore, her country urged Canada to change its course of action. The United States was prepared to use its legal rights, if necessary.

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

The Chairman drew attention to document WT/DS27/17/Add.1 which contained the second status report by the European Communities on its progress in the implementation of the DSB's recommendations with regard to its banana import regime.

The representative of the European Communities said that his delegation was pleased to present its second status report. At the present meeting, he only wished to underline three new elements. First, on 20 July 1998, the EC Council had adopted Council Regulation No. 1637/98 which had been published on 28 July in the Official Journal of the European Communities. This Regulation which had already entered into force would be applicable as of 1 January 1999, the expiry date of the reasonable period of time. He noted that that this decision had been taken in good time. Second, this was partial implementation of the DSB's recommendations. In the next months, another regulation concerning the detailed rules for the management of the import licensing regime would be adopted by the EC Commission, and the Council had given an express delegation of powers for that process. Third, the Communities had been authorized to open negotiations with substantial suppliers with regard to the allocation of shares in the EC banana tariff-rate quotas. These negotiations had already begun and he was not in a position to know whether they had been terminated at this stage and if agreement had been reached. This would be known in the next few weeks. The Communities had also entered into consultations with the complaining parties and third parties with regard to their claims concerning the EC banana import regime.

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

## **2. United States -Tax treatment for "Foreign Sales Corporations"**

### **(a) Request for the establishment of a panel by the European Communities (WT/DS108/2)**

The Chairman recalled that the DSB had considered this matter at its meeting on 23 July and had agreed to revert to it. He drew attention to the communication from the European Communities contained in document WT/DS108/2.

The representative of the European Communities said that at the DSB meeting on 23 July, his delegation had made a lengthy statement concerning this issue. He therefore did not wish to reiterate the points made at that meeting. In the EC's view, the tax system at issue was an export instrument designed to assist the US exports. The US administrative pricing rules did not bear any relationship to real economic processes which took place outside of the United States. In practice, as a result of this taxation system, the profits of US parent companies were exempted from taxes and this constituted export subsidies. In accordance with the US statistics, the FSC scheme was of considerable value and, in the Communities' view, constituted a violation which had detrimental effects on the US trading partners. He therefore requested that a panel be established to make findings with regard to the compatibility of this legislation with the WTO obligations of the United States.

The representative of the United States said that since a panel would be established at the present meeting to examine the FSC provisions of the US Internal Revenue Code, she did not wish to reiterate all the points made at the DSB meeting on 23 July. She only wished to state that the EC's

reinstitution of a matter considered by the United States as resolved was a legally unwarranted and commercially unjustified action which would not prove helpful to the multilateral trading system or to the US bilateral relationship with the EC and its member States. The United States was confident to prevail on the merits of this case and would state its arguments before the panel.

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

The representative of Canada reserved the third-party rights to participate in the Panel proceedings<sup>1</sup>.

### **3. United States – Measure affecting government procurement**

- (a) Request for the establishment of a panel by the European Communities (WT/DS88/3)
- (b) Request for the establishment of a panel by Japan (WT/DS95/3)

The Chairman proposed that the sub-items be considered together. First, he drew attention to the communication from the European Communities contained in document WT/DS88/3.

The representative of the European Communities drew attention to document WT/DS88/3 describing the law adopted by the Commonwealth of Massachusetts on 25 June 1996, which the Community had requested to be examined by a panel. He recalled that in January 1997, the Community had sent a letter to the US State Department containing its view that this law was incompatible with a number of provisions of the Agreement on Government Procurement (GPA). Since then, the Community had received repeated assurances from the US Administration that it was working with the State of Massachusetts to address the EC's concerns. He acknowledged and appreciated the efforts made by the US Administration in this respect. However, this law was still in place in its original form and there was no indication that it would be modified. In June 1997, the Community had requested consultations with the United States with regard to this matter. Three rounds of consultations had been held in 1997 and 1998. Although these consultations had enabled the parties to have a better understanding of their positions it had not been possible to find a mutually acceptable solution. The Community's concerns related to the GPA were contained in its request for the establishment of a panel. The main point was that companies wishing to supply goods or services to the State of Massachusetts were penalized if they were doing business in Myanmar. The Community believed that if this law was allowed to stand it would undermine one of the fundamental principles of the GPA, namely that political considerations should not be part of decision-making with regard to awarding procurement contracts. In certain limited circumstances, the GPA allowed for agreed exceptions to this principle. For example, under the provisions applicable to developing-country Members or if derogations had been mutually agreed. However, this law could not fall under any of the exceptions permitted under the GPA. The Community could not allow for any precedent to be created for other law-making authorities which had agreed to abide by the GPA rules. It therefore requested that a panel be established to examine the compatibility of this law with the US obligations under the GPA. He stressed that this was not intended to mean that the Community approved the practices of Myanmar, but to underline the need for Members to respect their international obligations.

The Chairman drew attention to the communication from Japan contained in document WT/DS95/3.

---

<sup>1</sup> After the meeting, Barbados and Japan reserved their third-party rights to participate in the Panel proceedings.

The representative of Japan said that his Government requested the establishment of a panel to examine the Act regulating state contracts with companies doing business with or in Myanmar enacted by the Commonwealth of Massachusetts on 25 June 1996. Under the Act, the public authorities of the Commonwealth of Massachusetts were, in principle, not allowed to procure goods or services from the person, whether US or foreign listed in the restricted purchase list as doing business with or in Myanmar. In particular, the Executive Offices of Massachusetts offered by the United States under the GPA were not allowed to award a contract to such persons if there was a comparable law bid or offer by a person not on the list. Japan considered that the measure in question was inconsistent with the US obligations under the GPA. Consultations held on 22 July, 2 October and 17 December 1997 by Japan and the United States had unfortunately failed to settle the dispute on this matter. Furthermore, the 1998 session of the Senate and the House of Representatives of the Commonwealth of Massachusetts had been terminated in July without any amendment to the Act. Therefore, Japan requested that a panel be established at the present meeting pursuant to Article 4.7 and 6 of the DSU, Article XXII of the GPA, with standard terms of reference provided for in Article XXII:4 of the GPA.

The representative of the United States said that her country regretted and was disappointed that the Community and Japan had requested the establishment of a panel given the strong interest of all three parties in improving the human rights situation in Myanmar. The United States remained concerned about the extensive abuses of human rights by the regime in Myanmar, which had been internationally condemned. Her country with the assistance and in consultations with the Massachusetts officials, would continue its efforts to reach a mutually agreed solution with the Community and Japan without prejudice to its WTO rights. Therefore, the United States was not in a position to agree to the establishment of a panel at the present meeting. If a panel were to be established to examine this matter the United States would defend the measure.

The representative of Japan said that it was necessary to make a distinction between the human rights issues and trade. This was similar to the distinction between labour standards and trade as discussed in the First Ministerial Conference. With regard to the question of human rights, Japan had worked closely with Myanmar for many years both bilaterally and through the Human Rights Commission in Geneva. He underlined that Japan did not wish to indicate that the human-rights record in Myanmar was perfect. On the contrary, improvements were required in this area but this did not justify an imposition of trade measures by any government.

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

#### **4. European Communities – Regime for the importation, sale and distribution of bananas**

- (a) Recourse to Article 21.5 of the DSU by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27/21)

The Chairman said that the item was on the agenda of the present meeting at the request of Ecuador, Guatemala, Honduras, Mexico and the United States.

The representative of the United States, speaking also on behalf of Ecuador, Guatemala, Honduras, Mexico and Panama, expressed concerns about the EC's failure to comply with the DSB's recommendations, its disregard for the importance placed in the DSU on prompt implementation of the DSB's recommendations, as well as the serious consequences of its tactics for the dispute settlement system. Therefore, the complaining parties believed it necessary to have recourse to Article 21.5 of the DSU for the DSB to consider this issue at the present meeting. Unfortunately, the Community had refused that the original panel examine the consistency of the EC's revised measures

with the DSB's recommendations. Since this matter was placed on the agenda, the complaining parties had entered into consultations at the insistence of the Community without prejudice to their continued view that such consultations were not required as a prerequisite to reconvening the panel pursuant to Article 21.5 of the DSU. The consultations had confirmed that the Community and the complaining parties could not agree on the WTO-consistency of the measures taken by the EC to comply with the DSB's recommendations by 1 January 1999, which was the only threshold issue under Article 21.5 of the DSU. Therefore, they believed that the DSB should take action to permit their recourse pursuant to Article 21.5 of the DSU to reconvene the same panel if the same panellists would be in a position to serve on it. She did not wish to reiterate the specific concerns of the complaining parties raised in the DSB about the WTO-inconsistency of the measures taken by the EC Council in June and July 1998 with respect to the EC's banana regime. She regretted that these concerns had not been taken into account by the Community. Despite repeated efforts by the complaining parties to engage in serious discussions concerning WTO-consistent solutions, the Community had taken a unilateral approach. First, it had fixed its position through its own internal procedures and then it had refused to consider any proposal for substantive changes despite the fact that these measures constituted a breach of its WTO obligations.

It was obvious from a comparison between the EC's new measures and the DSB's recommendations that these measures breached the WTO provisions: (i) the EC's market allocation in particular for the ACP countries and Latin American countries was almost the same, and as legally flawed, as the one that both the Panel and the Appellate Body had found to be inconsistent with Article XIII of GATT 1994; (ii) the EC's new criteria for distributing import licenses appeared only to perpetuate the discrimination that the Panel and the Appellate Body had found to be inconsistent with the GATS. The complaining parties disagreed that these so-called "new" measures were WTO-consistent as claimed by the Community.

The DSU provisions permitted the complaining parties to request that the original panel be reconvened in case of a disagreement on whether the EC's new measures complied with the recommendations of the Panel and the Appellate Body. There was no doubt with regard to the existence of such a disagreement between the Community and the complaining parties. In the past three months, the complaining parties had attempted to work with the Community in order to be able to invoke the DSU procedures with a view to reconvening the original panel to resolve the disagreement over implementation of the DSB's recommendations. They had tried to ensure that this recourse was timely and expeditious in order to enable the Community to change its course of action and to comply with its WTO obligations by the end of the reasonable period of time on 1 January 1999. These efforts, however, had been frustrated by the invocation of procedural roadblocks by the EC to avoid a rapid recourse to the original panel.

In the consultations held on 17 September, the Community had asked numerous repetitive questions which had already been answered in the numerous and detailed statements made at past DSB meetings. She recalled that the EC had suggested in the past that these statements should not be permitted to be made in the DSB. In the consultations, the EC representative had suggested that there was no disagreement but only some confusion over the WTO-consistency of the EC's measures. The Community had declined to clarify its intentions concerning recourse to Article 21.5 of the DSU. By the end of the consultations it had become obvious that there was a clear disagreement between the EC and the complaining parties with regard to the consistency of the revised banana measures with the DSB's recommendations. The complaining parties had made it clear that there was no basis for any further consultations and had no plans to hold further consultations.

In the view of the complaining parties, if the Community believed that its measures were WTO-consistent it should welcome the opportunity to quickly prove this to the panel. If these measures were WTO-consistent a prompt decision by the panel would be beneficial. The EC's insistence on consultations only delayed the process. This delay would only prolong the dispute

beyond the reasonable period of time established by the arbitrator. These delaying tactics, if tolerated, would have serious consequences for the DSU and the multilateral trading system. This system could not operate solely on the good faith of some Members, while others used what they perceived as *carte blanche* for obfuscation and attempts to delay resolution of the dispute. The DSU provisions had to be read in conjunction with the DSU's objectives and no single provision of the DSU such as Article 21.5 could be read so as to render other DSU provisions inoperative. The EC's concept of the DSU procedures could find trade complaints tied up in WTO procedures for years, even after a measure had been determined to be inconsistent with the WTO Agreement. The Community as a complaining party in numerous ongoing disputes in the WTO could not accept the procedural position that it was now advocating as a defending party. She said that justice delayed was justice denied and believed Members could not be expected to rely on such instruments to settle multilateral trade disputes. As already indicated, the complaining parties had requested the EC to agree to the reinstitution of the original panel to resolve the dispute. But the EC had refused to do so. She regretted that the EC had objected to the prompt submission of this disagreement to the original panel under Article 21.5 of the DSU. She reminded the DSB members, and in particular the EC, that Article 21.1 of the DSU stated that prompt compliance with the DSB's recommendations and rulings was essential in order to ensure effective resolution of disputes to the benefit of all Members.

The representative of the European Communities said that it was not his intention to respond to all the points made at the present meeting. However, he contested the implication that only some of the parties had acted in good faith. He believed that no Member had the right to state that it had acted in good faith and that other Members had not. Statements made in the DSB by the complaining parties, which the Community had regularly contested, were only statements, not established facts. He recalled that the first statement on this issue had been made in January 1998 after the EC had made its proposal before any decision had been taken. Since then, the complaining parties had continued to make the same statements in the DSB. The complaining parties had stressed the need for prompt implementation pursuant to Article 21 of the DSU and that "justice delayed was justice denied". In this context, he wished to recall that the reasonable period of time had not yet expired and the Community had stated that it would need this time due to its complicated legislative process. The Community was on schedule and if it had chosen, like some Members, to reveal its intentions only before the deadline, it would not have been criticized by the complaining parties. In his view, prompt implementation was a matter of interpretation and the Community believed that it was within the reasonable period of time for implementation of the DSB's recommendations. Although a lot of work was still required, the Community would promulgate its regulation in good time not only to meet its DSU requirements but also for the reasonable conduct of trade and transparency.

With regard to the recent consultations concerning implementation, he said that at the end of July the parties to the dispute had sent a letter to the Community containing their request to reconvene the original panel. This request had appeared to be rather unusual since the Community's interpretation of Article 21.5 of the DSU was that the DSB should reconvene the original panel, not the Community. This had led to several discussions on the interpretation of Article 21.5 of the DSU. There was no agreement on this matter. The Community believed that the dispute which fell under Article 21.5 of the DSU should be resolved in accordance with the normal dispute settlement procedures except as otherwise provided in this Article. This was provided by the wording of Article 21.5 of the DSU which read as follows: "... such dispute shall be decided through recourse to these dispute settlement procedures." In the Community's view this meant that the ordinary dispute settlement procedures would apply with the addition of two specific elements, namely resort to the original panel, if possible, and the requirement that the panel circulate its report within 90 days. The normal dispute settlement procedures implied the need to hold consultations and the Community had insisted on this point. The parties to the dispute had wished third parties to participate in these consultations which the Community had accepted. However since third parties had to be informed that consultations would be held, these consultations could not have been held at short notice. He noted that these were not delaying tactics but a simple application of the DSU procedures. It was

clear that there was a disagreement on this issue. However, the Community had only defended its position during the process and was pleased that this position had been accepted by the parties to the dispute. In light of this, the Community had been surprised by a letter, dated 8 September, which in its title referred to recourse to Article 21.5 of the DSU. However, the content of this letter was not clear. The letter had requested that the matter be included on the DSB's agenda and a series of points had been made. By placing this matter on the agenda, the complaining parties wished to preserve their procedural rights. However, it was not clear whether this letter constituted a request for a panel. Therefore, at the outset of this meeting, he had asked some questions in order to clarify this issue. The Community believed that since the normal procedures would have to be followed, these consultations had not yet been concluded and therefore it was inappropriate to request a panel at the present meeting. The Community was neither short of time nor was utilising delaying tactics. Furthermore, the parties to the dispute had complained about one element of the EC's regime on which a decision had not yet been taken. The procedures required that measures that had been taken to comply with the DSB's recommendations would be referred to the original panel. The Community was therefore not in a position to accept this point since no measures had yet been taken. Although this issue had also been subject to consultations, the Community could not accept the position of the complaining parties since legally the measures had not yet been taken and there was no decision on the import licensing regime. There was some ambiguity concerning the request made by the complaining parties and a disagreement on the interpretation of Article 21.5 of the DSU. A decision on its import licensing regime was in process in the EC and by the time of the next DSB meeting, if a panel request was made, the Community would make its response. The Community had no objections with regard to the idea of referring this matter to the original panel provided that the same members of the panel were available and were confident to work speedily to make their decision before the end of the year.

The representative of Colombia said that her country, as a third party to this dispute, had a continued interest in this matter which was a test case for the DSU provisions. Colombia expected that at its next meeting, the DSB would consider a request to reconvene the original panel to examine the EC Regulation No.1637/98. In accordance with Article 21.5 of the DSU the panel would have to circulate its report within 90 days after the date the matter was referred to it. Her country was concerned that at present there were no procedures for the 90-day period stipulated in Article 21.5 of the DSU. She noted that the working procedures of the DSU Appendix 3 had been designed for the six-month period. In view of the complexity of this case there was a need for clear procedures. Therefore, it would probably be realistic to envisage new procedures similar to those of the Appellate Body. She proposed that the DSB Chairman hold consultations in order to clarify the procedures with a view to meeting two objectives: (i) to be able to comply with the 90-day period; and (ii) to ensure that the rights of third parties were respected. In accordance with Article 12 of the DSU a panel had discretion to decide on its procedures. However, due to the fact that this subject was new and that a large number of third parties was involved in this dispute and since not much time was left, such consultations would provide important input for the panel without prejudice to its rights under Article 12.1 of the DSU.

The representative of Cuba said that he wished to state his country's position on this matter which had been made public in August 1998 by the Head of State during his visit to the Caribbean nations. He wished to address the issue of substance and not procedure. Cuba considered that the EC regulations on imports, sale and distribution of bananas should take into account the fragile and critical economic situation of the Caribbean nations which were highly dependent on banana exports to the Community. Such exports accounted for more than 60 per cent of the total income of these countries, and therefore the EC market was vital to the subsistence of the small Caribbean producers and to their national survival. Cuba considered that the current preferential tariffs and tariff-rate quotas granted by the EC to the ACP countries should be respected. The withdrawal of such preferences would have negative consequences and would not ensure fair treatment to those countries.



The representative of Saint Lucia believed that legal arguments and procedural questions should not overshadow the fact that real trade and economic issues were at stake in this dispute. The regulations currently proposed by the EC were in line with the Lomé Convention. His delegation hoped that rather than dealing with procedural issues, consultations would be held in good faith to enable the parties to seek a genuine solution to this dispute. Such consultations would also help to avoid the prolongation of this dispute which thus far had caused considerable uncertainty in the countries concerned and had undermined confidence in their fragile economies. He believed that it was still possible to negotiate and understand their positions and interests. To-date, the ACP countries had not been in a position to understand the intentions of the complaining parties. On the one hand the complaining parties had stated that they respected the Lomé Convention and that the ACP countries should keep their shares in the EC market. On the other hand their strategy seemed to be aimed at the elimination of the ACP countries from the EC market. The EC banana market was the largest and most lucrative in the world. However, this market was only profitable because it was regulated. It would not be in the interest of any party if new measures resulted in oversupply and the collapse of prices thereby rendering the impoverishment of many countries.

The representative of Jamaica said that her delegation had noted the procedural arguments outlined by both the EC and the complaining parties. Her delegation appreciated that this item had been placed on the agenda for information purposes only. Jamaica, as a banana producer and exporter, shared the concerns expressed by Cuba and Saint Lucia. Her country had participated as a third party in the banana dispute both under the GATT and the WTO dispute settlement system. Jamaica wished to retain its rights as a third party as provided for in the DSU and to ensure that these rights were not eroded if the original panel was reconvened. Jamaica supported Colombia's proposal and urged that the Chairman guide any consultations towards drawing up the terms of reference of the reconvened panel taking into account its particular concerns. In light of the implications of a disagreement on the interpretation of Article 21.5 of the DSU it might be necessary to clarify the procedures of Article 21.5 of the DSU.

The representative of Brazil said that at the DSB meeting on 23 July, his delegation had expressed Brazil's interest in discussions relating to the allocation of quotas as a result of the DSB's recommendations. Subsequently, Brazil had been informed that the Community would consult with interested parties on implementation of the DSB's recommendations. It had therefore requested to be joined in these consultations. During the consultations, held on 17 September, Brazil had clearly stated its position. At the present meeting, he wished to reiterate for the benefit of those Members that had not participated in the consultations that, at this stage, Brazil only wished to take part in and be informed of discussions with regard to the allocation of quotas. Although the discussion on Article 21.5 of the DSU was important, Brazil did not have any position regarding the procedural issues involved in this case.

The representative of Argentina said that since this item had been included on the agenda for information purposes, he only wished to draw attention to three systemic points. Argentina was concerned about the timing of the request for reconvening the panel pursuant to Article 21.5 of the DSU before the expiry of the reasonable period of time for implementation of the DSB's recommendations. Argentina believed that it was not appropriate to request that the original panel be reconvened before the expiry of the reasonable period. The publication or entry into force of a measure, *per se*, without being actually implemented should not automatically cancel the rights with respect to the reasonable period of time. Once the measure was implemented there would be no need to wait for the expiry of the reasonable period before invoking Article 21.5 of the DSU. A similar approach could also be taken in cases in which a respondent would recognize that it would not be possible to modify a measure aimed at implementing the DSB's recommendations.

With regard to the procedural nature of recourse to Article 21.5 of the DSU, his delegation did not know whether the provisions of Article 21.5 constituted new, accelerated or special

procedures and whether they had to comply with the procedural stages provided for in the DSU. In other words, whether it was necessary to hold prior consultations. Argentina believed that the wording of Article 21.5 in connection with implementation "...through recourse to these dispute settlement procedures", did not mean that this was not a case of special procedures as the accelerated time-limit contained therein would indicate. This clause should be analysed in a broader context of the DSU and since this matter had been discussed at length in the course of the previous proceedings there was no need to hold consultations. It would not be reasonable that a process which had to be completed within a 90-day period should be preceded by a 60-day consultation period which would be fruitless since the parties had been unable to reach agreement during the implementation period.

With regard to the procedures for the reconvening of the original panel, there was a need to consider from the systemic point of view the modality for reconvening of the original panel. In other words, such questions as the inclusion of this matter on the DSB's agenda, the timing of such an inclusion and the role of the DSB thereon. This issue should be approached from the premise that the procedures initiated as a result of recourse to Article 21.5 of the DSU should focus on the objective of settling the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". The aim should not be to start new proceedings or another appeal procedure, nor to establish a forum that would indirectly enable a resumption of discussions on the content of the Panel reports modified by the Appellate Body. The reconvening of the original panel should be strictly confined to determining the existence of measures aimed at implementing the DSB's recommendations and, if necessary, an evaluation of the consistency of such measures with the WTO Agreement.

The representative of Costa Rica said that his country had a substantial trade interest in this matter. For that reason, his delegation had participated as a third party in the banana dispute. Costa Rica shared the concerns expressed by Colombia, in particular the need to ensure that the rights of third parties were recognized in the procedures to be initiated shortly. His country wished to participate in this process and to be able to contribute towards the efforts made thus far in clarifying the provisions of Article 21.5 of the DSU.

The representative of Japan said that although his country was not a party to this dispute it had an interest in systemic implications. In his view, three key-issues were involved in this matter. One was prompt compliance with the DSB's recommendations in accordance with Article 21.1 of the DSU. The second issue was full implementation of the DSB's recommendations within the reasonable period of time. As long as the Community assured that the DSB's recommendations would be fully implemented within 15 months, it was premature to state that it was not fully implementing. However, Japan was concerned about the EC's interpretation of Article 21.5 of the DSU, namely that in this case normal dispute settlement procedures would apply with the two additional elements: possible referral to the original panel and the 90-day period for the circulation of the panel report. He was not in a position to know whether this interpretation was correct. He noted that if normal dispute settlement procedures were to apply in this case, including the 60-day consultation period which had begun on 18 August 1998, then this period had not yet expired. The Communities had stated that not all the measures had yet been implemented. He was concerned that at this stage it was not known when these measures would be implemented. He questioned that if this information would only become available at the last moment and if the complaining parties would not be satisfied with the outcome then implementation could not be completed within the reasonable period of time. In order to implement the DSB's recommendations, it was necessary to go through domestic legislative procedures which was a long process and to consult with other parties to the dispute on how to implement these recommendations. In light of this, some concerns expressed by the complaining parties at the present meeting were justified.

The representative of Côte d'Ivoire supported the statements made by Saint Lucia, Jamaica, Cuba, Costa Rica and Colombia and wished to reserve his country's rights, including its third-party rights, with regard to this matter.

The representative of Venezuela wished to indicate his country's interest as a third party and supported the proposal made by Colombia. His delegations had some doubts with regard to the interpretations of this Article since these procedures had been invoked for the first time. He drew attention to the word "existence" contained in the first sentence of Article 21.5 of the DSU which in his view did not have any legal value. This word referred to the existence of a measure and its implementation. References had also been made in this Article to recommendations. The wording stipulated the obligations of the parties with regard to implementation. In accordance with Article 21.5 of the DSU, the process should not lead to a new panel but constituted an interpretative recourse aimed at examining the consistency of a measure that had been implemented pursuant to the DSB's recommendations. The Community had stated that certain measures had not yet been implemented. The procedures referred to in Article 21.5 of the DSU could mean both the DSU and the Appellate Body procedures. He considered that this matter required further examination. His delegation supported Colombia's proposal that the Chairman hold consultations.

The representative of Australia said that since this item was on the agenda for information purposes she wished to make comments on some of the issues raised on interpretation of Article 21.5 of the DSU. Like other members, Australia considered that Article 21.5 of the DSU did not provide clarity on the subject. First, there was a need for prior consultations, or alternative of good offices, conciliation or mediation under Article 5.3 of the DSU. The text of Article 21.5 of the DSU referred to "these dispute settlement procedures" but there was nothing in the text to suggest that the procedures were limited to the panel stage. Article 21.5 should also be read in conjunction with other relevant provisions of the DSU, including the Article 5.3 option, together with Articles 6.1 and 7 of the DSU. It was important for the measures and other relevant issues to be fully clarified before embarking on a panel. As emphasized by the Appellate Body, consultations were also the key to the terms of reference of the panel. Clarification with regard to specific measures and specific legal issues before embarking on a panel could also serve to expedite the completion of the panel's report.

Second, the right of recourse to the Appellate Body by the complainant and respondent should be kept in mind. Article 21.5 had to be read in conjunction with Article 17.1 of the DSU which concerned panel reports. A panel examining implementing measures would in all likelihood be addressing substantially different legal issues. It would be inequitable to deny rights of appeal which were available to both complainants and respondents.

Finally, if the implementing measure was already in place there would be no reason to await the end of the implementation period before invoking the DSU procedures. If a measure was not in place, Article 21.5 would not be applied in accordance with the textual reference which stated "measures taken to comply with the recommendations". As a general point, recourse to Article 21.5 procedures before the end of the implementation period could be adverse to the transparency objectives of Article 21 of the DSU. Losing parties could then be dissuaded from providing precision to their implementation programme until close to the end of a 15-month period. This would not be particularly helpful to exporters wishing to have adequate notice of measures. Deferral of invoking Article 21.5 action until the end of the implementation period could provide scope for rolling over implementation at 15 month intervals. It was noted that the complaining parties would retain the right to make a case for a shorter arbitrated time-period as provided by the last sentence of Article 21.3(c) of the DSU.

The representative of the Dominican Republic thanked the Chairman for holding consultations on this matter and supported the points made by Saint Lucia, Costa Rica, Cuba and Jamaica with regard to the interest of the ACP countries in the EC's market. The Dominican Republic

wished to maintain its third-party rights and therefore wished to be fully associated with Colombia's proposal that the Chairman hold consultations to ensure the participation of third parties.

The representative of Nicaragua said that his delegation supported the statements made by Colombia, Costa Rica and Venezuela and wished to retain its third-party rights with regard to this matter.

The representative of Ecuador asked the DSB members to conceive this issue as if it were any other panel which had examined goods and services not related to bananas, and in this panel a party had won the case. As a result, a responding party had been granted a reasonable period of time to modify and bring its legislation examined by the panel into line with the DSB's recommendations. During this period of time, a responding party would be obliged to pass new legislation in order to comply the DSB's recommendations. Suppose that these new measures would produce adverse effects for the party that had won the case. He believed that these situations were covered by Article 21.5 of the DSU. Article 21 of the DSU referred to prompt compliance which entailed more than just procedures.

His delegation had noted that the Community had stated that it would implement its measures before the expiry of the reasonable period of time. This demonstrated that the complaining parties were right when they had argued that the EC did not need 15 months to bring its banana regime into conformity with its WTO obligations. He recalled that in the arbitration process, the complainants had asked that the Community be given a shorter period than 15 months. Ecuador believed that developing countries had the right to request compliance as provided for in Article 4.2 of the DSU and in accordance with this spirit, the Community was not doing enough to meet its obligations. With regard to the proposal made by Colombia, his delegation considered that it was not appropriate at this stage to take a decision on whether such consultations should be carried out or not. This could be decided at a later stage and should not stand in the way of rightful expectations of those countries that had won the case. Ecuador did not agree to holding such consultations at this stage.

He drew attention to the fact that the Community had not mentioned that the complaining parties had received a proposal in order to be able to resolve the procedural differences with regard to the interpretation of Article 21.5 of the DSU. This proposal contained certain elements which had not been acceptable to the complaining parties because they involved delaying procedures which were not acceptable to the complaining parties.

The representative of the United States said that with regard to the proposal made by Colombia, her delegation believed that it would not be appropriate to hold such consultations. It was up to the panel when reconvened to determine its working procedures. Therefore, in the view of the United States there were no basis for the Chairman to hold such consultations which in any case would be premature in light of the fact that a panel had not yet been requested.

The representative of the European Communities said that the discussion at the present meeting demonstrated that there was a problem of interpretation of Article 21.5 of the DSU. There were two different interpretations of this Article and at this stage both of them were valid. It was not up to the DSB to interpret the DSU provisions since this was the responsibility of the General Council. The responsibility of the DSB was to apply these provisions. At present there were different views and a large number of countries had interests in this dispute. These were the largest consultations that had ever been held, since more than 30 parties were involved. The third parties to this dispute had legitimate rights and for that reason the Community had not been able to agree to the first proposed date for consultations by the complaining parties in order to be able to respect the legitimate rights of third parties. The DSU procedures were aimed at protecting the rights of all parties. His delegation noted with interest the proposal made by Colombia and considered that this proposal should be taken into account. He hoped that it would be possible to revert to this issue in the

future so that the Community would be able to state its position. With regard to the comment made by Japan, he recalled that the Community had been granted a reasonable period of time until 1 January 1999. Since January 1998, the Community had been criticised by the complaining parties and, at the present meeting, Ecuador had stated that the complaining parties believed that the 15-month period was not necessary and that the Community could have implemented within a shorter period of time. It was not appropriate to sanction the parties that wished to ensure full transparency and to hold consultations with all the parties in order to preserve their legal rights by invoking the procedures of Article 21.5 of the DSU which would shorten the reasonable period of time for implementation. Consultations had failed because the complaining parties had asked the Community to apply its measures before the end of October. He believed that the intention of the complaining parties was to question the reasonable period of time established by the arbitrator.

The representative of Honduras said that her delegation wished to support Ecuador and the United States with regard to their statements concerning the proposal made by Colombia.

The representative of the Philippines said that he wished to address systemic issues regarding this case. The question was whether a specific measure was in conformity with the DSB's recommendations. He drew attention to Article 19 of the DSU which provided that where a panel concluded that a measure was inconsistent with a covered agreement it should recommend to bring such a measure into conformity with the WTO Agreement. If a panel concluded that a measure was in conformity with the WTO Agreement such a dispute would be terminated. However, if a panel concluded that a measure was not in conformity the process of bringing a measure into conformity would need to start again. His delegation had some doubts whether at the second stage a panel could go beyond recommending that a measure be brought into conformity. The Philippines was concerned that this could lead to a repetitious cycle of bringing a measure into conformity without ever resolving a dispute. From a systemic point of view, in order to be able to resolve a matter promptly, the parties might consider to resort to arbitration procedures under Article 25 of the DSU. It could be argued that the arbitration process was not confined to simply recommending that a measure should be brought into conformity and could provide rulings which would be binding by both parties thereby terminating the process.

The representative of Guatemala said that with regard to the interpretation of Article 21.5 of the DSU, Guatemala supported the statements made by Ecuador, the United States and Honduras.

The representative of Colombia said that delegations had stated that prompt compliance of the DSB's recommendations was important. Colombia had made its proposal with a view to clarifying the issue for all the parties involved. She believed that the complaining parties had a strong interest in prompt compliance. It was unusual that these important questions which the parties had been faced with since August had not been resolved and at this stage the parties to the dispute did not know what procedures to apply. For example, whether to enter into consultations, how to make recourse to the original panel or how to determine its terms of reference. When a panel would be reconvened then the question of procedures would become urgent. This panel would have to circulate its report within 90 days and since the working procedures of the DSU appendix 3 would not be helpful, the panel would first have to deal with procedural issues. She was concerned that instead of proposals made in an objective and constructive manner there was a great amount of misinterpretation. It was therefore important to clarify procedures for the panel. She recognized that there was no consensus with regard to the proposal made by Colombia and hoped that the parties would not devote too much time to determine the procedures if a panel was established.

The Chairman said that the discussion at the present meeting was useful. It had shown that a large number of countries had an interest in this issue and enabled delegations to have an important exchange of views which could be followed up in another context. He believed that this matter required further consideration but at this stage he would not take any action thereon.

The DSB took note of the statements.

## **5. India – Patent protection for pharmaceutical and agricultural chemical products**

### **(a) Panel Report (WT/DS79/R)**

The Chairman recalled that at its meeting on 16 October 1997, the DSB had agreed to establish a panel to examine the complaint by the European Communities. The Report of the Panel contained in document WT/DS79/R had been circulated on 24 August 1998, and was now before the DSB for adoption at the request of the Community. In accordance with Article 16.4 of the DSU, this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

The representative of the European Communities thanked the panel for its work. He recalled that the EC and its member States had requested the establishment of a panel to examine this matter since India had neither provided for the possibility to grant patent protection for pharmaceutical and agricultural chemical products, nor a system to file patent applications for such inventions in accordance with Article 70.8 of the TRIPS Agreement. Furthermore, there was no system whereby exclusive marketing rights would be granted to those parties which had filed applications under the mailbox provisions in accordance with Article 70.9 of the TRIPS Agreement. The Panel's conclusion that India was in violation of the TRIPS Agreement with respect to both issues confirmed the views of the EC and its member States. In light of this, he requested that the DSB adopt the Panel Report at the present meeting.

The representative of India said that before turning to the substance concerning this issue, he wished to make a comment with regard to the inclusion of this item on the agenda of the present meeting. His delegation recognised that Article 16.1 read in conjunction with Article 16.4 of the DSU envisaged that a panel report be adopted within a time-frame of 20 to 60 days after its circulation. The Panel Report under consideration had been circulated on 24 August 1998, and since then only 29 days had elapsed. The current practice was that reports were placed on the DSB's agenda for adoption nearer the 60 day-period than the minimum requirement of 20 days. In this case, the Report had to be included on the agenda of the present meeting since by 21 October -- the date of the next DSB meeting -- 61 days would elapse from the date of the circulation of the Report. India did not wish to question the legality of the inclusion of this item on the agenda of the present meeting. However, he wished to point out that the time available to examine this Panel Report had been limited.

India was prepared to join a possible consensus in favour of the adoption of the Panel Report. However, he wished to present his country's views on some aspects of the Report and requested that these views be fully recorded pursuant to Article 16.3 of the DSU. The Panel Report constituted an important contribution, which highlighted, explicitly and implicitly, the complexities of the transitional provisions of the TRIPS Agreement. He recalled that on 16 January 1998, the DSB had adopted the panel and the Appellate Body reports with regard to India's compliance with its obligations under Article 70.8 and 70.9 of the TRIPS Agreement, pertaining to the complaint by the United States. At the present meeting, the Panel Report submitted for adoption by the DSB pertained to the EC's complaint. In India's view, the situation was rather unique. The United States had previously initiated the proceedings against India on the same subject, in which the Communities had participated as a third party. After the panel had completed its work related to the first dispute, the

Community had initiated separate proceedings with regard to India's obligations under Articles 70.8 and 70.9 of the TRIPS Agreement. His delegation had raised its concerns in the DSB with regard to the EC's approach, and had pointed out that this created an avoidable and unnecessary burden on India. These concerns had also been raised before the Panel as contained in paragraph 4.2 of its Report. India welcomed that in paragraphs 7.9 to 7.21 of its Report, the Panel had addressed this systemic issue in detail. However, the Panel had not found any violation of either Article 9.1 or Article 10.4 of the DSU in the procedure adopted by the EC. While India's understanding of these two Articles was slightly different it respected the Panel's finding on this issue. India welcomed the Panel's observations in paragraph 7.22 which read as follows: "We note that India's rationale behind its restrictive reading of Articles 9.1 and 10.4 is that an unmitigated right to bring successive complaints by different parties based on the same facts and legal claims would entail serious risks for the multilateral trade order because of the possibility of inconsistent rulings, as well as problems of waste of resources and unwarranted harassment. While we recognise that these are serious concerns, this Panel is not an appropriate forum to address these issues." India was glad that the Panel had recognised its concerns and had acknowledged that these concerns were serious. The Panel had observed that it was not an appropriate forum to address these issues. It was the Panel's interpretation of Articles 9.1 and 10.4 that had led to this conclusion. India hoped that these serious concerns would be taken into account in the context of the DSU review.

The next systemic issue related to the extent of the binding nature of precedents. He recalled that India had stated before the Panel that although there was an earlier panel report as well as the Appellate Body report on this subject, since the Community had chosen to make a separate complaint on the same subject, instead of becoming a co-complainant in the US case, India was entitled to "normal dispute settlement procedures" referred to in Article 10.4 of the DSU, and the Panel was obliged to make an objective assessment of the facts and arguments presented in the proceeding in accordance with Article 11 of the DSU. The Community had asked the Panel "to extend to it the findings in the earlier dispute". The Panel had made its ruling in this regard in paragraph 7.30 of its Report, which read as follows: "It can thus be concluded that panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 we are not legally bound by the conclusions of the Panel in dispute WT/DS50 as modified by the Appellate Body report. However, in the course of "normal dispute settlement procedures" required under Article 10.4 of the DSU, we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings (which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the referral to the 'original panel' wherever possible under Article 10.4 of the DSU."

India was glad that the Panel had concluded that panels were not bound by previous decisions of panels or the Appellate Body even if the subject-matter was the same, thus upholding his country's position. The Panel had made a fair observation that in the course of normal dispute settlement procedures pursuant to Article 10.4 of the DSU, it would take into account the conclusions and reasoning of the panel and Appellate Body reports in WT/DS50. However, India was concerned that the Panel had seemed to imply in the last two sentences of paragraph 7.30 that it was obliged under Articles 3.2 and 10.4 of the DSU to give significant weight to both Article 3.2 of the DSU and the need to avoid inconsistent rulings. India had stated before the Panel that in the interpretation of Articles 9.1 and 10.4 of the DSU, it was important to keep in mind the need to avoid inconsistent rulings. As he had already stated, the Panel had not accepted India's interpretation of Articles 9.1 and 10.4 of the DSU. However, it seemed that the Panel had cited this consideration to justify its excessive reliance on the previous case. He noted that there was some dichotomy in the reasoning of the Panel. On the one hand, the Panel had stated that it was not bound by previous decisions of panels or the Appellate Body even if the subject matter was the same. It would imply that in accordance

with normal dispute settlement procedures the Panel should make an objective assessment of facts. However, at the same time, the Panel had been completely swayed by the previous case, which was contrary to its commitment to make an objective assessment of the facts. In India's view when a panel examined a matter already adjudicated upon, on the basis of a fresh complaint, it should not attempt - for the purpose of providing security and credibility to the multilateral trading system - to seek a way which would endorse the findings in the previous case. In India's view, such an approach would make the second proceedings an empty formality, which as the Panel conceded would not be appropriate.

It was clear from paragraph 7.33 of its Report that the Panel had totally deferred to the findings in the previous dispute. In that paragraph, the Panel had recalled that in the earlier dispute, the panel had reached the conclusion that India had failed to take necessary action to implement its obligations under Article 70.8(a) and that this conclusion had been upheld by the Appellate Body. The Panel had also stated that it would only analyse the new elements provided by India, if necessary. India believed that normal dispute settlement procedures would require the Panel to make an objective assessment of the matter and that it could not simply take the previous decision as a starting point and add that it had sought new elements. Furthermore, in paragraph 7.63 of the Report, concerning Article 70.9, the Panel observed as follows: "we further note that regarding Article 70.9, India has not brought forward any new factual information".

India regretted that while the Panel had been willing to take into account the earlier panel and the Appellate Body reports, India's arguments against different aspects of these reports had not been taken into account with the same degree of seriousness. In Section 4 of the Report which contained the arguments of the parties, India had submitted a number of factual and legal arguments in order to demonstrate the flawed approach adopted in the previous case. However, all these arguments were described as "criticism of panel and Appellate Body reports" (paragraph 6.3). The Panel had decided, in principle, that India had been entitled to normal dispute settlement rights, and had refused to accept the EC's argument to extend to it the earlier rulings, but had failed to allow India to exercise this right in full measure.

He drew attention to another systemic concern. In paragraph 7.40 of its Report, the Panel had observed that the findings made in paragraph 7.39 could be confirmed by the negotiating history of the TRIPS Agreement. In paragraph 7.72 of its Report, the Panel had referred to the drafting history of the TRIPS Agreement and had stated that its observations in paragraph 7.11 could be confirmed by the drafting history of the TRIPS Agreement and had expressed its disagreement with India's interpretation of Article 70.9. It was not clear who had this drafting history. India, which had participated in the negotiations on Articles 70.8 and 70.9, was seriously concerned about the way Article 70.9 had been interpreted and had found it unusual to be told that the negotiating history of Article 70.9 did not support India's view, notwithstanding that it could not be totally ignorant of the negotiating history of Article 70.9. If somebody had provided the Panel with any recorded negotiating history, India would have wished to have had this record during the proceedings in order to compare this recorded negotiating history with its own records. If, on the other hand, this negotiating history was based on personal recollections of those involved in the Panel, it was not appropriate for the Panel to rely on such personal recollections. He wished to clarify that, at this stage, India was not concerned so much about what was the negotiating history of Articles 70.8 and 70.9, but was concerned about the systemic issue resulting from references to negotiating history to which the parties had no access. He believed that this was a very important systemic issue which required further reflection. It would not be appropriate if panels were provided with a negotiating history of which the parties to the dispute were not aware.

India was concerned that in paragraph 7.51 of its Report, the Panel had indicated that to some extent it was influenced by the fact that India had initially attempted to amend the Patents Act but had subsequently maintained the mailbox system through administrative instructions. India had argued



before the Panel that under Article 1.1 of the TRIPS Agreement, Members were free to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice. The mere fact that India had initially chosen one particular route and had later chosen another route did not make the second route *per se* illegal. India regretted that in spite of this, the Panel had chosen to make its observations contained in paragraph 7.51 of its Report.

With regard to Article 70.9 of the TRIPS Agreement relating to the grant of exclusive marketing rights (EMRs), the question of timing was central. There was a fundamental difference between the language of Article 70.8(a) and Article 70.9 of the TRIPS Agreement. While the Panel had pointed out that the phrase "notwithstanding the provisions of part VI (i.e. Transitional Arrangements)" was in both Articles, the Panel was silent with regard to one fundamental difference in the language of these Articles, which India had highlighted during the proceedings. Article 70.8(a) contained an explicit phrase "as from the date of entry into force of the WTO Agreement" while no such phrase was contained in Article 70.9. India considered it unfortunate that the Panel Report which had repeatedly referred to Article 31 of the Vienna Convention had overlooked the fundamental difference between the language of Article 70.8(a) and Article 70.9. With regard to the observations of the Panel in paragraph 7.64 of its Report, he wished to point out that the phrase "notwithstanding the provisions of part VI" contained in Articles 70.8(a) and 70.9, did not necessarily mean that the obligations had to start on 1 January 1995. If this were to be the case, the phrase "as from the date of entry into force of the WTO Agreement" would not have been included in Article 70.8(a). India regretted that the Panel had failed to note that while Article 70.8(a) contained the phrase "as from the date of entry into force of the WTO Agreement", Article 70.9 did not contain such phrase.

In paragraph 7.68 of its Report, the Panel had referred to the EC's claim that one pharmaceutical company based in the EC had applied for market approval in India with regard to a product for which a mailbox application had been filed. In paragraph 7.69 of the Report, the Panel observed that the fifth and the last condition for grant of exclusive marketing rights under Article 70.9 related to marketing approval in India and that this was under the control of its authorities. The Panel had further observed that "however, if marketing approvals are denied for the purpose of delaying the grant of exclusive marketing rights, it would give rise to questions regarding good faith application of the TRIPS Agreement". India regretted this comment which, in its view, had no basis. No allegation had been made that India had delayed deliberately the grant of marketing approval with a view to delay or deny the grant of exclusive marketing rights. The letter in Annex 4 of the Panel Report had been submitted to the Panel by the complainant during the second hearing on 29 April 1998. From the text of the letter, which had been written one day before the date of the second hearing, one could understand that it had been written in response to a request from the EC. The letter had stated that "a marketing approval application has been filed in India and we expect launch to occur in early 1999. We will therefore be making an application for marketing exclusivity before that time." Thus, neither the EC nor the companies concerned had made allegations of deliberate delay by India in providing marketing approval. In the light of this, India was concerned about the observations of the Panel which seemed to imply that it was delaying the grant of marketing approval, because it had not yet provided a system of grant of exclusive marketing rights in its law.

In order to avoid any confusion he wished to state that India recognised its obligations under Articles 70.8(a) and 70.9 of the TRIPS Agreement. India had established on the date of entry into force of the WTO Agreement, i.e. 1 January 1995, a mailbox, i.e. a means by which applications for product patents in the pharmaceuticals and agricultural chemical sector could be filed. This mailbox operated on the basis of administrative instructions. The EC's contention was that the present system did not provide necessary legal security to applicants while India's position was that the mailbox it had established was consistent with its law and that it provided necessary legal security to applicants. The Panel in paragraph 7.58 of its Report had noted the point made by India that the present system ensured the retention of the necessary facts to determine novelty and priority for the purpose of decisions on future grant of patent rights pursuant to Articles 70.8 (b) and (c). However, the Panel

considered that this would not alter its concerns regarding the soundness of the legal basis for the system under its present law. With regard to Article 70.9 the issue was a narrow one. Paragraph 7.61 of the Panel Report had defined the issue in clear terms by stating that the central question before the Panel was that of timing, i.e. as of when should there be a mechanism ready for the grant of exclusive marketing rights. India had pointed out that it had not denied exclusive marketing rights to any eligible product. India's contention was that so far it had not failed to implement its obligations under Article 70.9 and that it was not obliged to make EMRs generally available before all the events specified in Article 70.9 had taken place. However, in the view of the Panel, India should have had a mechanism in place to provide for the grant of EMRs effective as from the date of entry into force of the WTO Agreement.

Thus, in respect of Articles 70.8(a) and 70.9, the differences concerned certain legal issues. He wished to highlight the fact that the issue before the Panel was not India's refusal to accept its obligations but rather the difference of opinion between the parties with regard to the manner of implementation of the obligation under Article 70.8(a) and the timing of implementation of the obligation under Article 70.9. India recognised that the Panel had interpreted these obligations in a particular manner but it had not imposed new obligations. He did not wish to reiterate India's belief in, and its commitment to, a rule-based multilateral trading system. It was in this light that he had stated that India would join in a consensus in favour of adoption of the Report. He had highlighted some of the issues resulting from the Panel Report, notwithstanding India's respect and appreciation for the efforts of the Chairman and the members of the Panel. It was India's conviction that only by raising the concerns resulting from reports of panels and Appellate Body at the time of their adoption it was possible to have a vibrant and well-functioning dispute settlement system. In other words, India was convinced that constant vigilance was required within the automatic dispute settlement system

The representative of Argentina said that pursuant to Article 16.4 of the DSU, his delegation wished to comment on three systemic implications resulting from the conclusions of the Panel Report. In paragraph 7.20 of its Report, the Panel in rejecting India's interpretation that Article 10.4 of the DSU could only be invoked at an early stage of the proceedings, had based its decision on the wording of Articles 10.4, 21.5 and 22.6 of the DSU. The Panel had inferred that since Articles 21.5 and 22.6 might be invoked only when there was a failure to comply with the DSB's recommendations, Article 10.4 might be invoked where "the reference is to a panel the final report of which has already been issued and adopted". The logic underlying this conclusion was that Article 21.5 had been drafted to settle a dispute as to whether a measure complied with the DSB's recommendations

Likewise, Article 22.6 referred to a dispute on retaliation which presupposed that the DSB had already determined that a measure had not been brought into conformity with a covered agreement. In order to avoid contradictory reasoning, the Panel should have found that under Article 10.4 not only a report had been issued and had been adopted but also that the reasonable period of time for the implementation of the DSB's recommendation had expired. Otherwise, this would lead to a situation which the Panel had recognized as a serious source of concern in paragraph 7.22: "... the possibility of inconsistent rulings, as well as problems of waste of resources and unwarranted harassment". In the view of Argentina, if the DSB's recommendations had been made and a reasonable period for implementation had been notified, the possibility of a series of successive disputes brought by third parties pursuant to Article 10.4, which would not allow the respondent to fully use its right to a reasonable period of time, would not contribute to the strengthening of the dispute settlement system.

Another concern related to the issue of the admissibility of the case under Article 10.4 of the DSU. Both parties had based their submissions on arguments concerning the scope and interpretation that should be given to Articles 9.1 and 10.4 of the DSU. The Panel had rejected the possibility of ruling on the admissibility of India's request on the grounds that it could not make a ruling *ex aequo et bono*. Argentina did not think that the argument was that the Panel should resolve the case in

accordance with the international law principle of equity but rather that it had been asked to assess its own jurisdiction. The DSB only carried out a general review of whether a panel would meet the substantive formal requirements laid down in the DSU. This was due to the automatic nature of the establishment of panels, and consequently control of the legality of the establishment of a panel, appointment of panelists or the matter in dispute could only be carried out in the proceedings. The legal basis for this possibility was Article 1.1 of the DSU, which put the DSU in the category of covered agreements. This reasoning of the Panel reaffirmed Argentina's conviction with regard to the need to analyse the question of preliminary issues in the context of the review of the DSU.

Argentina was also concerned about the implications of footnote 95 referring to paragraph 1.2 of the Report. That paragraph stated as follows: "... Informing the parties to the dispute that he had determined the composition of the Panel pursuant to Article 10.4 of the DSU, taking into account the fact that the European Communities and their member States had been a third party to the panel proceeding on *"India – Patent Protection for Pharmaceutical and Agricultural Chemical Products"* (WT/DS50 – complaint by the United States) and the measure at issue in the present dispute had already been the subject of the earlier proceeding, the Director-General appointed the same Panel members as in the earlier dispute ...". He stressed that in Argentina's view the only power that the Director-General had under the DSU was to appoint panelists in the absence of agreement pursuant to Article 8.7 of the DSU. Argentina did not believe that the DSU granted the Director-General the powers of interpreting whether or not other provisions of the Understanding, in this case Article 10.4, should be applied when discharging the functions entrusted to him under Article 8.7 of the DSU.

The representative of the United States said that references had been made to the reports of the panel and the Appellate Body adopted on 16 January 1998 in the case of the US-India dispute on the same matter. The United States still awaited India's action to comply with the DSB's recommendations concerning this issue. He therefore wished to ask India whether it could provide any information on steps to be taken towards compliance.

The representative of India said that his delegation would provide such information at the appropriate time.

The DSB took note of the statements and adopted the Panel Report contained in document WT/DS79/R.

## **6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/82)**

The Chairman drew attention to document WT/DSB/W/82 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/82.

The representative of the United States said that his delegation had no objections to the inclusion of either of the two names on the indicative list but wished to make comments with regard to one name submitted for approval at the present meeting. Over the past three years, Mr. A. Mukerji (India) had become very well known to him and to his delegation. Mr. A. Mukerji's knowledge of the WTO issues was unsurpassed and the United States hoped that by including his name on the indicative list his considerable skills would not be lost after his departure from Geneva. He was certain that the views of the United States were shared by other Members.

The DSB took note of the statements and approved the names contained in document WT/DSB/W/82.

**7. United States – Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea.**

(a) Statement by Korea

The representative of Korea, speaking under "Other Business", said his country had withdrawn its request for the establishment of a panel on United States – Imposition of Anti-Dumping Duties on Imports of Colour TVs from Korea. This withdrawal, which had been circulated in WT/DS89/8 on 5 January 1998, had been made in response to the United States' preliminary determination of 19 December 1997 to revoke the anti-dumping duty order upon the fifth request filed by Samsung Electronics on 24 June 1996. At the time of the withdrawal, Korea had reserved the right to reintroduce the request for the establishment of a panel in the event that the content of the final determination by the United States would differ from that of the preliminary determination. On 27 August 1998, the United States had made a final determination to revoke the anti-dumping duty order which had been imposed on Samsung in 1984. Korea considered that the above-mentioned determination by the United States had resolved its concerns on this matter. Therefore, as notified to the DSB in its communication of 15 September 1998 contained in WT/DS89/9, Korea would not seek further consideration of this matter by the DSB.

The representative of the United States thanked Korea for its communication of 15 September in which it had notified that it would not seek further consideration of this matter by the DSB. The United States welcomed the fact that Korea would not seek further consideration of this matter by the DSB and that consideration of this matter had now been terminated.

The DSB took note of the statements

**8. Indonesia – Certain measures affecting the automobile industry**

(a) Statement by the European Communities

The representative of the European Communities, speaking under "Other Business", drew attention to Indonesia's communication contained in WT/DS54/12 – WT/DS55/1 – WT/DS59/10 – WT/DS64/9 in which it had informed the DSB of its intentions with respect to the implementation of the DSB's recommendations. He recalled that Indonesia had requested 15 months for the implementation of the DSB's recommendations with regard to its 1993 National Car Programme. In the Community's view this period of time was excessively long since modification of this Programme would only require an action by the Indonesian executives. In accordance with the terms of Article 21 of the DSU, Indonesia had to comply immediately. Even if immediate compliance was not practicable, a 15-month period of time could not be considered as a reasonable period of time in the sense of Article 21 of the DSU. On 21 September, the Community had already expressed its concerns to Indonesia on this matter.

In the Community's view the mere fact that the 1996 Programme had been terminated did not imply full implementation of the DSB's recommendations. In accordance with Article 7.8 of the SCM Agreement, Indonesia had to withdraw its subsidies or at least remove their adverse effects within 6 months from the adoption of the Report. This meant that, within that period, Indonesia was required to ensure that the beneficiary of the 1996 Programme ceased to enjoy any benefits that continued to have adverse effects on the EC's exports. In that respect, it was not clear whether Indonesia intended to recover subsidies already granted, which might still cause adverse effects, such as tax benefits on cars that had already been imported but had not yet been sold under the Programme. The Community requested further clarification with regard to Indonesia's measures to

be taken to comply with the DSB's recommendations, in particular any steps to be taken to remove adverse effects of the subsidies granted to its National Car industry.

The representative of the United States said that in his country's view the question of the reasonable period of time had not yet been resolved. The United States had consulted with Indonesia and hoped that these continued consultations would enable the parties to reach agreement on this issue as well as on other issues regarding the implementation of the DSB's recommendations.

The representative of Japan said that his country appreciated that on 21 August, Indonesia had informed the DSB in writing of its intentions to implement the DSB's recommendations. Japan had hoped that Indonesia would immediately adjust its measures in order to comply with the DSB's recommendations. It was therefore concerned that Indonesia had indicated that it would continue the exemptions of customs duties and luxury tax with regard to National Cars already produced or imported. On 21 September, Japan had held consultations with Indonesia on this matter and wished to have its response as soon as possible.

The representative of Indonesia said that with regard to the 15-month reasonable time period for implementation of the DSB's recommendations concerning the 1993 Programme, he wished to underline that this was the maximum period of time required by Indonesia to bring the Programme into conformity with its WTO obligations. Indonesia's primary intention was to act expeditiously with regard to the DSB's recommendations. However, as a result of its current domestic economic, social and political situation -- in addition to normal legislative procedures -- his authorities considered that it was difficult to fully dedicate their time and efforts in order to complete their review of the 1993 Program in a shorter period of time. In the consultations with the complaining parties, Indonesia had explained the following steps taken for the purpose of the implementation of the DSB's recommendations: (i) The first step, which had started shortly after the adoption of the panel report was an inter-departmental discussion to consider policy options for the implementation of the DSB's recommendations; (ii) The second step was the review of the 1993 program with the aim to make necessary changes in accordance with Indonesia's WTO obligations. For this purpose, the Department for Industry and Trade had held a series of discussions with related government agencies as well as with the automobile industries associations (i.e. GIAMM and GAIKINDO); (iii) As a preliminary result of the above steps, it had been concluded that the time-frame for the review process and the consideration of policy options would be, at the latest, the early 1999, during which a new policy was expected to be ready for issuance. The effective date for the entry into force of the new policy would be October 1999 at the latest.

Members were aware of Indonesia's critical economic situation. The automotive industry was one of the industries severely affected by the current financial crisis. Some industries had halted their production and many workers had been laid off. The main reason for Indonesia to request a reasonable period of time for implementation was to take account of the concerns of the industries that would require a transitional period for adjustment. In the discussions with his authorities, several companies had indicated the need for such a transitional period in order to be able to adjust gradually their production when the 1993 Programme would be phased-out. His authorities were compelled to accommodate those concerns in an effort to prevent those industries from collapsing, which could worsen the level of unemployment already approaching 30 million people. Although the 45-day period provided in the DSU had elapsed his delegation was confident that the parties would soon be able to agree on the reasonable period of time for the implementation of the DSB's recommendations.

With regard to the follow-up measures concerning the 1996 Program, he said that pending further information, the Presidential Decree No. 20/1998 of 21 January 1998 had revoked Presidential Instruction No. 2/1996 and Presidential Decree No. 42/1996, thereby terminating the authority for import duty and luxury tax exemption subsidies to National Car producers. He wished to assure the DSB that his Government had no intention to continue the exemptions of import duties and luxury tax

with regard to National Cars. As of 2 February 1998, the effective date of the 21 January Decree, none of the remaining national car would receive the exemptions. He also wished to inform the DSB that Indonesia was still in the process of collecting from PT. Timor Putra National (TPN) the foregone taxes and import duties on sold cars and import duties on unsold Timor cars. In this respect, the Minister of Industry and Trade had requested the Minister of Finance to take necessary action with regard to reimbursement of the foregone taxes and import duties by PT.TPN. He reiterated that his Government would fully comply with the DSB's recommendations.

The DSB took note of the statements.

## **9. Review of the DSU**

The Chairman, speaking under "Other Business", said that he wished to inform delegations that in accordance with the arrangements for the Review of the DSU outlined at the DSB meeting on 23 July 1998, the Secretariat had prepared a compilation of the informal and preliminary comments submitted for the DSU Review by Members through 31 August 1998, which had been circulated as Job. No. 4762. In addition, the Secretariat had prepared statistical information relating to the operation of the DSU which had been circulated as Job No. 4750. Both papers had been circulated in English and the French and Spanish translations would follow shortly. It was his intention to convene an informal meeting of the DSB on 1 October 1998 in order to start the examination of the compilation of informal and preliminary comments and to discuss how to organize further work.

The DSB took note of this information.

---