WORLD TRADE ORGANIZATION

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Dispute Settlement Body
18 November 1997

MINUTES OF MEETING

Held in the Centre William Rappard
18 November 1997

Chairman: Mr. Wade Armstrong (New Zealand)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB
- Japan - Taxes on alcoholic beverages: Status report by Japan (WT/DS8/18/Add.2, WT/DS10/18/Add.2, WT/DS11/16/Add.2)

The Chairman said that under Article 21.6 of the DSU, "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 drew attention to document WT/DS8/18/Add.2 - WT/DS10/18/Add.2 - WT/DS11/16/Add.2, which contained the third status report by Japan with regard to its progress in the implementation of the DSB's recommendations.

The representative of Japan said that pursuant to Article 21.6 of the DSU, his Government had the obligation to inform the DSB of progress in the implementation of the DSB's recommendations on this matter. Japan continued examination of possible and practical responses in order to find a mutually acceptable solution with other parties to this dispute regarding the modalities for the implementation of the DSB's recommendations. To this end, his country would continue discussions with the parties to the dispute.

The representative of Canada expressed regret that Japan had not announced that it would adhere to the 15 months found by the arbitrator to be a reasonable period of time for the implementation of the DSB's recommendations. Canada's preference remained that Japan take the necessary steps to bring its internal tax system on distilled spirits into conformity with the findings of the panel and the Appellate Body. He therefore urged Japan to take all necessary steps to implement the DSB's recommendations within the specified 15-month period.

The representative of the United States expressed her country's concern with regard to Japan's status report. She noted that it was now three months before the date set by the arbitrator for the expiration of the reasonable period of time. However under the existing Japanese law, the implementation of the DSB's recommendations would not be terminated until 2001. Therefore, Japan would be the first Member to have failed to implement the DSB's recommendations before the end of the reasonable period of time. It would also be the first Member to trigger the application of Article 22.2 of the DSU. A number of times over the past months, the United States had held consultations with Japan on this matter. It was regrettable that Japan did not appear to appreciate the seriousness of the situation.

She recalled that Japan had drawn up the proposal for implementing legislation in November and December 1996. Subsequently, in February 1997, the arbitrator had ruled on the time-period for implementation.[1] In spite of this decision, Japan had enacted its proposal unchanged. Given the current situation, now was Japan's last chance to avoid missing the deadline. January would be too

[1]Award of the Arbitrator is contained in document WT/DS8/15 - WT/DS10/15 - WT/DS11/13.

late. The United States hoped that Japan would avoid being the first Member to face retaliation authorized under the dispute settlement mechanism by taking a fresh approach resulting from a change in attitude.

The representative of Japan said that he was uncertain what the United States had meant by stating that January would be too late. In his view, January 1998 was not too late in terms of the 15-month deadline set by the arbitrator. Over the past several months, his country had been sincerely engaged in bilateral consultations with the United States and he hoped that in the next few weeks it would be possible to find a mutually satisfactory solution. This would enable the incorporation of any eventual agreement into Japan's new tax system for submission to the Parliament in the beginning of 1998. With regard to the statement made by Canada, he said that Japan had repeatedly expressed its readiness to enter into bilateral consultations with Canada on this matter. In the past week his Government had made some specific offers and he hoped that this would also lead to a mutually satisfactory solution with Canada.

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

2. Chile - Taxes on alcoholic beverages
   - Request for the establishment of a panel by the European Communities (WT/DS87/5)

The Chairman recalled that the DSB had considered this matter at its meeting on 16 October and had agreed to revert to it. He drew attention to the communication from the European Communities contained in WT/DS87/5.

The representative of the European Communities said that this was the second time that the Communities' request for a panel was on the DSB's agenda. Prior to the present meeting, he had received a text of the law which had been enacted by the Chilean Congress but had had no time to examine it. In his understanding, consultations on this law held by the Communities with Chile had not been fully satisfactory. Since the Communities believed that it was not possible to find a satisfactory solution at this stage, they wished to maintain their request. Following Chile's formal notification of this new legislation, the Communities, after its examination would inform Chile of their intentions concerning this matter.

The representative of Chile recalled that at the October DSB meeting, his delegation had stated that the Chilean Chamber of Deputies had approved a draft law amending the tax system on alcoholic beverages which had been the subject of the Communities' request for consultations. Subsequently, this draft law had been approved by the Senate and had been published in the Official Journal of Chile on 18 November 1997. He underlined that this draft law had never been discussed during the consultations held with the Communities.

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

The representatives of Canada, Mexico, Peru and the United States reserved their third-party rights to participate in the Panel proceedings.

The representative of Chile regretted the DSB's decision to establish a panel at the present meeting, but understood that the DSB had to observe the DSU procedures.

The representative of Peru said that in view of the fact that his country had a substantial trade interest in this matter his delegation wished to participate in this Panel as a third party. He recalled that Peru had also participated in the consultations held on this matter. With the establishment of this panel at the present meeting, the question of alcoholic beverages in Chile, in particular the so-called "Pisco chileno" would be considered for the first time in the WTO. Since the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) would only enter into force in Chile and Peru in the year 2000, his delegation wished to reserve its right to invoke Article 22.1 of the TRIPS Agreement and other provisions related thereto. Peru believed that the denomination of origin of Pisco was exclusively Peruvian and as such gave his country exclusive rights.

The representative of Chile pointed out that the issues concerning the TRIPS Agreement had never been addressed in the consultations requested by the Communities, nor had they been mentioned in the request for a panel. Chile reserved its right to decide how and when these issues would be addressed.

The DSB took note of the statements.

3. India - Quantitative restrictions on imports of agricultural, textile and industrial products
   - Request for the establishment of a panel by the United States (WT/DS90/8 and Corr.1)

The Chairman recalled that the DSB had considered this matter at its meeting on 16 October and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS90/8 and Corr.1.

The representative of the United States said that her country had held several consultations with India with regard to the balance-of-payments measures which in the view of the United States were unjustified. Because its efforts had not produced any solution, the United States requested the establishment of a panel to examine India's system of quantitative restrictions and non-automatic import licensing on more than 2,700 tariff lines. By quantitative restrictions, the United States addressed all import prohibitions, bans, restrictions, import licenses, special import licenses and the prohibition of non-commercial (sample) quantities as well as the procedures to implement and to administer these measures. The United States believed that India's system which had been in place since the late 1940's, continued to unfairly deny its trading partners access to India's market and to unjustifiably shield Indian industry from competition. Her country considered that India's quantitative restrictions on the items in question were inconsistent with its obligations under Articles XI:1 and XVIII:11 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. The United States also believed that India's import licensing procedures and practices were inconsistent with the fundamental requirements of the WTO provided under Article XIII of GATT 1994 and Article 3 of the Agreement on Import Licensing Procedures.

For more than 18 months -- beginning in November 1995 -- this matter had been discussed in the Committee on Balance-of-Payments Restrictions (BOP Committee). Both the BOP Committee and the International Monetary Found (IMF) had concluded that India did not have a balance-of-payments crisis and thus the use of trade measures justified on balance-of-payments grounds was not warranted. At the end of June, the BOP Committee process had concluded without a satisfactory solution as to the phase-out of India's measures. The United States had hoped that this matter would be resolved in the BOP Committee. The United States which had high regard for its relations with India was reluctant to make this request for the establishment of a panel and her delegation continued to consult with the Indian delegation. She hoped that it would be possible to resolve this matter on a mutually agreeable basis. However, since this matter remained unresolved, the United States

requested the establishment of a panel and looked forward to continued consultations with India in an effort to resolve this matter.

The representative of India recognized that since the US request had been made for the second time the panel would be established automatically at the present meeting in accordance with the DSU provisions. At the October DSB meeting, his delegation had stated that India did not believe in procedural trifling. However, as consultations had appeared to be at a promising stage it had believed that some more time might be necessary to deal with this matter. He noted that the United States had reiterated its request for a panel and India had no objection with regard to this request. However, he wished to raise two points in connection with this matter. First, the United States had mentioned that India's restrictions had been in place since the 1940's, information which was factually incorrect. Second, the United States had also mentioned that the BOP Committee had concluded that India did not have balance-of-payments problems. In his view the BOP had not reached such a conclusion because there had been a divergence of views on this matter. He recalled that the BOP Committee had submitted a factual report[2] to the General Council concerning its consultations with India which reflected different views as required under the relevant WTO provisions. India accepted the United States' request and his delegation was aware that the DSB had to establish a panel at the present meeting in accordance with the DSU provisions. He noted that the United States had indicated that in parallel with the proceedings of the panel it was willing to continue its consultations with India with a view to finding a mutually agreed solution.

The representative of the European Communities said that in the past week, the Communities had reached a settlement with India with regard to the latter's quantitative restrictions on agricultural, textile and industrial products which had been introduced for balance-of-payments purposes. Following their request for consultations, the Communities had held negotiations with India on the elimination of restrictions. These negotiations had resulted in a significant and satisfactory improvement in the liberalization schedule. This schedule covered a six-year period with front-loading of the Communities' priority products. It constituted the basis of an exchange of letters between the Communities and India for the settlement of the dispute concerning India's quantitative restrictions. This exchange of letters would be notified to the Secretariat. In his delegation's understanding, other Members which had requested consultations on this matter had also reached settlements with India, preventing the pursuit of the dispute to a panel stage. The Communities welcomed this outcome and hoped that discussions between India and the United States would enable them to reach an amicable settlement without further pursuing this dispute.

The representative of Brazil said that as had been indicated by India, there had been a divergence of views in the BOP Committee on this matter, and no conclusions had been reached.

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.

4. Japan - Measures affecting agricultural products
   - Request for the establishment of a panel by the United States (WT/DS76/2)

The Chairman said that the DSB had considered this matter at its meeting on 16 October and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS76/2.

[2]WT/BOP/R/32.

The representative of the United States said that her country requested the establishment of a panel to examine whether the import prohibition on fruits and varietal testing requirements maintained by Japan were inconsistent with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the GATT 1994 and the Agreement on Agriculture. For each agricultural product for which Japan required quarantine treatment, the importation of each variety of that product was prohibited until the quarantine treatment had been tested for that variety, even though the pest was the same and the treatment had proven effective with respect to other varieties of the same fruit. This extra and excessive testing served as a significant barrier to market access. Japan had not produced any scientific evidence that the effectiveness of the quarantine treatment differed by variety. In addition, Japan's import prohibition and absence of published regulations for approval of imports of fruits lacked transparency. The United States had sincerely hoped that it could resolve this matter without requesting a panel, but Japan had not been forthcoming in addressing this unfair barrier or in providing meaningful access for the commodities in question.

The representative of Japan said that his country had actively sought a solution to this dispute through consultations. Unfortunately, the United States had not responded positively to Japan's efforts. After the first round of consultations held in June 1997, Japan had asked the United States, *inter alia*, for specific legal reasons and basis for its request for consultations. The United States had not responded to Japan's enquiry and had requested the establishment of a panel which included a new element, namely Article 7 of the SPS Agreement which had not appeared in the request for consultations. After the United States had made its first request for a panel at the DSB meeting in October, Japan had tried to settle this matter in consultations. However, the United States had cancelled the second round of consultations on the grounds that such consultations would be meaningless unless Japan's offers met the United States' request.

Japan had proposed further consultations, but the United States had imposed a precondition for holding such consultations. In Japan's view, the United States' approach was neither reasonable, nor constructive. Bilateral consultations, required to be held prior to the establishment of a panel would lose their function and meaning by this approach. The US attitude was not consistent with the objectives and spirit of the DSU, namely that Members should try to reach in good faith a mutually acceptable solution to disputes through consultations. Japan therefore found this situation regrettable. It recognized that a panel would be established at the present meeting in accordance with Article 6.1 of the DSU. However, Japan believed that the measures in question were consistent with the relevant WTO provisions, including the SPS Agreement, and it intended to fully present its views before the panel. He stressed that Japan was still prepared to hold consultations and hoped that this matter could be settled through consultations.

Japan would accept the standard terms of reference for the panel, provided that the United States gave clear confirmation with regard to the following points: (i) the measures to be examined by the panel would be the requirements for additional testing on additional varieties of fruits upon importation, as specified in the US request for a panel. These measures would be limited to apples, nectarines and cherries. In its request for a panel, the United States had referred to Japan's measures on the importation of agricultural products in a general manner. However, during the consultations, it had only addressed the measures with regard to these three products; (ii) in accordance with Article 6.2 of the DSU, the panel should only discuss the articles of the relevant WTO agreements that had been specifically listed and identified in the request for the establishment of a panel. Therefore, the last sentence of the second paragraph in the US request should be revised to read as: "The provisions ... are the following", instead of "... include, but not limited to". If the United States did not agree with the above-mentioned points, Japan would request consultations on the terms of reference of the panel pursuant to Article 7.1 of the DSU.

The representative of the United States said that her delegation could not agree to the attempt by Japan to unilaterally reduce the scope of the US request for a panel. Under Article 7 of the DSU, Japan had the right to seek agreement with the United States on special terms of reference but her country also had the right to insist on standard terms of reference.

The representative of Japan reiterated that his delegation could not accept standard terms of reference for the reasons stated above, in particular with regard to the two points. He therefore requested consultations with the United States to seek agreement on the terms of reference for the panel within the next 20 days in accordance with Article 7.1 of the DSU. He believed that not only his delegation but also some other delegations had a similar problem regarding the terms of reference proposed by the United States. He expressed concern that often terms of reference were broad, instead of listing laws, regulations or measures. There was also a tendency to include the wording "but not limited to" which in practice meant that the United States could introduce other additional elements. In his view, this was a serious problem affecting the functioning of the dispute settlement mechanism. Japan had already presented its arguments with regard to this procedural matter in another dispute, currently under examination by a panel, and he hoped that a sound ruling on this matter would be given by that panel and that this practice would not be repeated in future.

The Chairman proposed to invite the parties to the dispute to consult on the terms of reference for the panel in accordance with Article 7.1 of the DSU.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU. The DSB also agreed that as proposed by the Chairman, the parties to the dispute consult on the terms of reference for the Panel in accordance with Article 7.1 of the DSU.

The representatives of the European Communities and Hungary reserved their third-party rights to participate in the Panel proceedings.[3]

5. United States - Imposition of anti-dumping duties on imports of colour television receivers from Korea.
   - Request for the establishment of a panel by Korea (WT/DS89/7)

The Chairman drew attention to the communication from Korea contained in WT/DS89/7.

The representative of Korea recalled that on 30 April 1984, the United States had imposed anti-dumping duties on colour television receivers (CTVs) from Korea. Samsung Electronics Co. Ltd. was one of the Korean producers affected by this anti-dumping duty order which still remained in force. Since then, the United States had determined that Samsung Electronics had not sold CTVs in the United States at dumped prices from 1 April 1985 to 31 March 1991. Since 1 April 1991, the Korean company had ceased to export CTVs to the United States. Thus, the United States had maintained the anti-dumping duty order on CTVs with respect to Samsung Electronics for the past twelve years, despite the absence of dumping and the absence of exports. The United States had never examined whether the continued imposition of the duty was necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Based on its history of no dumping through four separate administrative review requests, the Korean company had repeatedly requested the revocation of measures. But these requests had been rejected on procedural rather than substantive grounds. Most recently, Samsung had requested revocation on 20 July 1995. The United States had eventually decided to initiate a review on 24 June 1996.

[3]After the meeting Brazil reserved its third-party rights.

However, a preliminary decision for revocation had still not been taken. Before initiating this review, the United States had initiated an anti-circumvention investigation on 19 January 1996, only five months after receiving a petition by several labour unions. No determination in this anti-circumvention investigation had yet been made while the United States took a position that the review determination had to await the outcome of the anti-circumvention investigation. All these actions or inactions by the United States were inconsistent with its obligations under the GATT 1994 and the Anti-Dumping Agreement and thus nullified or impaired Korea's benefits under these Agreements. On 10 July 1997, Korea had requested consultations with the United States on this matter. Two rounds of consultations had been held on 7 August and 8 October 1997, but no mutually satisfactory solution had been found. Korea, therefore, requested the establishment of a panel with standard terms of reference to examine this matter in accordance with Article 6.1 of the DSU.

The representative of the United States said that her country was not in a position to consent to the establishment of a panel at the present meeting. However she wished to make a few comments regarding Korea's request for a panel. Although the United States did not agree with many points raised by this request for a panel, it would not address each and every point at this stage, but would stress the concerns raised by this request. First, the United States believed that Korea's request for the establishment of a panel was premature. The US agency proceedings challenged by Korea had not even reached the preliminary stage of decision by the United States. While these proceedings were in progress, no anti-dumping duties were being collected on imports of Samsung's CTVs into the United States from Korea, Mexico or Thailand. Therefore, it was regrettable, that Korea had chosen to burden the dispute settlement system with this matter at this early stage. Korea had not exhausted administrative remedies and the case was not ripe for a panel. Second, as with most legal proceedings, the facts of this dispute were complicated. However, the United States was concerned about Korea's presentation of the facts of this case. Therefore, at the present meeting her delegation wished to ensure that Members were fully apprised of the relevant facts.

Her delegation was concerned that Korea's panel request suggested that the United States had inappropriately maintained the anti-dumping duty order with respect to Samsung long after the company should have been eligible for revocation. This was misleading. The United States had not delayed a proper review for revocation for Samsung. The fact of the matter was that the primary causes of delay had been: (i) the lengthy litigation in this case, which had been pursued by Samsung and had been resolved favourably for Samsung; and (ii) Samsung's failure to follow the most basic procedural standards for revocation. Due to the lengthy litigation and appeals in this case, Samsung's potential eligibility for revocation had only become evident to the US Department of Commerce after the resolution of that litigation and the application of court decisions in December 1995. Moreover, because Samsung had failed to follow the most basic procedures established by the US law to obtain revocation of the order, the US Department of Commerce had not been able to consider revocation in the context of its annual administrative reviews conducted in 1995. Instead, despite Samsung's failure to follow minimal procedures established in US law to preserve the rights of all parties, the US Department of Commerce had taken the unusual step of initiating a special review for Samsung to ensure that the issue of revocation had been properly considered and addressed. Thus, the United States was presently conducting a proceeding to address the very issue that Korea raised with its panel request at the present meeting. Furthermore, the United States fundamentally disagreed with Korea on whether anti-circumvention determinations were appropriate and permissable under the WTO Agreement. The GATT 1994 and the Anti-Dumping Agreement recognized the right of all Members to impose anti-dumping duties to counteract dumping. The authority to address circumvention of an anti-dumping duty order was integral to each Members' ability to enforce its right to counteract dumping. It was imperative that the authority to impose duties include the ability to enforce orders -- otherwise that authority would be meaningless.

The representative of Thailand said that her country had participated in the consultations requested by Korea with the United States since part of the US action was the initiation of the

anti-circumvention investigation on the same product exported by Thailand. During the consultations, her country had raised its concerns with respect to the US action. The United States had indicated that it would be in a position to announce the outcome of the investigation by the end of October 1997. However, the absence of such an announcement had caused uncertainties to Thai exporters. The Decision on Anti-Circumvention had recognized that the negotiations on this matter during the Uruguay Round had not been successful and had referred the matter to the Committee on Anti-Dumping Practices for resolution. This matter was presently under consideration in the Informal Group on Anti-Circumvention. This meant that at present no multilateral rules existed which applied to alleged anti-dumping circumvention. Therefore, Members could not take such an action. Thailand wished to reserve its third-party rights to participate in a panel, if and when established, and to pursue the matter further in the DSB if the United States decided to take anti-circumvention action.

The representative of Mexico said that her country had an interest in this matter. Mexico had participated in the consultations and would continue to follow closely developments concerning this matter.

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

6. United States - Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above from Korea
   - Request for the establishment of a panel by Korea (WT/DS99/2)

The Chairman drew attention to the communication from Korea contained in document WT/DS99/2.

The representative of Korea said that on 16 July 1997, the United States had made a final decision not to revoke the anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above originating in Korea. His country believed that the US decision and other measures at issue were inconsistent with the United States' obligations under the WTO agreements, in particular the GATT 1994 and the Anti-Dumping Agreement, and thus nullified or impaired Korea's benefits under these agreements. On 14 August 1997, Korea had requested consultations with the United States on this matter. The consultations had been held on 9 October 1997, but had failed to settle the matter in a mutually satisfactory manner. There had been no indications to suggest that further consultations would be productive. Therefore, Korea requested that a panel with standard terms of reference be established to examine this matter.

The representative of the United States said that her country was not in a position to consent to the establishment of a panel at the present meeting. However, she wished to make a few comments regarding Korea's request for a panel. First, the United States was concerned that Korea's request did not comply with the requirements under Article 6.2 of the DSU. For example, Korea had identified as one of the measures at issue "the US Tariff Act of 1930, as amended (19 U.S.C. 1673 et seq.)". Since this reference encompassed the entire US anti-dumping law, the United States was not in a position to determine which particular section or sub-section of that law in the view of Korea was inconsistent with the GATT 1994 or the Anti-Dumping Agreement. Should a panel be established based on this request, the United States intended to bring these defects to the attention of the panel.

Second, Korea appeared to be making claims that were not related to the anti-dumping order on DRAMS from Korea. For example, it claimed that de minimis standard used by the United States in administrative review proceedings was inconsistent with Article 5.8 of the Anti-Dumping Agreement. While the United States disagreed with Korea's contention, she noted that the standard applied by the US Department of Commerce had resulted in a finding that the Korean producers had

de minimis dumping margins. Therefore, Korea was not affected. In so far as the anti-dumping order on DRAMS was concerned, the WTO consistency of the US de minimis standard was a "moot" issue. Thus, Korea regrettably appeared to have chosen to burden the dispute settlement system with an issue that was not relevant to the dispute over the continued existence of the US anti-dumping order on DRAMS from Korea.

The representative of Japan recalled the discussion on the terms of reference for the panel under item 4 of the agenda. The United States had raised its concerns with regard to the broad terms of reference specified by Korea in its request for a panel. In particular, the United States believed that this request did not contain specific references as to which sections of law or which measures created problems. Similar concerns had often been raised by Japan on other occasions. He noted certain inconsistency regarding specification of terms of reference. In other words, when a country was the complainant it presented terms of reference which were very general and when on the defence, the same country insisted on specific terms of reference. In his view this should be considered during the review of the DSU or it should be decided by the Panel or the Appellate Body.

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

7. European Communities - Measures affecting butter products
   - Request for the establishment of a panel by New Zealand (WT/DS72/2)

The Chairman drew attention to the communication from New Zealand contained in document WT/DS72/2.

The representative of New Zealand said that the EC Commission had decided that New Zealand butter manufactured by the Ammix and spreadable butter-making processes was not "manufactured directly from milk or cream" and had excluded such butter from eligibility for entry into the European Communities under New Zealand's country-specific tariff quota established by the EC's Schedule. New Zealand considered that as a result of their decision, the Communities had nullified or impaired benefits accruing to New Zealand within the meaning of Article XXIII:1(a) of GATT 1994, by failing to carry out their obligations under the GATT 1994, the Agreement on Technical Barriers to Trade, and the Agreement on Import Licensing Procedures. New Zealand also considered that these decisions and related actions had otherwise nullified or impaired benefits accruing to New Zealand directly or indirectly under the WTO Agreement pursuant to Article XXIII:1(b) of GATT 1994. In a communication dated 3 April 1997 contained in WT/DS72/1, New Zealand had requested consultations with the Communities pursuant to Article XXII:1 of GATT 1994 and related provisions in other relevant covered agreements. Consultations had been held on 29 April 1997 but had not resulted in a resolution of the dispute. He emphasized that since his Government had become aware of the Communities' decision in 1996, there had been extensive bilateral consultations, including a dialogue between New Zealand and the EC Ministers, in an effort to resolve the dispute in a cooperative manner that was a traditional feature of its trading relationship with the Communities. Unfortunately, this had not resolved the dispute either. Accordingly, as outlined in its request, New Zealand requested the establishment of a panel with the standard terms of reference as set out in Article 7 of the DSU.

The representative of the European Communities said that in the view of the Communities this request concerned technical matters. He recalled the discussion under the previous item of the agenda with regard to the specificity of the terms of reference for panels. In this case, annexes described the Ammix butter-making process and the spreadable butter-making process. The Communities regretted that during tariff negotiations and in the process of granting tariff concessions frequently the Communities had one view about what should be covered and their partners had another. He noted that New Zealand had invoked both Article XXIII:1(a) and XXIII:1(b) of GATT

1994 which was a policy to insure that, whether the Communities were in violation with the WTO or not, New Zealand would have a case. The Communities accepted the establishment of a panel at the present meeting since in practice no other solution to this problem was possible.

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

The representative of the United States reserved her Government's third-party rights to participate in the Panel proceedings.

8. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/65 and 67)

The Chairman drew attention to documents WT/DSB/W/65 and 67 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in the above-mentioned documents.

The DSB so agreed.

The Chairman said that the Secretariat had been expected to circulate an updated list of governmental and non-governmental panelists at the end of September 1997, on the basis of updated curricula vitae to be submitted by delegations. Due to a delay in the submission of such updated curricula vitae, the Secretariat had not been able to circulate on time an update of the list of panelists, and at this stage a number of delegations had not yet submitted updated curricula vitae of panelists. The Secretariat had therefore circulated a preliminary update of the list of panelists in documents WT/DSB/W/66 and Add.1 He urged delegations which had not yet sent updated curricula vitae to do so by 1 December 1997. After that deadline, the Secretariat would circulate the final version of the updated list of panelists. The names for which updated curricula vitae had not been submitted by 1 December 1997 would not appear in the list.

The DSB took note of this information.

9. Adoption of the 1997 Draft Annual Report of the DSB (WT/DSB/W/64 and Corr.1)

The Chairman said that in pursuance of the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO contained in document WT/L/105, he was submitting for adoption a draft text of the 1997 Annual Report of the DSB in document WT/DSB/W/64 and Corr.1. This report covered the work of the DSB since 20 November 1996. It had been prepared in accordance with the structure of the 1996 Annual Report. He proposed that following its adoption, the Secretariat be authorized to update the Annual Report under its own responsibility in order to include the actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would then be circulated on 28 November and submitted for consideration by the General Council at its meeting on 10 December. In his view this document constituted a very useful compendium of information.

The DSB adopted its Annual Report contained in WT/DSB/W/64 and Corr.1 on the understanding that it would be further updated by the Secretariat as proposed by the Chairman.[4]

10. European Communities - Import regime for the importation, sale and distribution of bananas - Period of time for the implementation of the DSB's recommendations

The representative of the European Communities, speaking under "Other Business", raised the question of the reasonable period of time to be agreed upon for the implementation by the Communities of the DSB's recommendations. Originally, he had intended to inform the DSB that no agreement had been reached on this issue in discussions with the parties to the dispute. However, the day before the meeting, the Communities had received a joint letter from Ecuador, Guatemala, Honduras, Mexico and the United States[5] in which they had stated that they had felt compelled to request that a reasonable period of time be determined through binding arbitration. He had no objections to the procedures invoked by the complainants since this option was provided under Article 21.3(c) of the DSU. He was surprised by this letter because after several discussions and exchanges with the parties to the dispute, it was his impression that there had been no disagreement about the period of time required by the Communities. Since new regulations usually entered into force on 1 January, the Communities had asked for 15 months plus one week for the DSB's recommendations to be implemented by 1 January 1999. He believed that the time period proposed by the Communities had not been contested. The Communities had explained in considerable detail the process and procedures required internally in the Council of Ministers and in the European Parliament, which made it clear that this period of time would be necessary in order to amend their banana import regime. It was therefore surprising that despite the fact that there had been no disagreement on the period of time, the complainants had taken recourse to arbitration. He questioned what would be the subject of arbitration. He believed that what lay behind this request was a semantic discussion which concerned whether the Communities had stated their intentions with regard to implementation of the DSB's recommendations within the meaning of Article 21.3 of the DSU or whether in slightly different terms used by the Communities which amounted to the same thing. In his view, this should not lead to any delay by asking the arbitrator to consider a subject on which there was no disagreement. He therefore clarified that there was no disagreement with regard to the period of time proposed by the Communities, but on another matter which did not require arbitration pursuant to Article 21.3(c) of the DSU. At this stage, he was not in a position to state that the Communities could accept this procedure. He wished to have the possibility to further consider and discuss this matter with the complainants since it appeared that their course of action would be futile.

The DSB took note of the statement.

11. European Communities - Import Regime for the importation, sales and distribution of bananas - Statement by the European Communities concerning Panama's request for consultations

The representative of the European Communities, speaking under "Other Business", drew attention to the request for consultations by Panama concerning the European Communities' banana

[4]Subsequently circulated in WT/DSB/10 and Corr.1.

[5]Subsequently circulated in WT/DS27/13.

import regime.[6] The subject of consultations appeared to be identical to that already examined by the panel and the Appellate Body.[7] The Communities accepted Panama's request and were now in the process of fixing an acceptable date for holding consultations. However, a large number of other interested parties had asked to be joined in these consultations, including those that had participated in the proceedings of the panel and the Appellate Body. This had not been foreseen in the DSU. Although it was not possible to foresee all innovative initiatives that delegations would take, he believed that this matter raised a systemic issue which had already been apparent in other cases. In his view, this request for consultations would not have created any problems if only Article XXII had been invoked. However, these consultations were also under the DSU procedures and therefore could lead to further stages. The question was, what would happen if Panama requested the establishment of a panel. A new panel would effectively re-open the proceedings of the previous panel and the Appellate Body. One could envisage various solutions to this problem. For example, the matter would remain at the stage of consultations and Panama would be given assurances as to how its interest would be taken into account during the implementation of the findings of the present panel. He only wished to draw attention to this systemic issue and proposed that the Chairman hold informal consultations with interested parties on what would be the best way forward to avoid these systemic difficulties. He believed that all Members would have an interest in avoiding these problems which could raise difficulties.

The representative of India noted that the representative of the Communities recognized the systemic difficulties involved in this matter and hoped that in other similar cases he would also recognize the same difficulties.

The representative of Panama said that his delegation was aware of the Communities' concerns and had noted their comments in that respect. He clarified that Panama had no intention of re-opening this matter through its request for consultations. The reports of the panel and the Appellate Body had been adopted by the DSB and Panama did not wish to modify any decisions contained therein. However, as one of the main suppliers of bananas to the Communities, Panama had to defend its rights and its considerable trade interest in this matter. The Communities had accepted the panel and the Appellate Body reports. Panama, the most recent Member of the WTO, had certain rights regardless of whether or not it had participated in the consultations, the presentation of arguments and the appeals procedure. Panama had not been previously included among the parties to the dispute. Thus, it was not clear that all of the recommendations would be implemented to the advantage of his country. It was also not certain that if Panama did not act independently, it would have the right to request full benefits. Thus, by submitting a request for consultations, Panama had sought to protect its interests as far as possible and thereby to enhance its control over, and its involvement in, this case. Panama was doing nothing more nor less than what the Communities had done in the past when they had requested the establishment of panels to examine the matters already addressed by other panels. He believed that Panama's request for consultations was even more justified and necessary than the Communities' requests. The Communities had decided to participate as a third party in some cases only to discover afterwards that they would have preferred to become complainants and subsequently had tried to rectify this situation. Panama could not participate in the earlier banana proceedings since it was not yet a Member of the WTO. While Panama was aware of the concerns expressed by the Communities, it would vigorously defend its right and the benefits accruing to it under the WTO Agreement. If his country considered that those rights and benefits were being impaired or infringed as a result of measures taken or not taken by the Communities in implementing the recommendations of the panel, Panama would take appropriate steps.

[6]WT/DS105/1.

[7]WT/DS27.

The Chairman recalled that in accordance with the rules of procedure for DSB meetings, the representatives should avoid unduly long debates and discussions on substantive issues under "Other Business". The DSB should limit itself to taking note of the statements made and of any reactions to such statements by other delegations directly concerned. He requested that substantive discussions should be avoided at the present meeting.

The representative of the European Communities said that he wished to make two comments. First, in response to India, he clarified that he had alluded to the fact that systemic difficulties had become obvious over time and had raised some of these problems even at the time when the Communities had requested the establishment of a panel with regard to the case concerning India. His suggestion that there could be other solutions available to both parties also included India's case. In other words, there was no lack of coherence and it would be better for the system if a solution was found which would avoid any risk of a panel re-opening the cases which had already been concluded. Second, he clarified that he was not in any way denying the right of Panama to invoke the DSU provisions. He only wished to draw attention to the systemic problem which could arise but Members had the right to request consultations if they so wished.

The representative of Argentina fully shared the Chairman's concerns and wished to point out that under "Other Business" substantive matters could not be discussed, in particular such as the subject under consideration. At present, the DSU provided Members with rights and obligations which could not be extended nor reduced in their scope. Any systemic problems could be taken up in the context of the DSU review.

The Chairman said that the Communities had made a proposal which in his understanding concerned the question of how Members should proceed when a new dispute settlement procedure was invoked on a dispute on which a panel or the Appellate Body had already reached a decision. The circumstances might differ but in a number of instances this systemic concern had risen. He asked whether it would not be desirable for him to consult on the question of holding informal consultations on the systemic issue raised by the Communities, namely, how to proceed when a new dispute settlement procedure was invoked on a dispute on which a panel and the Appellate Body had already reached a decision. It should be clearly understood that in raising this question with delegations, any such informal consultations would be on the systemic issue and not on any particular case and would not infringe on the rights and obligations of Members. If Members agreed, he would be ready to consult with them to see if there is a consensus in favour of informal consultations on the systemic issue.

The representative of Jamaica said that listening to the discussion he had the impression that he might have had a completely different point of view concerning the rights and obligations of Members with regard to decisions by panels and the Appellate Body. He recalled that Jamaica had indicated that it was not the panel or the Appellate Body but the appropriate body which could amend or change the rules, thereby changing the rights and obligations of Members. The Chairman had proposed that consultations be held on a systemic issue. In his view, no systemic issue had arisen with respect of the right of a Member to raise at any point a matter when it believed that its interests were adversely affected by the action of another Member. He therefore asked the Chairman to reformulate his proposal.

The Chairman proposed to consult with delegations after the meeting on the Communities' proposal, namely that informal consultations be held on the systemic question raised by the Communities as to how to proceed when a new dispute settlement procedure was invoked with regard to a dispute on which a panel or the Appellate Body had already reached a decision. That was his understanding of the issue raised by the Communities and his proposal was that he would simply

onsult with delegations as to whether they would wish the Chairman to hold informal consultations on this issue. He did not seek delegations' reactions at the present meeting.

The representative of Jamaica said that the consultations by the Chairman should also include situations where the implementation of the DSB's recommendations was in progress. It was his understanding that the Communities' proposal concerned the decision that had been taken but had not yet been implemented, and Panama had indicated that it wished to ensure that in the implementation its rights would be preserved.

The Chairman said that before the initiation of any consultations, he would clarify the point raised by the Communities. During his first informal consultations with Members, it would be possible for delegations to clarify with the Chairman their understanding of the issue raised. At this stage, he only sought indication that Members would wish the Chairman to take up this issue.

The representative of Argentina said that over the past two years, Members had acquired certain experience in the application of the DSU in relation not only to the point raised by the Communities but also with regard to other matters, for example the application of Article 6.2 of the DSU. All these matters could be taken up in due time in the context of the review of the DSU. If the informal consultations would address the definition of the issue, Argentina believed that this would be appropriate, otherwise one particular issue should not be considered separately. His delegation was prepared to react to the Chairman's proposal.

The representative of India said that his delegations had no problem with any proposal by the Chairman to hold consultations. He supported the statement by Argentina. At the outset of the meeting, the Chairman had indicated that he would make a statement concerning the review of the DSU. There was a number of systemic issues which had been identified regarding the operation of the DSU. He recalled that India had raised one systemic issue in the past which the Communities had referred to at the present meeting. Another issue related to the question of terms of reference mentioned by the United States and Japan. He thought that it would be useful to consider these issues in a comprehensive manner during the review of the DSU. It might be difficult to isolate and deal with only one issue even though the issue under consideration was of great importance to India. Therefore, India had no objections with regard to the proposal by the Chairman to hold consultations on this matter, but it would be appropriate to consider all the issues in a comprehensive manner during the review of the DSU in 1998.

The representative of Uruguay said that his delegation had no objections with regard to the Chairman's proposal to hold consultations on whether to consult or not on this matter. However, there was a number of systemic issues which should be considered during the DSU review.

The Chairman noted that there was no consensus on the proposal to hold consultations on the matter at hand.

The DSB took note of the statements.

12. Review of the DSU
- Statement by the Chairman

The Chairman, speaking under "Other Business", raised the question of the review of the DSU. He noted that on different occasions several delegations had identified issues which, depending

on the views of Members, might be matters for consideration in the context of that review. He recalled that the Ministerial Decision on the Application and Review of the Understanding on the Rules and Procedures Governing the Settlement of Disputes invited the Ministerial Conference to complete a full review of dispute settlement rules and procedures within four years after entry into force of the WTO Agreement and to "take a decision on the occasion of the first meeting after the completion of the review whether to continue, modify or terminate such dispute settlement rules and procedures". That Decision had indicated that the review should be completed by January 1999 - four years after entry into force of the WTO - with a view to a decision at the subsequent Ministerial Conference which might take place in 1999. There was a number of questions -- procedural in the first instance -- to which the Ministerial Decision gave rise, for example: (i) where the review would be undertaken; (ii) when it might be initiated; (iii) the procedures which might be followed in terms of seeking the view of Members and whether there were any other elements such as the Appellate Body from which inputs should be sought. He believed that it would be timely to initiate consideration of these procedural matters on which it would be helpful to achieve some measure of understanding before embarking next year on the substance of the review. Rather than enter into discussion at the present meeting on these procedural issues, he invited delegations to put forward their views to him which would form a basis for informal consultations with a view to reporting back to the DSB early next year.

The DSB took note of the statement.