WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/101
8 May 2001

(01-2367)

Dispute Settlement Body
12 March 2001

MINUTES OF THE MEETING

Held in the Centre William Rappard
on 12 March 2001

Chairman: Mr. R. Farrell (New Zealand)

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1. Surveillance of implementation of recommendations adopted by the DSB

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

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

(c) India – Quantitative restrictions on imports of agricultural, textile and industrial products: Status report by India

(d) Turkey – Restrictions on imports of textile and clothing products: Status report by Turkey

(e) Chile – Taxes on alcoholic beverages: Status report by Chile

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 five sub-items to which he had just referred be considered separately.

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.16)

2. The Chairman drew attention to document WT/DS27/51/Add.16 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that since the publication of Council Regulation (EC) No 216/2001, intensive discussions had continued on the effective implementation of the new first come, first served (FCFS) system for the management of the three tariff-rate quotas. In particular, these discussions had taken place in the Banana Management Committee and the Customs Code Committee. The FCFS system, which had never been applied in the banana sector, had to be adapted to take into account the specific characteristics of that market. The Commission had started to study the programming changes required to adapt the existing computer system for managing tariff quotas on an FCFS basis taking into account the special requirements of the tariff quotas for bananas. This study included the possibility of enhancing the tariff quota information provided on the Commission's public website, with the result that operators could receive, up to two days before the official answer to their request for quota benefit, an indication of what that answer would be. In addition, specific anti-fraud and anti-speculation mechanisms had to be introduced to ensure that only legitimate trade operators would have access to the tariff-rate quotas. He said that it proved impossible to have the new system in place by 1 April 2001. The date of entry into force of the new regime had now been postponed until 1 July 2001[1], because a *quasi* absolute certainty was required so that the FCFS system would work correctly. In the meantime, the tariff rate quotas would continue to be managed on a historical basis.[2] This delay would also give traders enough time to adapt to the new

[1] Article 1 of the Commission Regulation (EC) No. 395/2001 of 27 February 2001, OJ L58 of 28.2.2001, p.11.
[2] Articles 2 and 3 of Commission Regulation (EC) No. 395/2001.

trade regime, and would enable the EC to work towards finding an agreed solution with exporters in adjusting the FCFS system.

4. The representative of the United States said that it was unfortunate that the EC was moving forward with the FCFS system. The United States believed that the EC would not resolve this long-standing dispute by implementing the FCFS system and urged the EC member States to reconsider their position on this issue.

5. The representative of Honduras said that the content of the status report submitted by the EC at the present meeting did not meet the requirements of the DSU provisions. Honduras was concerned about the EC's new banana import regime which, in its view, would continue to maintain illegal elements. The EC's approach was incorrect since its premises were not in line with the DSB's recommendations. The EC was still not in compliance with these recommendations despite the fact that it had been allowed an excessive time-period. It had also failed to take into account the proposals submitted by the Caribbean and Latin American countries. The status report submitted by the EC at the present meeting did not refer to a WTO-compatible solution. Honduras was concerned about the tariff of €300/tonne which was aimed at giving preferences to ACP countries, and about the violation of Article XIII of the GATT 1994 due to the discriminatory use of quotas. If this new system was implemented, Honduras would have no alternative but to object to the extension of the Lomé waiver requested by the EC and would have to invoke the DSU provisions in order to restore the benefits accruing to it under WTO rules. He pointed out that the FCFS system would further discriminate against countries such as Honduras, and would continue to undermine the credibility of the dispute settlement system. Honduras urged the EC to end this discrimination and to initiate, as soon as possible, an open and equitable discussion aimed at complying promptly with the DSB's recommendations in this case.

6. The representative of Guatemala said that the status report submitted by the EC at the present meeting, in which the EC had claimed to provide information on its progress in implementation, did not meet her country's expectations. The purpose of surveillance of implementation of the DSB's recommendations was to allow Members to hear progress reports on efforts made in good faith by other Members to comply with the DSB's recommendations. However, in this case that purpose had been nullified by the EC's reluctance to comply. Guatemala regretted that the banana import regime was not being modified in a way that was fully compatible with WTO rules. He noted that Council Regulation (EC) No. 216/2001 only covered the peripheral aspects of the banana import regime, and did not deal with the substantive provisions. The Regulation contained illegalities such as a high level of preferences for ACP countries and the discriminatory use of the proposed quotas. The Regulation was not yet in force, despite the fact that the EC had been given more time for compliance than necessary. The new regime, which was WTO-incompatible, would continue to violate Guatemala's rights and would undermine the effective functioning of the DSB. Guatemala would pursue the implementation in this case and hoped that WTO rules would be respected. If necessary, Guatemala would also be prepared to make use of its legal rights. Guatemala called for an end to this dispute, as no party would win from confrontation, and believed that it was still possible for the EC to make amendments and to comply with the DSB's recommendations.

7. The representative of Nicaragua said that his country supported the statement by Guatemala. The status report submitted by the EC at the present meeting did not meet his country's expectations. Nicaragua urged the EC to continue to seek a viable solution.

8. The representative of Ecuador said that the most recent Council Regulation (EC) No. 216/2001 contained three elements that were different from the current Regulation. First, it established a transitional regime and contained an undertaking to move, after a five-year period, to a tariff-only regime. Second, it established tariff preferences for the ACP countries that were more extensive than those authorized under the Lomé waiver. Third, it did not give authorization to the EC to subdivide quotas into country quotas because under the provisions of Article XIII of GATT 1994 in

order to do so an agreement was required between all parties having substantial interests in supplying the product concerned. On a number of occasions, the EC had stated that such an agreement did not exist. The EC was maintaining country quotas despite the fact that a mere administrative decision was sufficient to redress this illegality. In addition to these three elements, another regulation with regard to the management of quotas was required and was currently being prepared by the EC. Ecuador had informed the EC of its decision to contribute to the process and to support the work being done to put in place the new regime. The Ecuadorian authorities and the representatives of its private sector had participated in meetings held in Brussels by the Commission to explain the scope of the licence distribution regime according to a method based on the chronological order of submission of applications, which was similar to the FCFS method. Ecuador had made comments on some aspects of this method. The system proposed by the EC for distributing licences on the basis of chronological order of submission of applications did not have to be complicated. Ecuador, therefore, urged the EC to apply this system in a transparent manner without imposing additional restrictions such as seeking to limit the number of ports at which bananas shipped in the same vessel could be unloaded. It was Ecuador's understanding that the EC had no intention of laying down any category and definition of operators to restrict the participation of exporters and importers interested in access to the EC's market. Ecuador recognized that the system put forward by the EC was better than the current one since it would reduce the irregular market based on licences which benefited the most inefficient producers.

9. Ecuador recognized that the EC and the United States wished to avoid trade wars, but in the meantime the implementation process continued to be delayed, thus causing harm to developing countries such as Ecuador. He noted that in 1999 the EC's banana regime had generated losses of at least US$201.6 million to Ecuador, for which the EC had been found responsible. Such losses had probably been greater in 2000 and the same situation continued in 2001. The EC's failure to comply harmed other Members by an amount that was minor compared to the losses suffered by Ecuador. The delay in complying with the DSB's recommendations, which in this case would amount to about 45 months, continued to generate poverty in many developing countries, while the administrative decisions that would partially redress the illegalities and reduce the damage still awaited adoption. He noted that it took less time to reform the constitution of a country than to modify the banana import regime and that the recent Nice Agreement or even the Treaty of Rome had been concluded more quickly. The EC was not willing to comply with the DSB's rulings. The recent decision to postpone, once again, the implementation of a new banana import regime harmed Ecuador and undermined the multilateral trading system. This situation reflected the fact that when the interests of more powerful Members were at stake, nothing prevented them from overriding the rights of other Members and thus undermining the multilateral trading system.

10. The representative of Saint Lucia, speaking on behalf of Dominica, Saint Lucia, and Saint Vincent and the Grenadines, recalled that the exports of the respective countries had fallen by 50 per cent since the entry into force of the EC single market in bananas, dragging the national economies into decline and undermining economic prospects. There were two distinct but interrelated issues before Members at the present meeting, namely the FCFS system proposed by the EC, and the EC's compliance with the panels' rulings to bring its banana import regime into conformity with the DSB's recommendations. In previous DSB meetings, Saint Lucia had refrained from going into any depth on the question of the FCFS because it had hoped that the concerns expressed directly to the EC would have been heeded. However, this was not the case and she, therefore, wished to reiterate the position of the respective countries and of the wider ACP group on this matter. At a meeting in Brussels in December 2000, ACP Ministers had unanimously adopted a resolution in which they had expressed concern "that an FCFS system could result in the rapid destruction of the ACP banana industry, because it would deprive ACP producers and exporters of security of access to the EU market." They had further noted that, "the demise of the banana industry in ACP countries would create tremendous social and economic dislocation, eroding the achievements made in the fight against poverty, a fundamental objective of ACP-EU cooperation as enshrined in the Cotonou Agreement." The EC had felt that it had no option but to revert to this system as no progress was being made in the negotiations

due to a lack of sufficient willingness to compromise. Nonetheless, it would not be appropriate for the EC to introduce a system which would cause difficulties to many supplying countries. She urged the EC to reconsider its position.

11. The respective countries firmly rejected the use of trade sanctions against the EC. The continued application of the sanctions would poison the atmosphere for constructive negotiations to find a fair and balanced solution to the dispute, and the new threat of their rotation would further prejudice that search. She noted that the positions taken by the parties concerned had often been misinterpreted, but in reality all countries sought the same result, i.e. a WTO-compatible regime which would end this long and damaging dispute. They all wished to have a stable European market which, without being oversupplied, could be accessed on a secure, predictable and remunerative basis. The most effective way of achieving this was by maintaining the current tariff rate quotas for a transitional period of adequate duration and by awarding import licences on the basis of past trade. According to some press reports, earlier negotiations between the US and the EC seemed to have narrowed the gap in the search for a solution on this basis. Given the peculiarities of the EC banana market and the dynamics of this dispute, the parties involved could not all realize their maximum demands and, therefore, negotiators would have to be constructive and display both the will to compromise and the courage to make concessions. There was a need to move beyond paying no more than lip service to the interests of supplying states and to be prepared to take concrete measures for the protection and advancement of the interests, not just of their large corporations but also of the countries concerned, especially the most vulnerable ones.

12. The representative of Panama said that his delegation had noted the EC's status report and supported the statements made by Honduras and Guatemala, in particular with regard to the point that the status report did not contain any information on how the EC would comply with its WTO obligations and referred to a regime that would preserve the illegalities of the current system. Since many delegations had already made statements on the proposal by the EC, his delegation wished to focus on another issue. He noted that in its report, the EC had stated that the measure it had taken resulted from its contractual obligations. This unfortunately implied that the obligation to comply with WTO rules was not a priority for the EC and was considered to be less important. The proposed regime, which was a transitional measure, was illegal. If a single tariff regime were to be applied, it should be applied in such a way so as to ensure a just and equitable market access. Tariffs should not be prohibitive in order to avoid discrimination against Latin American countries and a transitional period should be provided to all producers, including the European ones. He noted that certain elements of the Regulation were not clear, i.e. tariff quotas were specified but, at the same time, Article 18.4 of the Regulation stated that a tariff preference of €300/tonne would apply under and outside of the tariff quota. This was a contradiction. The Regulation did not contain any indication with regard to the definition of "operators" and how licences would be distributed. Furthermore, Article 18.7 of the Regulation referred to hurricane licences which had been found to be illegal by the Panel. Like other countries, Panama believed that the regime proposed by the EC would not solve the dispute and urged the EC to consider the proposal made by several Latin American countries. That proposal could serve as a good basis for negotiations and could enable the parties to resolve this dispute.

13. The representative of Colombia said that his delegation was concerned that problems related to the application of the EC's new banana import regime had not yet been resolved. The administration of the new regime under a global quota would result in a price reduction for Latin American producers without any price improvement for EC consumers. The new regime would limit demand by means of quotas, while leaving the supply from Latin American producers unrestricted, each one having the possibility of exporting an unlimited quantity of bananas. The regime would also encourage the entry of new suppliers into the market and this would have a negative impact for non-preferential suppliers. The situation would look even worse if one were to take into account that the EC had proposed a preference for ACP producers that implied almost infinite protection and, in turn, EC producers benefited from a price support system which would enable them to sell all their

production without any risk. Since bananas were perishable and over-supplied products, it was necessary to have a country-quota system for substantial suppliers to avoid a further drop in prices for Latin American producers. He noted that at the first meeting between the EC and the four substantial suppliers, held on 2 February 2001, a number of ideas had been put forward, which could provide a basis for a regime that would meet the interests of all parties. Colombia also believed that, as indicated by Ecuador, the new regime should be transparent.

14. The representative of Costa Rica said that although the new banana import regime had not yet been put in place, it was possible to note a new direction taken by the EC, as indicated by its Regulation 216/2001. Costa Rica was concerned about the new regime, which in its view would exacerbate discrimination between Latin American exporters of bananas, while benefiting other groups of countries. His country was also concerned that the EC maintained its intention to put in place an FCFS system which could favour some operators. He noted that Ecuador had expressed its position with respect to the fact that the EC would maintain country quotas. Costa Rica hoped that the regime would be changed as quickly as possible and that all the elements violating WTO rules would be eliminated. It was not appropriate, as requested by Ecuador, to start eliminating some of the elements at this stage, in particular since the EC had an obligation to maintain country quotas with respect to some countries, including Costa Rica. The country quotas should be maintained and the EC should continue to pursue its efforts, based on its internal mandate, in order to find an understanding among the substantial suppliers.

15. The representative of Mexico said that his country wished to reserve its position on the views expressed at the present meeting. He recalled that Mexico had a substantial interest in this matter and wished to participate in the discussions to be held in the DSB or in any other forum.

16. The representative of Ecuador, in response to the statement made by Costa Rica, said that it was the Panel that had requested that country quotas should be eliminated, not his country. He noted that, at this stage, there was no agreement between the main suppliers.

17. The representative of the European Communities said that, as he had stated previously, a lack of agreement among the main banana suppliers continued to persist. It was difficult to reconcile those different positions, as each supplier wanted to obtain a higher market share. The EC had tried to find ways and means to come to an agreement with the main suppliers and, at the same time, to implement a system which would be WTO-compatible. The EC continued to believe that the FCFS system, if correctly implemented, would be WTO-compatible. Thus far, no proposal had been made that could result in an agreement among the parties concerned, while at the same time being WTO-compatible. The EC would continue to work towards implementation of the FCFS system and remained open to dialogue with the principal suppliers.

18. The representative of Panama said that the EC had stated that substantial suppliers sought higher shares of the market. Panama did not have a position concerning its market share and believed that, at this stage, it was important to ensure that a new banana regime was WTO-compatible. None of the proposals made by the EC in this regard provided for such a regime. He underlined that it was not necessary to obtain a consensus among the parties in order to put in place a WTO-compatible regime. To the extent that the EC was proposing to reproduce elements of the current import regime, which had been found to be illegal, any new regime would also be illegal. He added that a regime that was WTO-inconsistent could again be challenged through legal means.

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

(b) Japan – Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.12)

20. The Chairman drew attention to document WT/DS76/11/Add.12 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations with regard to its measures affecting agricultural products.

21. The representative of Japan said that, as indicated in the status report, his country and the United States had completed technical consultations with regard to a new quarantine methodology on the eight products which were potential hosts of codling moth. In order to introduce this new methodology, domestic regulations had to be put in place. Japan's quarantine authorities were currently in the process of doing this and it was expected that the parties would notify the DSB of a mutually satisfactory solution in the near future. He recalled that at previous DSB meetings some Members had stated that they wished to know the content of this new methodology. He said that Japan's quarantine authorities in Tokyo were now in a position to provide, on an informal basis, further information. He noted that the new measure would be applied in conformity with the requirements of Article 2.3 of the SPS Agreement which specified that SPS measures should not arbitrarily or unjustifiably discriminate between Members. In case an exporting country requested Japan to import a product, his country was prepared to hold scientific and technical consultations with that country and would establish the necessary methodology. If the exporting country wished the application of the same methodology as the one applied to US products, this would be done, provided that it proved to be scientifically and technically appropriate.

22. The representative of the United States said that her country was pleased that its technical discussions with Japan had been concluded and looked forward to Japan's early completion of remaining administrative steps necessary for implementation.

23. The representative of Australia said that his country was among those countries who had sought information on technologies and methodologies relevant to the implementation in this case. Australia, therefore, thanked Japan for its advice that this information was available in Tokyo, on an informal basis, upon request. He expected that his country would be able to secure such information in the very near future.

24. The representative of Brazil said that, in the past, his country had expressed interest in this issue and would continue to monitor any developments in relation to this case.

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

(c) India – Quantitative restrictions on imports of agricultural, textile and industrial products: Status report by India (WT/DS90/16/Add.6)

26. The Chairman drew attention to document WT/DS90/16/Add.6 which contained the status report by India on its progress in the implementation of the DSB's recommendations with regard to its quantitative restrictions on imports of agricultural, textile and industrial products.

27. The representative of India said that his country's status report was self-explanatory. India remained committed to removing restrictions maintained for balance-of-payments reasons as per the agreed timetable. He recalled that in accordance with the agreement reached with the United States on a reasonable period of time under Article 21.3(b) of the DSU, on 1 April 2000, India had already removed such restrictions for about half of the items. For the remaining items the reasonable period of time would expire on 1 April 2001. To this end, he wished to inform Members that India was on course in implementing its commitments.

28. The representative of the United States noted that this was the last report before the expiry of the reasonable period of time in this case. The United States was concerned about some press reports indicating that India might not remove all its remaining quantitative restrictions by 1 April 2001. The United States, therefore, sought clarification as to whether India would meet that deadline.

29. The representative of the European Communities welcomed India's commitment to remove its remaining quantitative restrictions, without any exception, by 1 April 2001.

30. The representative of India said that his delegation had noted the statements made by the United States and the EC and would convey them to the relevant authorities. He said that his statement made at the present meeting remained valid.

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

(d) Turkey – Restrictions on imports of textile and clothing products: Status report by Turkey (WT/DS34/12/Add.6)

32. The Chairman drew attention to document WT/DS34/12/Add.6 which contained the status report by Turkey on its progress in the implementation of the DSB's recommendations with regard to its restrictions on imports of textile and clothing products.

33. The representative of Turkey said that his country and India had agreed to hold further consultations within 30 days starting from 8 March 2001. To this end, the parties had reached an agreement on the procedures under Articles 21 and 22 of the DSU as contained in document WT/DS34/13. He noted that, through a joint letter, India and Turkey had requested a special DSB meeting to be held on 20 March 2001 in order to take note of that agreement. Turkey hoped that further consultations would enable the parties to arrive at a mutually satisfactory solution.

34. The representative of India said that his delegation had noted the status report submitted by Turkey as well as its statement. Since the reasonable period of time for implementation had expired on 19 February 2001, in light of the requirements of Articles 21 and 22 of the DSU, the parties to the dispute had agreed on 8 March 2001 to hold consultations within the next 30 days aimed at compliance by Turkey with the DSB's recommendations and rulings. This bilateral agreement, which had been circulated to Members, preserved India's rights under Articles 21 and 22 of the DSU during and beyond the consultation period. A special meeting of the DSB was scheduled for 20 March 2001 to take note of this bilateral agreement. He reiterated that India continued to hope that Turkey would comply with its WTO obligations.

35. The representative of Hong Kong, China said that his delegation had participated as a third party in this dispute and continued to maintain its interest in this case. Hong Kong, China was, however, disappointed with the quality of the status reports submitted by Turkey. The reports were consistently lacking in information. He pointed out that the objective of Article 21.6 of the DSU had not been met in this regard. It was his delegation's understanding that the parties would hold consultations on this matter and that a special DSB meeting was scheduled for 20 March 2001 to take note of the bilateral agreement. In this context, he underlined the need to strictly adhere to the requirements of Article 3.5 and 3.6 of the DSU.

36. The DSB took note of the statements and agreed to revert to this matter at a future meeting.

(e) Chile – Taxes on alcoholic beverages: Status report by Chile (WT/DS87/17/Add.2 – WT/DS110/16/Add.2)

37. The Chairman drew attention to document WT/DS87/17/Add.2 – WT/DS110/16/Add.2 which contained the status report by Chile on its progress in the implementation of the DSB's recommendations with regard to its taxes on alcoholic beverages.

38. The representative of Chile said that, as indicated in the status report, at the 1 February 2001 DSB meeting, his delegation had stated that Chile's Congress had adopted amendments to the law on taxes on alcoholic beverages. This law had now been published and was fully in force. Thus, Chile had fully complied with the DSB's recommendations in this case. As a result, this matter should no longer appear on the agenda of future DSB meetings.

39. The representative of the European Communities said that the EC thanked Chile for its efforts to bring its legislation into compliance with the DSB's recommendations within the time-frame set by the Arbitrators. The EC welcomed the fact that the parties to the dispute had been able to negotiate in a constructive way.

40. The DSB took note of the statements.

2. Argentina – Measures affecting the export of bovine hides and the import of finished leather

(a) Implementation of the recommendations of the DSB

41. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 16 February 2001, the DSB had adopted the Panel Report on "Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather". He invited Argentina to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

42. The representative of Argentina said that, pursuant to Article 21.3 of the DSU, his country wished to report on its intention regarding the implementation of the DSB's recommendations and rulings in this case. He noted that this implementation consisted of two elements. First, with regard to the Panel's recommendation relating to Article X.3(a) of GATT 1994, Argentina was pleased to report that the Directorate-General of Customs had issued two instructions whereby it had made confidential all information connected with trade strategy in the export operations mentioned in Resolution 2235/96. Specifically, all data on the exporter, price, quantity and destination were protected. Similarly, a new clearance form had been issued through the Customs Computer Directorate and would be used in the inspection under Resolution 2235/96, setting out the data referred to above. Two elements remained to be done: (i) the approval by the Technical Directorat; and (ii) drafting an amendment to Resolution 2235/96 for the form to be used in accordance with the new status of confidentiality for the various items. The recommendations on this point would be implemented shortly thereafter. Second, Argentina also wished to implement the DSB's recommendations concerning advance payment of VAT and turnover tax on imports. However, in order to do so it would need a reasonable period of time. In this regard, consultations were being held with the EC on the modalities. He wished to underline that, as provided for in Article 21.2 of the DSU, particular attention should be paid to matters affecting the interests of developing-country Members due to a possible impact of the implementation of the DSB's recommendation on their fiscal situation.

43. The representative of the European Communities said that the EC welcomed the first steps taken by Argentina to introduce the necessary changes in the administration of its customs regulations. The EC had already started its discussions with Argentina on the time-frame for compliance, and was confident that those discussions would contribute to full and timely implementation of the DSB's recommendations.

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

3. Belgium – Administration of measures establishing customs duties for rice

(a) Request for the establishment of a panel by the United States (WT/DS210/2/Rev.1)

45. The Chairman drew attention to the communication from the United States contained in document WT/DS210/2/Rev.1.

46. The representative of the United States said that her country was requesting the establishment of a panel to examine Belgium's measures relating to the imposition of customs duties on imports of US rice. At its 1 February 2001 meeting, the DSB had considered the US request for the establishment of a panel on this matter. At that meeting, the EC had raised procedural concerns regarding that request. While the United States understood that the EC had raised its concerns in good faith, it did not consider these concerns to be well-founded. However, the United States had revised its panel request in an effort to accommodate the EC's concerns. Accordingly, at the present meeting, the United States was requesting the DSB to consider its new panel request which contained additional details on the specific measures at issue. The United States had provided dates and reference numbers for examples of correspondence issued by the Belgian customs authorities that indicated the particular shipments at issue and demonstrated the Belgian customs authorities' ongoing rejection of transaction values for purposes of establishing the important customs values. The United States hoped that with this revised request it would be possible to move on to consideration of the merits of the issue and to begin the panel's proceedings to determine whether or not Belgium had breached its WTO obligations.

47. The representative of the European Communities said that by introducing in its revised panel request references to customs authority correspondence of 30 November 1999 and 24 November 2000, the United States had sought, unsuccessfully, to rectify the serious flaws identified by the EC at the 1 February 2001 DSB meeting. The EC found it unacceptable that panel requests could be modified in the interval between two DSB meetings. This had never before been accepted by the DSB. Moreover, the reference to the letter of 30 November 1999, which had just been incorporated into the US request, did not change the fact that the refusal to make a refund payment, which was the subject of this dispute, was contained in the letter dated 24 November 2000. In other words, some time after the date of 12 October 2000 when the consultations cited in the panel request had been sought. As ruled by the Appellate Body on a similar issue, the final decision of the customs authority could not, therefore, be the subject of this panel request.

48. On the substance of the matter, it now appeared that the United States was neither attacking the system of cumulative collection in general, which was not in force, nor the usual application procedure of the customs authorities in Belgium, but rather the treatment of the refund requests of a given importer whose price declarations were considered unjustifiable. The EC considered that, assuming that the customs administration had made an error in this case, it was for the courts who had jurisdiction in the first instance to decide on the case in point and not the WTO. In the EC's view, recourse to the multilateral dispute settlement system should concern disputes between the Member governments relating to measures judged to be inconsistent with the provisions of the agreements. The EC did not think it should substitute itself for national courts to determine whether legislative or regulatory provisions, the consistency of which with the multilateral trade agreements was not in

dispute, had been correctly applied under national law by a public authority in an individual, specific case. Finally, in the light of enquiries made, the EC remained convinced that the customs authorities were right in refusing the refund requests from the importer concerned. Consequently, the EC did not consider the complaint of the United States, which included several major procedural flaws, to be justified in substance. The EC did not wish to enter into a procedural dispute at this stage. For this reason, it agreed to the establishment of the panel requested by the United States at the present meeting. The EC, however, wished to place on record that its consent had been given at the first request for the establishment of this panel. In addition, the EC reserved the right to raise before the panel the above-mentioned flaws contained in the panel request.

49. 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.

50. The representative of India reserved its third-party rights to participate in the Panel's proceedings.

4. Chile – Price band system and safeguard measures relating to certain agricultural products

(a) Request for the establishment of a panel by Argentina (WT/DS207/2)

51. The Chairman recalled that the DSB had considered this matter at its meeting on 1 February 2001 and had agreed to revert to it. He then drew attention to the communication from Argentina contained in document WT/DS207/2.

52. The representative of Argentina said that pursuant to Article 6.1 of the DSU, his country was requesting the DSB, for the second time, to establish a panel to examine Chile's price band system, the provisional and definitive safeguard measures on imports of wheat, wheat flour and edible vegetable oils as well as the extension of those measures. Argentina considered that the price band system applied by Chile violated Article II of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The safeguard measures on imports of wheat, wheat flour and edible vegetable oils violated Articles 2, 3, 4, 5, 6 and 12 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994. In an effort to find a mutually satisfactory solution, Argentina and Chile had held consultations over the past weeks, but had not been able to reach an understanding. Nevertheless, some of the options discussed in the consultation held on 8 March 2001 constituted a basis for negotiations, irrespective of the DSB's decision to establish a panel at the present meeting. He said that, as had been officially communicated to the Chilean authorities after the most recent bilateral meeting, his country was willing to continue its discussions with Chile on the issues to be examined by the panel.

53. The representative of Chile said that, as stated by Argentina, despite intensive discussions, the parties to the dispute had not been able to find a mutually satisfactory solution. However, Chile would continue to make efforts in the coming weeks in order to reach an understanding with Argentina. His country regretted Argentina's decision to proceed with its request, but hoped that the parties would be able to find a solution to this dispute in the very near future. He noted that the consultations had been held on the safeguard measures that had been in place until 25 November 2000. These measures had then been extended for a period of a further last year, pursuant to Chilean legislation. The extended safeguard measures were identical to the original safeguard measures, but could have been different if the circumstances giving rise to the application of such measures had changed. The question was therefore whether or not the original and the extended measures were identical in legal terms. If not, consultations should be held with regard to the extended measures because these measures had not been the subject of the initial consultations. In Chile's view, this was a systemic issue which required further reflection by Members and the Secretariat and, if appropriate, consultations could be held on this matter in order to reach an

interpretation through which Members could fill this gap. At the present meeting, he did not wish to enter into a procedural debate and as a sign of good faith he would not question the legal identity between the original safeguard measures and their extension. He added that it was his delegation's understanding that Argentina's complaint concerned only measures applied on imports of wheat, wheat flour and edible vegetable oils.

54. The Chairman noted that the issue raised by Chile required further reflection.

55. The representative of Argentina said that his delegation had noted the concern raised by Chile. As indicated previously, Argentina believed that its panel request had been carefully worded in order to indicate its concerns about both the price band system and the safeguard measures relating to certain agricultural products.

56. The representative of Chile reiterated that it was his delegation's understanding that Argentina's complaint concerned only certain measures applied on imports of wheat, wheat flour and edible vegetable oils.

57. 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.

58. The representatives of Colombia, Costa Rica, the European Communities, Guatemala, Honduras, Japan, Nicaragua, Paraguay and the United States reserved their third-party rights to participate in the Panel's proceedings.

59. The representative of Brazil said that his country had an interest in this case and might also reserve its third-party rights within the next few days.

60. The DSB took note of the statement.

5. Canada – Export credits and loans guarantees for regional aircraft

(a) Request for the establishment of a panel by Brazil (WT/DS222/2)

61. The Chairman drew attention to the communication from Brazil contained in document WT/DS222/2.

62. The representative of Brazil said that, on 22 January 2001, his country had requested consultations with Canada with regard to the financing programmes used in relation to exports of regional jets. During these consultations, which had been held on 21 February 2001, Canada had not provided any significant information on its programmes. Brazil regretted that the consultations had not been meaningful, especially in light of Article 4.3 of the DSU, which provided that Members should enter into consultations "in good faith … with a view to reaching a mutually satisfactory solution". Since no such a solution had been found, Brazil was requesting the establishment of a panel pursuant to Article 4.4 of the SCM Agreement, with standard terms of reference, to examine export financing provided by the Export Development Corporation (EDC) through its Corporate Account and the Canada Account and to examine guarantees provided by the province of Quebec through its programme "Investissement Québec". At the present meeting, he did not wish to reiterate Brazil's concerns about the lack of transparency of the Canadian programmes or the double standard applied by Canada in comparing financing practices of other Members to its own. He only wished to underline the importance of the systemic issues to be examined by the panel.

63. He said that with regard to EDC's Corporate Account, the panel would have to examine the issue of competition between government agencies and private banks in the so-called "market window". While some wished developing countries to be constrained by the OECD Arrangement

rules, export credit agencies (ECAs) of a number of developed countries operated in this "market window", without observing the rules. These ECAs alleged that their interest rates were above cost of funds and claimed, without providing any evidence, that those rates were equivalent to the rates prevailing in the international market. This was not a balanced argument, given the high cost of funds in developing countries. Brazil was confident that the panel would carefully examine this issue in the light of both the letter and the spirit of the SCM Agreement and WTO principles.

64. He recalled that for the first time in April 1999, the operation of the Canada Account had been found to be inconsistent with Canada's obligations under the SCM Agreement. The review of Canada's implementation under Article 21.5 of the DSU had been concluded in May 2000. Since then, Canada had not even tried to bring its programme into conformity with the WTO Agreements, despite its promises to do so repeatedly made to Brazilian officials. In January 2001, Canada had announced that the programme would continue to be used in future to secure contracts for Bombardier with terms that were, as acknowledged by Canada, more generous than those prevailing in the market. The panel should address this disregard for the multilateral trading disciplines.

65. Brazil would request the panel to examine export credits or guarantees offered by "Investissement Québec" which was a programme used in regional aircraft export transactions and constituted part of a financing package offered by Canada to Air Wisconsin. According to Canadian sources, this financing package reduced aircraft prices by Can$2 million. In this regard, one of the systemic issues that the panel would have to consider was the fact that the credit that developed countries were in a position to guarantee could never be guaranteed in the same way by developing countries. The financing institutions received guarantees that, in effect, transferred all risks of the operation to the government guaranteeing the transaction and, thus, the private bank charged the interest rates as if it was lending to the government. These loans were offered at rates that were below Commercial Interest Reference Rate (CIRR) and with longer repayment terms than those established under the OECD Arrangement.

66. He noted that only a few provisions of the SCM Agreement governed the area of export financing. However, if these provisions were not interpreted in such a way so as to ensure a level playing field for all Members, developing countries would continue to face obstacles in this area. He underlined that the panel would have to deal with the issues of critical systemic importance not only for Brazil, but also for other developing countries. Long-term export financing was not an area to which developing countries had attached priority during the past multilateral trade negotiations. This was because ECAs concentrated most of their resources to finance operations of key enterprises or sectors dealing with high cost, high technology products in markets that were restricted to developed countries. He underlined that the provisions of the SCM Agreement regulating export financing had to be interpreted in a way that took fully into account notions of equity and fairness. This was essential in order to preserve and to strengthen the multilateral trading system. If not, countries would have no incentives to pursue further negotiations.

67. The representative of Canada said that, contrary to what had been stated by Brazil at the present meeting, his country had participated in good faith in the consultations held on 21 February 2001 and was willing to provide the necessary information. However, a list of specific questions had only been provided to Canada during the consultations, and, at that time, Canada had given assurances that it would provide responses to those questions. However, the same questions seem to have been received by the Brazilian press the day before the consultations had taken place. In response to Brazil's allegations regarding double standard, disregard for WTO disciplines and complaints about the Canada Account, he said that the dispute in question had lasted for five years and five different panels had ruled against PROEX, but Brazil continued to disregard those rulings.

68. In its panel request, Brazil alleged the existence of prohibited export subsidies. Therefore, in accordance with Article 4.4 of the SCM Agreement, it was entitled to the immediate establishment of a panel in the absence of negative consensus. However, Canada continued to be surprised by Brazil's

request for the establishment of a panel. This was because Brazil's complaint related to financing support proposed by Canada to Air Wisconsin on terms and conditions equivalent to those offered to Air Wisconsin by Brazil to support its regional jet manufacturer, Embraer. It would therefore be logical to conclude that Canada's financial proposal was WTO-consistent. However, if Brazil contended that the Canadian proposal was WTO-inconsistent, then one should assume that Brazil's financing offered to support Embraer was also WTO-inconsistent. In other words, a case against Canada was, in effect, against the financing that Brazil had consistently and regularly provided to support Embraer. He recalled that on 10 January 2001, Canada had announced that for one specific transaction, it would be prepared to provide financing on the same terms that Brazil used to support the sale of Embraer aircraft. In doing this, Canada was merely seeking to level the playing field and its action was a measured and focused response to Brazil's persistent refusal to withdraw its export subsidies for regional aircraft. Canada continued to be concerned about the logical inconsistency of the Brazilian position. It hoped, however, that this panel, as well as the panel established pursuant to Article 21.5 of the DSU, which was currently examining the compliance of Brazil's PROEX export subsidy programme, would clarify the rules that governed export financing. Canada remained willing to negotiate in good faith with Brazil in an effort to reach a mutually satisfactory resolution to this ongoing dispute. However, any such resolution had to be premised on full compliance by Brazil with its WTO commitments.

69. The representative of Brazil said that he did not wish to imply that Canada had not acted in good faith but had only referred to the DSU provisions. He disagreed with Canada's statement that the Brazilian press had been provided with a list of questions before such questions had been made available to Canada. He did not know how the press had obtained this information. He noted that, in the past, there had been situations in which parties not involved in disputes had obtained panel submissions addressed exclusively to Canada, which had been directly involved in such disputes.

70. The representative of Canada reiterated that no information had been submitted to Canada prior to the 21 February consultations. A list of questions had been provided to Canada during the consultation while the same questions seemed to have been made available to the Brazilian press the day before the consultations had taken place.

71. The DSB took note of the statements and agreed to establish a panel in accordance with the accelerated procedures pursuant to Article 4.4 of the SCM Agreement, with standard terms of reference.

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

6. European Communities – Anti-dumping duties on imports of cotton-type bed linen from India

(a) Report of the Appellate Body (WT/DS141/AB/R) and Report of the Panel (WT/DS141/R)

73. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS141/8 transmitting the Appellate Body Report on "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India", which had been circulated in document WT/DS141/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report."

74. The representative of India said that his country welcomed the Appellate Body's rulings on the zeroing methodology and on the calculation of dumping margins. The Appellate Body had upheld the Panel's finding that the negative margin should not be taken as zero while calculating the dumping margin on a product subject to anti-dumping investigation. This was an important and significant decision of the Appellate Body. India also welcomed the Appellate Body's decision that the method for calculating amounts for administrative, selling and general costs (SG&A) and for profits set out in Article 2.2.2(ii) of the Anti-Dumping Agreement could only be used if data relating to more than one other exporter or producer was available (paragraph 76 of the AB Report). Thus, this provision was not applicable where data of only one producer/exporter was available. Accordingly, SG&A and profits of one single exporter could not be attributed to all other producers/exporters as had been done by the EC in this case. Further, the Appellate Body had found that Article 2.2.2(ii) of the Anti-Dumping Agreement contained specific requirements. These requirements did not call for the exclusion of sales not made in the ordinary course of trade (paragraph 83 of the AB Report). India welcomed this ruling.

75. He noted that the Panel's finding, as modified by the Appellate Body, had confirmed that the EC's actions were inconsistent with the Anti-Dumping Agreement in two basic areas. First, the determination of injury was critically flawed. By establishing injury on the basis of only two out of 15 mandatory factors and, moreover, by impermissibly looking outside the domestic industry, no proper injury determination had been made in this case. Hence, a basic requirement for the imposition of anti-dumping duties was absent. It followed that the measures were and remained unjustified. Second, the calculation of dumping was critically flawed. In calculating dumping margins by inferring data from one atypical producer, zeroing the non-dumped exports, and by restricting profits to data in the ordinary course of trade, the dumping margins were improperly skewed in three aspects. This had led both to calculation of dumping where there was in fact none, and to a gross over-statement of dumping in circumstances where the dumping was in fact minimal.

76. It was well known that the textile industry was of great importance to India's development and that the illegal levying of anti-dumping duties in this case had adversely affected India's market access in the EC. India was, therefore, requesting the EC to draw the appropriate and only conclusions from the Reports, namely, to revoke the measures that had been illegally imposed and to refund the anti-dumping duties illegally collected since December 1997. Furthermore, India called upon the EC to respect its obligations under Article 21.2 of the DSU and to act without further hesitation or delay.

77. The representative of the European Communities said that the EC welcomed the Panel Report which constituted a backing for the EC anti-dumping policy and the way it had applied the Anti-Dumping Agreement in its investigation concerning bed linen originating, *inter alia*, in India. He noted that most of the claims raised by India had been rejected by the Panel. There were, however, five points, including three technical points, on which the EC's views had not been upheld. However, the EC was surprised and concerned about the Appellate Body Report. This was not because the Report was not in its favour, but because, in some instances, that Report was difficult to understand and the Appellate Body had made a narrow and too literal reading of the provisions of the Anti-Dumping Agreement. The real implications of this ruling from a legal and factual point of view were still to be seen, and the EC was currently examining them in detail. Nevertheless, the EC would promptly comply with the DSB's recommendations and rulings. With regard to other investigations, the EC would shortly announce that interested parties could request a review if they considered that they were affected by this ruling. The EC also wished to inform the DSB that the method used by the EC to calculate dumping condemned by the Appellate Body was also applied by other Members, including India. The EC, therefore, expected that these Members would bring their practices in line with the Anti-Dumping Agreement as soon as possible.

78. The representative of Egypt said that her country, which had participated as a third party in this case, was in general satisfied with the conclusions of the Panel Report, in particular with regard to its interpretation of Article 15 of the Anti-Dumping Agreement, and the determination that the method

applied by the EC in calculating the margin of dumping, the so-called zeroing method, violated the provisions of Article 2.4.2 of the Anti-Dumping Agreement. Egypt welcomed the conclusions of the Appellate Body which had refuted the EC's method used in calculating amounts for SG&A and for profits in the anti-dumping investigation as being inconsistent with Article 2.2.2(ii) of the Anti-Dumping Agreement. However, Egypt had reservations with regard to the Panel's misinterpretation of some provisions of the Anti-Dumping Agreement, in particular since those misinterpretations had not been appealed. In Egypt's view, the Panel had erred in rejecting India's claim concerning the failure of the EC to examine the accuracy and adequacy of evidence provided by the complainant. In its consideration of Article 5.3 of the Anti-Dumping Agreement, the Panel had restricted its analysis to the element of sufficiency of the evidence while ignoring the requirement that the evidence presented had to be accurate and adequate to justify the initiation of an investigation. In other words, the Panel had failed to clearly delineate the scope of Article 5.3 of the Anti-Dumping Agreement. Egypt disagreed with the conclusion of the Panel that the EC did not conduct an evaluation of all relevant economic factors and indices having a bearing on the state of industry and had, thus, failed to act consistently with its obligations under Article 3.4 of the Anti-Dumping Agreement. In Egypt's view, the Panel's reasoning was unclear since its interpretation of the Article would unnecessarily create a burden on investigating authorities not anticipated under the Anti-Dumping Agreement.

79. With regard to the EC's treatment of all imports from India, Egypt and Pakistan as dumped, Egypt believed that the relevance of Article 9.2 of the Anti-Dumping Agreement, on which the Panel had relied in its decision, was questionable. In Egypt's view, Article 3.1 of the Anti-Dumping Agreement should have been the yardstick in this regard as it dealt with investigation proceedings related to injury examinations and provided that the effects of the imports on the domestic industry had to be limited to dumped imports only not to all imports of that particular product. The Panel had ignored the fact that evaluation of injury should be based on positive evidence, and that the effects of the dumped imports on the industry should be based on the imports that had been found to be dumped, and not on imports from all sources. Egypt, therefore, urged the EC to bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

80. The representative of the United States said that her country was concerned about the Appellate Body's decision, and was monitoring the situation carefully, in particular since the standard of review was at the centre of the dispute settlement system. The United States had grave concerns about whether the Appellate Body had properly applied the special standard of review under Article 17.6(ii) of the Anti-Dumping Agreement.

81. The representative of Japan said that his country welcomed the Reports of the Panel and the Appellate Body, which had ruled that the practice of zeroing negative margins was not permissible under the Anti-Dumping Agreement. Japan had long argued that the so-called zeroing was an unfair methodology of calculating dumping margins since it created margins arbitrarily even where there were none. Therefore, the decision of the Panel and the Appellate Body justified Japan's long-standing position in this respect. Japan expected that zeroing would be prohibited not only in the EC but also in other countries which used this practice when calculating dumping margins.

82. The representative of Canada said that his country was concerned about the conclusions of the Appellate Body that the practice of zeroing, as applied by the EC in establishing the margin of dumping, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. In Canada's view, the EC's interpretation of Article 2.4.2 of the Anti-Dumping Agreement, which was based on the recognition that there might be different types or models of the product under investigation, was reasonable and should have been considered as a permissible interpretation of that provision. Canada was concerned that the Appellate Body's ruling might result in a greater number of investigations in respect of more narrowly defined products with related cost and resource implications for all parties concerned.

83. The representative of Hong Kong, China said that his delegation wished to make a few observations with regard to the Appellate Body's findings. First, Hong Kong, China welcomed the Appellate Body's confirmation of the Panel's ruling that the practice of zeroing negative dumping margins in the determination of dumping was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. This ruling should bring an end to a matter which had generated considerable controversy for a long period of time. The Appellate Body had also clearly stated that the Anti-Dumping Agreement concerned the dumping of a product and that, the margins of dumping to which Article 2.4.2 referred were the margins of dumping for a product and not for the various types or models of that product. Once defined, the product should be treated consistently thereafter in accordance with that definition. Therefore, all types or models falling within the scope of a like product had to be necessarily comparable, and export transactions involving those types or models had to be considered "comparable export transactions" within the meaning of Article 2.4.2 of the Anti-Dumping Agreement. Hong Kong, China noted with satisfaction that the Appellate Body had emphasized that Article 2.4.2 of the Anti-Dumping Agreement referred to all "comparable export transactions", and had concluded that the practice of zeroing negative dumping margins did not take fully into account the entirety of the prices of some export transactions, namely those export transactions where negative dumping margins were found. As such, the comparison between export price and normal value was not a fair comparison as required by Article 2.4.2 of the Anti-Dumping Agreement.

84. Second, with regard to Article 2.2.2(ii) of the Anti-Dumping Agreement on calculation of constructed normal value, Hong Kong, China noted that the Appellate Body had reversed the Panel's ruling in this regard and had found that the method for calculating the amounts for SG&A and for profits could only be used if data relating to more than one other exporter or producer was available. Furthermore, the Appellate Body had reversed the Panel's finding, and had concluded that a Member was not allowed to exclude those sales that were not made in the ordinary course of trade from the calculation of the weighted average under Article 2.2.2(ii) of the Anti-Dumping Agreement. Hong Kong, China welcomed the clear-cut interpretations given by the Appellate Body. These should help reduce the scope for manipulation in the comparison methodology which could be used to produce arbitrary and inflated dumping margins.

85. Third, with regard to Article 3.4 of the Anti-Dumping Agreement on the analysis of the state of the domestic industry, Hong Kong, China noted the clarifications made in the Panel Report regarding the analysis of the state of the domestic industry. In particular, the Panel had confirmed a similar finding in previous panel reports that an anti-dumping authority had to examine all relevant economic factors and indices listed under Article 3.4 of the Anti-Dumping Agreement. This would enhance transparency and inject more objectivity in the determination of injury. Notwithstanding these observations, Hong Kong, China supported the adoption of the Reports and the way forward suggested by India.

86. The representative of Brazil said that his country had not participated as a third party in this dispute, but had followed the developments in this case very carefully. He noted that several elements of the methodology used by the EC to calculate dumping margins were similar to those used in its investigation against Brazil's products. Brazil had been consulting with the EC on anti-dumping duties on iron pipes and fittings. During those consultations, Brazil had complained about the same shortcomings in the EC's methodology, in particular the zeroing practice which created an artificial and inflated dumping margin. Brazil expected the EC to revoke its measures that used the same methodology. He added that the request for review was a right granted under the Anti-Dumping Agreement and, therefore, Brazil would consider it as a right not as the means for implementation.

87. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS141/AB/R and the Panel Report in WT/DS141/R, as modified by the Appellate Body Report.

7. Appointment of Appellate Body members

(a) Statement by the Chairman

88. The Chairman made a following statement[3]: "On 10 December this year the contracts of three of the present members of the Appellate Body will expire. The three members who will conclude their terms are: Claus-Dieter Ehlerman; Florentino Feliciano and Julio Lacarté-Muro. You will recall that under Article 17.3 of the Dispute Settlement Understanding '… The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of the membership in the WTO …'. Procedures for the selection of Appellate Body members are set out in the decision of the Dispute Settlement Body of 10 February 1995. The appointments are made by the DSB. A joint proposal is put to the DSB, after appropriate consultations, by a selection committee comprising the Director-General, the Chair of the DSB, the Chairs of the General, Goods, Services and TRIPS Councils. Suggestions for candidates can be forwarded by delegations to the Director-General. With the termination of the three Appellate Body members' terms on 10 December, a time-frame needs to be decided upon for the commencement and conclusion of the selection process. Factors to be taken into account in this connection include the northern summer break in August, and also the fact that the WTO Ministerial in Qatar is to be held in November. It is probably fair to assume that, after the summer break, considerable time will be devoted by delegations to preparations for the Ministerial. In addition, were the decision of the DSB on the appointments to be made after the November Ministerial, there would be little more than three weeks before the expiry of the existing three contracts. This would put considerable pressure on signing of the new contracts, on the reasonable time necessary to familiarize the new members with Appellate Body procedures, and on allowing for a smooth transition. On this basis, therefore, I would like to propose to you for consideration at our next regular DSB meeting that we adopt the following 15 week time-frame for the appointment of the three new members of the Appellate Body: (i) invitation to forward nominations to the Director-General from 17 April 2001, with the deadline for nominations closing on 15 June 2001; (ii) start of the Selection Committee's work on 22 June 2001; and (iii) possible decision by the DSB on the appointees on approximately 27 July 2001. This timetable would hopefully allow for a well-ordered appointment process allowing the Appellate Body to operate effectively and with a smooth changeover from 11 December 2001." He said that the text of this proposal would be available in the room and suggested that Members reflect on this issue. He proposed that the DSB revert to this matter at its next regular meeting.

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

8. Timing of notification of third-party interest in panel proceedings

90. The Chairman recalled that at the 1 March 2001 DSB meeting it had been agreed to include this item on the agenda of the present meeting in order to allow delegations to exchange views on the matter and to comment, if they so wished, on the Secretariat's advisory opinion contained in JOB(01)/25. He considered that it would be useful to have a discussion on this subject in light of some of the preliminary views already aired by Members on 1 March. He first wished to clarify how the timing issue had been addressed in the past. He was not assuming that Members wished to take any further binding general decisions about future practice, unless of course there were to be a consensus at the present meeting to adopt such decisions. He was not prejudging this point. He underlined that there were three different situations where the timing of notification of third-party interest was to be considered. First, and most fundamentally, a 10-day period for notifying third party interest was followed in the DSB as the general norm. That general practice had been endorsed at the

[3] The Chairman's statement was subsequently circulated in document WT/DSB/23.

21 June 1994 Council meeting, and Article XVI:1 of the WTO Agreement noted that the WTO "… shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947". Second, this practice varied in the case of panels relating to Article 4 of the SCM Agreement and dealing solely with prohibited subsidies issues. The DSB asked that third-party rights be notified within five rather than 10 days. This halving of the time-frame appeared to have reflected the shortened time-frame under Article 4 of the SCM Agreement for dispute settlement proceedings. Third, there was the question of Article 21.5 compliance panels. This seemed to relate to whether, given the halving of the time period for Article 21.5 compliance panel proceedings, there should also be a five-day period for notification of third-party interests applied to all such cases. The Secretariat noted factually in this connection – in footnote 2 of the background paper – that the five-day period had not been followed where 21.5 panels involved issues other than Article 4 of the SCM Agreement.

91. The representative of Mexico recalled that the question of timing for reservation of third-party rights in an Article 21.5 proceeding had been discussed on several occasions. For the first time, the issue had been raised at the DSB meeting on 14 October 1999. At that time, Mexico had stated that, in its opinion, a period of five days was not applicable to all proceedings under Article 21.5 of the DSU. The issue had also been raised at the DSB meetings on 16 February and 1 March 2001. At that time, it had become clear that Members considered that the five-day period was not a WTO practice and was not binding. At the present meeting, he wished to make a few systemic comments with regard to the Secretariat's background note. First, it was up to Members to establish and, where appropriate, to modify any time-periods for exercising the right to participate in a panel as third parties. Second, without entering into the substance of the legal questions in the background note, Mexico considered that unlike several other provisions of the DSU such as Article 4.11, which granted a period of 10 days in order to join in consultations, Article 10 of the DSU did not set any time-period for Members to reserve their third-party rights in panels' proceedings. It was clear that the drafters of the DSU did not wish to restrict that right. Neither Article 21.5 of the DSU nor Article 4.12 of the SCM Agreement contained a provision to the contrary.

92. Mexico was concerned that the Secretariat's note seemed to indicate that, since Members had not opposed the Chairman's statements in very specific cases, which was not the case, that constituted the binding practice. As a result, Members were legally obliged to notify their substantial interest in order to participate as third parties in all panels established under Article 21.5 of the DSU. The 10-day period was not a matter for the DSB to decide. If a statement by the then Chairman had been accepted in the GATT Council, this did not mean that, as a result of the note, Members' rights and obligations could be changed in the context of the covered agreements. The background note prepared by the Secretariat was not a legal document. If Members decided to interpret or amend the DSU, this would have to be done by the Ministerial Conference or the General Council in accordance with the procedures established for that purpose. The issue of a five-day notification period had not been formally submitted to any of these bodies and there was no reason to believe that Members had consented to be bound by it.

93. The representative of the United States said that his country welcomed the fact that, at its 1 March meeting, the DSB had agreed without objection to include this item on the agenda of the present meeting. As the United States had indicated at that meeting, the Secretariat's note addressing this issue raised a number of very troubling and fundamental concerns. The United States did not understand the purpose of the Secretariat's note on the notification of third-party interest in Article 21.5 proceedings. It was the US understanding that the Secretariat had been requested simply to provide a factual background note on the notification issue. Instead, the Secretariat had gone beyond the bounds of what had been requested and had prepared an advisory legal opinion. The WTO was a Member-driven organization. Therefore, it would be useful first to have a clarification of the status of the Secretariat's note. It was not clear what status, if any, a legal opinion from the Secretariat had. It could not be an interpretation of the relevant Agreements since only the General Council had the authority to interpret the WTO Agreements.

94. Furthermore, regardless of its status, the Secretariat's note was objectionable because it contained inaccurate facts, used faulty analysis, and was inconsistent with the provisions of the DSU and the Marrakech Agreement. For example, the note incorrectly referred to a "constant practice of uncontradicted rulings from the Chairman". The 21 June 1994 statement by the GATT Council Chairman and the subsequent statements of Chairpersons regarding the 10-day notification period were not rulings. He recalled that, at the 16 February DSB meeting when this issue had been raised, the United States had specifically sought confirmation that the Chairman had made a statement not a ruling. The Chairman had confirmed that he had made a statement. Therefore, from the factual point of view, there were no rulings from the Chairman on the 10-day notification period they were merely statements. The United States was particularly troubled by the assertion in the Secretariat's note that there was a process within the WTO under which statements by Chairpersons could establish a "binding practice". He questioned how practice could be binding, in particular practice that stipulated that Members should do something. Although it was unclear what was meant by this, it seemed to suggest a process for developing DSU rules other than those provided under the DSU and the Marrakech Agreement. This concern was not limited to the DSB. The note's analysis would apply to each WTO body. It would suggest that from now on, Members would have to intervene to reserve their rights after every statement made by Chairpersons of Councils, Committees or subsidiary bodies or risk having the statement ripen into a "binding practice". If nothing else, this could certainly make meetings much longer. Moreover, such a process would appear to undermine the consensus based approach that was fundamental to the operation of the DSB and the WTO Agreements. It would mean that new obligations and rights could be created in the DSU that would apply to all DSB members, regardless of whether they were parties to a particular dispute in which a DSB Chairman's statement was made giving rise to a "binding practice". In this particular case, the Secretariat gave no legal authority for the Chairman to have issued any such statement or ruling. Article 10.2 of the DSU was clear. If a Member notified the DSB of its interest, that Member had a right to participate in the panel proceedings as a third party. It was difficult to see how Chairman's statements, no matter how often repeated, could limit or take away this right from Members. The WTO Agreement was clear on the amendment process for the DSU, and it did not include a Chairman's statement.

95. The United States was also very puzzled by the note's analysis of the relationship between Article 4.12 of the SCM Agreement and Article 21.5 of the DSU. This was not appropriate or helpful to the issue at hand. The United States did not agree with the conclusions drawn therein. There was no basis for the conclusion in the last paragraph of that note that the DSB was in the process of establishing a practice of a five-day deadline for reserving third-party rights in all Article 21.5 panel proceedings. This conclusion was directly in contradiction with the practice identified in footnote 2 of the same note. Footnote 2 showed that in 10 out of 14 panels under Article 21.5 of the DSU there was a 10-day period suggested for reserving third party rights. He reiterated its request for clarification of the status of the note. It was important not to have any doubt or to have others refer to the note in the future as providing legal basis in the WTO system. It was his understanding that it was not the Chairman's intention to go into the merits of the question of a deadline for Article 21.5 panels at the present meeting. That discussion might take place at a later date. He underlined that while the United States did not object to a five-day period for notifying a third-party interest in Article 21.5 panels, this could not be based on the flawed theories contained in the Secretariat's note.

96. The representative of Hong Kong, China said that his delegation could not agree with the legal reasoning of the arguments contained in the Secretariat's note. At the present meeting, Hong Kong, China wished to make comments on the general issue of timing of notification of third-party interest in panel proceedings. He noted that Article XVI:1 of the WTO Agreement was the legal basis for carrying over the practice from the GATT which provided that "the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947 ..." In the view of his delegation the use of the word "guided" meant that such previous GATT practice was for guidance purpose, and was not mandatory. Members should take the GATT practice into account, but they were not obliged to follow such practice. The 1994 GATT Decision concerning the timing of notification of third-party interest should be understood in this context. The Decision only

provided a benchmark, which suggested that Members should indicate their intention to participate as a third party within 10 days. Moreover, the use of the term should reflect the point that this was not a legally binding time-period for notification of third party interest. In other words, Members were not obliged to follow the 10-day rule established under the GATT system.

97. With regard to the binding customary practice, he said that by noting that third parties had followed the 10-day rule in 92 proceedings after the entry into force of the WTO, the Secretariat's note suggested that such a constant practice could become "binding practice of the organization". References had been made to the Namibia case to justify such an observation. Hong Kong, China had strong reservation on the applicability of the principle drawn from the Namibia case to the DSB. There was a crucial difference between the situation in the Namibia case and in the DSB. The facts in the two instances were not comparable. In the Namibia case, it was an institution, i.e. the UN Security Council, which took decisions on behalf of the organization. However, in the DSB, Members decided on time-frames within which they should exercise their rights. Third-party interest was not an organization issue; it was an individual Member's prerogative. There was nothing like a WTO decision in this respect. It was not up to the DSB to determine who would and who would not participate as a third-party. It was up to Members to do so. It was also questionable whether it was possible to refer to customary practice with respect to the timing of notification of third-party interest. Even if one were to acknowledge that in all cases thus far, third parties had consistently notified their interest to participate in proceedings within 10 days, it was highly doubtful whether such practice should be part of the DSB practices, as suggested in the Secretariat's note. At best, one could claim that only those Members who had been parties to DSB proceedings had participated in constituting the practice of the 10-day notification. It was important to bear in mind that the overwhelming majority of Members, who had not yet been parties to DSB proceedings, could hardly have consistently and uniformly adopted such practice. Under the circumstances, it was legally unsustainable to refer to customary practice, which required both considerable practice and *opinio juris*. The first element was missing and, at this stage, it was impossible to prejudge what was the *opinio juris* of the majority of Members on this issue.

98. With regard to the DSU provisions, pursuant to Article 10 of the DSU, interested Members only had to notify the DSB that they wished to participated as a third party in the proceedings. There was no provision which required Members to do so within 10 days from the establishment of the panel. Moreover, the DSU provisions did not provide that the DSB could decide on the timing of notification of third-party interest. The DSB had no competence to decide on the issue. There was therefore no question of the Chairman's ruling in this regard.

99. With regard to a five-day notification period in cases pursuant to Article 4 of the SCM Agreement, he said that given that there were only a handful of cases, Hong Kong, China considered it premature for the Secretariat note to suggest that a "consistent practice has developed in the DSB, through which recourse was made to a five-day notification procedure in cases relating exclusively to prohibited subsidies claims". His delegation did not accept the notion that a customary practice, if any, had evolved. More importantly, however, there was no legal ground to substantiate the argument that the 10-day rule was legally binding on all Members. The current practice was merely a guideline. Hence Article 4.12 of the SCM Agreement could not be applicable to the 10-day rule. Following this argument, it would therefore be legally unsustainable to consider applying a five-day rule in cases pursuant to Article 4 of the SCM Agreement. Hong Kong, China believed that instead of using "binding customary practice" as the legal basis for the 10-day notification rule, Members should consider a more proper channel; i.e. Article X of the WTO Agreement. The only way to clarify the issue of timing of notification of third-party interest was through legislative action in accordance with Article X.

100. The representative of Nicaragua said that his country was concerned about the interpretation contained in the Secretariat's note concerning the timing of notification of third-party interest in panels procedures. Nicaragua believed that, as a matter of principle, the Secretariat was not entitled to

make any changes to the WTO Agreements. Any interpretation or modification to the DSU could only be made by Members through a decision taken by the Ministerial Conference or the General Council.

101. The representative of Australia said that his country considered that the reasoning in the Secretariat's paper was legally incorrect and that the paper did not provide legal justification for a five-day period for third party submissions in this instance. It was a matter for Members to determine an appropriate period on the basis of what might be reasonable in the circumstances. As to what was reasonable, a time-period should reflect the need for Members to obtain clearance in capitals. Australia was not convinced that an additional five days would be disruptive of Article 21.5 proceedings in regard to prohibited subsidies. It would be a relatively simple matter to extend the proceedings if Article 8.3 of the DSU were to apply to Article 21.5 panel composition.

102. The representative of Canada said that his country shared the systemic concerns expressed by other Members regarding certain aspects of the Secretariat's background note. In particular, Canada was concerned about the Secretariat's suggestion that binding practice was being made in the DSB that could be used to interpret the rights and obligations of Members, or could have the effect of modifying the provisions of the DSU. This was even more troubling when one considered the inherent difficulty of trying to determine what constituted DSB practice, or who would make such a determination.

103. The representative of Colombia said that his country shared the systemic concern expressed by previous speakers with regard to the scope that should be given to customary practices within the WTO. In Colombia's view, a statement made by the Chairman was not enough to constitute customary practice. Even if it was, it would still be important to make it clear that the scope of its application could only extend to the day-to-day work of this organization and that, under no circumstances, could it impair the rights or guarantees of the Members.

104. The representative of Saint Lucia said that the Secretariat's background note provided interesting insights into developments in the WTO jurisprudence – from the Secretariat's perspective – and gave Members an opportunity to address the issues on the record. Although many countries had taken little part in shaping the procedures and practices of the GATT 1947, they were fully cognizant that the Marrakesh Agreement provided that the WTO had to be guided thereby. Saint Lucia, therefore, understood the rationale for a general practice whereby Members notified their interest in participating as a third-party in panel proceedings within 10 days from the date of the establishment of a panel. She noted that even this 10-day time-frame might pose challenges to some developing-country Members who did not have the capacity to monitor closely all WTO proceedings. It was therefore a matter of some concern to read that there was "a perceived need to adjust this practice" and reduce the time-frame from 10 to five days in respect of Article 21.5 compliance cases. Her delegation was not convinced by the stated contextual and systemic reasons for doing so. The Secretariat pointed to a consistent practice of regular panels and compliance panels dealing solely with prohibited subsidies issues. A consistent practice of 3 out of 3 regular panels established pursuant to Article 4 of the SCM Agreement, and 4 out of 4 Article 21.5 compliance panels concerning disputes involving four Members as principal parties and a mere handful of third-parties – a so-called consistent practice involving less than 10 of some 140 Members. It was true that practices might show patterns which might help to identify and clarify certain trends which might develop within an organization. In the long term, practices might lead to the emergence of general principles, but equally so they might be shaped by particular circumstances which would disprove this. The Secretariat noted that there were several other Article 21.5 compliance panels involving issues other than, or additional to, prohibited subsidies, where the five-day rule had not been implemented. Indeed, the weight of the practice rebutting the notion of a five-day rule for all Article 21.5 compliance panels, involving cases in which Members participated as third parties, exposed certain deficiencies in the underlying logic advanced in the Secretariat's background note. WTO jurisprudence affirmed that "the DSU must be interpreted so as to promote the prompt settlement of

disputes, without adopting a reading of DSU provisions that would prolong disputes unnecessarily or make the DSU overly difficult for Members, including developing country Members, to use."[4]

105. She noted that since the DSB agenda was circulated in advance Members were aware of the possible establishment of a panel. However, in certain circumstances, the deliberations and proceedings in the DSB could prompt third-party participation. The reduction in the period under reference could prove difficult for non-resident missions and even Geneva-based missions not present when a decision to establish a panel was taken. In such cases, bearing in mind the delay in finding out what transpired might be no less than a day or two, to which should be added the time needed to consult with capital and convey the request, five days was unlikely, in certain circumstances, to provide a realistic time-frame. Article 21.5 of the DSU provided a compliance panel with a measure of flexibility with respect to the 90-day reporting period. Nevertheless, the pressure on compliance panels to circulate their reports within the stated period clearly heightened stress levels within the Secretariat and consequently the desire for increasing the time available to them. This apparently had clouded a simple argument for DSB reforms with the citing of precedents. Recent jurisprudence of the Appellate Body reminded Members that "Determining what the rules and procedures of the DSU ought to be is not ... [the] responsibility [of the Appellate Body] nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO."[5] Against the specific practical and real concerns raised by the Secretariat her delegations had also its concerns with respect to the further marginalization of the rights of third-parties. It had reservations regarding the five-day rule proposed by the Secretariat. Taking into consideration the tightness of DSU time-frames and the difficulties this might pose for compliance panels and the Secretariat, Saint Lucia was also aware of its capacity constraints and the challenges facing small missions, especially those which were nonresident.

106. The representative of Malaysia said that his country wished to be fully associated with previous speakers and believed that the Secretariat had overstepped its authority by issuing a legal advisory note. In Malaysia's view only Members could make the rules. Chairmen could make a statements, but Members were not bound by the Chairman's statements and it was inappropriate for the Secretariat to indicate that this could constitute customary binding law.

107. The representative of the European Communities said that he did not understand all the commotion about the legal note. It was legal advice that Members could decide to follow or not. He said that the EC was rather open on the issue under consideration. There was a need for a time-frame for notification of third-party interest because this had an impact on the composition of the panel. The 10-day period was being applied and now there was a question as to whether this period could be reduced in some cases to five days. His delegation did not have a position on this issue and was open. Since many delegations had difficulties with such a reduction, the 10-day period should be preserved.

108. The representative of Chile said that his delegation had examined the Secretariat's note in a different spirit and believed that there was a need to have a practical solution to the issue at hand. He noted that many delegations had stated that the legal analysis of the Secretariat were erroneous. The Secretariat's note indicated that the practice in this regard had been agreed in June 1994 by the Council and that it had been followed up to now in virtually all cases. He believed that it would be reasonable to maintain this practice. He hoped that this discussion would not have any effect on the substance concerning the 10-day period because there was a need to have an established time-period. Any problems that might arise could be dealt with on a case-by-case basis. This practice should be maintained unless Members decided otherwise. His delegation was ready to discuss this issue. He noted that Hong Kong, China had stated that it was questionable that a binding customary practice had developed since only a few cases had been involved and a few Members had participated in those

[4] Panel Report on "European Communities – Regime for the Importation, Sale and Distribution of Bananas", WT/DS27/ECU, para. 7.32.

[5] Appellate Body Report on "United States – Import Measures on Certain Products from the European Communities", WT/DS165/AB/R, para. 92.

cases. Hong Kong, China had further stated that in the case of Namibia, as referred to in the Secretariat's note, a collective body had taken a decision. In Chile's view, when the Chairman was inviting Members to reserve the third-party rights within the next 10 days, the DSB was accepting the rule of 10 days regardless of whether countries expressed an interest within that 10-day period or not. This was acceptable for all Members and constituted valid rules. Hong Kong, China had also referred to Article XVI:1 of the WTO Agreement and had highlighted the use of the word "guided". He noted that in Spanish this term was "se regirá" which was stronger than "guided".

109. The Chairman said that in the light of the discussion it would seem inappropriate to suggest to apply a five-day notification period in all Article 21.5 compliance cases other than in the case of panels relating exclusively to prohibited subsidies matters. There had been no consistent practice applied in this regard. He therefore wished to make the following suggestions. First, the general 10-day notification period should remain as the norm. Second, with cases exclusively involving Article 4 of the SCM Agreement on prohibited subsidies, Members had accepted to modify the 10-day period to five days. Therefore, Members should continue to take this practice into account in future cases solely involving Article 4 of the SCM Agreement. He also wished to comment on the status of the note prepared by the Secretariat. It was clear that the note was not more than a background paper and had no formal status. That was why it had been circulated as a job number. The note provided background material which had been advanced by the Secretariat with the intention of putting it forward in a positive spirit and delegations did not have to agree with its content. The purpose of the note was to contribute to the dialogue and debate on this matter.

110. The representative of the United States sought clarification with respect to the suggestions made by the Chairman. It was his understanding that the Chairman was suggesting to continue to follow the past practice in terms of making a statement whenever a panel was established and that such a statement would be the customary one about indications of third-party interest in writing as opposed to some other more formal suggestion that the DSB would have to take.

111. The Chairman confirmed that this was the essence of the suggestions that he had made. The practice followed by Members in relation to the 10-day rule and the five-day rule would continue to be followed.

112. The representative of Bulgaria said that it was his country's understanding that the Chairman had made a suggestion but that no decision was required on this matter. He wished to know whether his understanding was correct that the term "practice" in the Chairman's statement was without prejudice as to whether this constituted binding customary practice.

113. The Chairman said that he believed that he had used his words very carefully in terms of the positions of delegations. He had only suggested that Members would continue to take this practice into account in future cases solely involving Article 4 of the SCM Agreement.

114. The representative of Hong Kong, China said that he supported the statement made by the Chairman but in the minutes of the meeting there should be no indication that the DSB had decided on this matter. It was not up to the DSB to decide on this matter. His delegation noted the Chairman's statement with regard to the approach to be taken in future cases and would work on that basis.

115. The DSB took note of the statements.

9. Statement by Canada on its implementation of the DSB's recommendations in the case on "Canada – Certain Measures Affecting the Automotive Industry"

116. The representative of Canada, speaking under "Other Business", said that he wished to inform Members that Canada had fully complied with the DSB's recommendations and rulings in the case on "Canada – Certain Measures Affecting the Automotive Industry". He recalled that on 17 September 2000, Canada had repealed the auto pact's production-to-sales ratio requirement, as recommended by the panel. On 4 October 2000, an arbitrator had determined that Canada had to implement the remaining elements of the DSB's recommendations and rulings by 19 February 2001. He said that Canada had met that deadline. On 18 February 2001, Canada had repealed the remaining auto pact measures, namely: the motor vehicle tariff order (1998) and the special remission orders. Canada would be pleased to provide copies of its implementing measures to any Member.

117. The representative of Japan said that his country had hoped that Canada would eliminate all import tariffs on automobiles. Nevertheless, Japan was glad that Canada had fully complied with the recommendations within the time-limit set by the DSB.

118. The DSB took note of the statements.

10. Remuneration of Appellate Body members

(a) Statement by the Chairman

119. The Chairman, speaking under "Other Business", recalled that in the decision approved by the DSB on 10 February 1995, the question of the conditions of employment of members of the Appellate Body had been covered and the 10 February 1995 text included a reference to determining whether a move to full-time employment was warranted. It seemed appropriate for this matter to be raised in the context of new appointments to the Appellate Body. If a decision on this happened to be made in the course of the appointment process, it could potentially be applied to new members and the option could be put to existing members of the Appellate Body. He recalled that, at the time of the last set of interviews for the Appellate Body, the point had been made to applicants that the positions were very close to full time. He had since obtained from the Secretariat figures indicating that, in practice, it had become very close to a full-time job. Time records shown that, based on an eight-hour working day, four of the Appellate Body members in the year 2000 had worked more than 100 per cent full time, based on a 12-month work year of 220 working days. These four figures ranged from 104 per cent to 117 per cent. This raised the question of whether the DSB should discuss moving Appellate Body members from their existing part-time employment situation – which involved retainers, travel expenses, per diems and communication costs, for example – to a full-time employment basis involving a salary and a pension scheme. He fully appreciated that there were other options which could also be considered, including the expansion of the size of the Appellate Body. Advice that he had received from the Secretariat suggested that enlargement of the Appellate Body would require an amendment to the DSU. However, he had been advised by the Secretariat that there was no barrier in Article 17.8 of the DSU to moving to full-time employment. It would seem that the language did not limit employment to part time. In the light of paragraph 11 of document WT/DSB/1 concerning the establishment of the Appellate Body, it would seem appropriate for this matter to be discussed initially in the DSB, any change to full-time terms would need to be decided by the General Council assuming the functions of the Ministerial Conference. Because of the budgetary consequences, there would be a need for a consequential recommendation from the Committee on Budget, Finance and Administration. He stressed that he was not suggesting that a decision on full-time employment, or on enlargement of the Appellate Body, should necessarily be driven by budget considerations. However, it might nonetheless be useful to convey the fact that, according to a careful 10-year simulation done by the Secretariat, the cost of moving to salary plus pension would be budget-neutral, compared with the existing part-time remuneration package. In fact it seemed that there could indeed be savings. In addition, the Secretariat had done a simulation looking at enlargement of the Appellate

Body and its conclusion was that, although enlargement could make it possible for members of the Appellate Body to treat the job as a less than full-time occupation, increasing the number of members would in all cases add to the expense of the Appellate Body's operation. He was making this statement to provide at least some initial background to the question so as to enable delegations at a subsequent meeting of the DSB to air views on the subject. This should in turn allow Members to consider whether the full-time issue was one which might be resolved in parallel with the new appointments or whether it was a matter for longer-term consideration.

120. The representative of Norway said that the last point referred to by the Chairman was very important because, as the previous selection process had demonstrated, this information was of crucial importance for some candidates. Therefore, it would be very useful to clarify this issue prior to the new selection process. He proposed that consultations on this matter should be held before the next meeting of the DSB.

121. The representative of Japan said that his country was always in favour of expanding the size of the Appellate Body in order to meet the increasing demand. However, this was not only a question of budget but a question of how to ensure the high quality of the Appellate Body. In order to consider the merits of transforming the Appellate Body into a more permanent structure it was necessary to reflect on whether a full-time or a part-time job would make it easier to secure high quality candidates.

122. The DSB took note of the statements.