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Dispute Settlement Body
27 January 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 January 2000

Chairman: Mr. Kåre Bryn (Norway)

Prior to the adoption of the Agenda, the item concerning the Panel Report on "United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kindgom" was removed from the Agenda as a result of the US decision to appeal the Report. Also the item concerning the proposed nominations for the Indicative List of Governmental and Non-Governmental Panelists was removed from the agenda in order to allow more time for consultations. It was agreed that the item be taken up at the next regular meeting of the DSB.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.4)
(b) United States - Import prohibition of certain shrimp and shrimp products: Status report by the United States (WT/DS58/15/Add.4)
(c) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11)
(d) Korea - Taxes on alcoholic beverages: Status report by Korea (WT/DS75/18-WT/DS84/16)
(e) United States - Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabit or above from Korea: Status report by the United States (WT/DS99/6)

The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations of 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 be considered separately.

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

The Chairman drew attention to document WT/DS27/51/Add.4, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations concerning its banana import regime.

The representative of the European Communities said that, as he had stated at the DSB meeting on 19 November 1999, the EC had now developed a proposal to modify its banana import regime. That proposal comprised a decision to continue discussions with interested parties. These discussions were ongoing and the proposal was now before the EC Council of Ministers. However, thus far, no satisfactory solution that all the parties were willing to accept had been found. Efforts towards finding such a solution continued.

The representative of Costa Rica recalled that, in previous DSB meetings, his country had expressed concerns about certain elements contained in the EC's proposal and, at the present meeting, he wished to reiterate these concerns. Costa Rica urged the EC to comply with the DSB's recommendations and to respect its international obligations.

The representative of Guatemala said that the EC's non-compliance had already gone far beyond the WTO legal limits. The reasonable period of time for implementation with the DSB's recommendations in this case had expired more than a year ago. However, thus far, there was no solution that would be both compatible with WTO rules and would take into account the interests of the parties to the dispute. Guatemala was concerned about this delay. She noted that every day of the EC's non-compliance represented a cost for Guatemala's agriculture. Moreover, such non-compliance undermined the principle of equity. Guatemala urged the EC to meet its WTO commitments as soon as possible in order to put an end to this long-standing dispute.

The representative of Ecuador noted that the EC's status report did not provide sufficient information on the current state of the situation. Ecuador believed that the EC was not doing enough to comply with its obligations. For more than one year, the EC had been delaying its implementation which was legally incorrect. He was concerned that if other Members acted in a similar way as the EC, the multilateral trading system could be undermined. It was his country's understanding that the EC had not changed its position on its new proposal despite the fact that all the interested parties, including the United States, the ACP and Latin American countries, had opposed that proposal. The

EC Commission was now consulting with the interested countries but its intention was to maintain its banana import regime as restrictive as the present one. There was no clear willingness on the part of the EC and its member States to rectify the situation. Furthermore, a transitional period which was excessively long would not lead to a fairer and less discriminatory regime. The transitional period would be longer in place than the present regime, which had entered into force seven years ago. He was concerned that the banana dispute could remain unresolved for such a long period of time. This was unacceptable to Ecuador and he believed that it did not meet the wishes of other Members.

The representative of Panama noted that in previous DSB meetings the status report submitted by the EC had not provided sufficient information. The status report at the present meeting contained two paragraphs and ignored a number of relevant facts. The EC had referred to its proposal without indicating that, on the basis of the discussions and consultations, that proposal had been broadly rejected. The EC had stated that the discussions with the interested parties were underway, but Panama, a major banana supplier to the EC market, had not noticed any interest on the part of the EC to have a real dialogue. The same attitude was shown towards other Latin American countries, which were affected by the banana regime. The EC had stated that several proposals had been received and were being examined although "… there continue to be divergent views expressed by the main parties concerned, and even where there is apparent agreement, differences emerge in the details." Panama considered that this assertion was incorrect, and did not do justice to the efforts made by the Latin American countries, which had put forward a proposal. The various proposals referred to by the EC constituted a single proposal for a global quota regime with two tariff levels. It was clear that some details still had to be worked out, but it was not correct to state that there was a difference of opinion between the parties concerned. The Commission was aware that there was sufficient ground to consider a proposal on the basis of a global tariff quota with two tariff levels. The EC had not referred to the damage caused to Latin American countries due to its failure to comply with the rulings. More than one year had passed since the end of the reasonable period of time for implementation, but the EC had not been in a position to put in place a substantially modified regime. Panama was concerned that the EC authorities continued to disregard the need for a technical and political dialogue with the affected Members. Consequently, Panama urged the EC to demonstrate its willingness to hold discussions with all the interested parties, and in particular with the Latin American countries, on their proposal to which the Commission did not pay attention. Panama considered that only a multilateral dialogue involving all the interested parties would enable the EC to make progress towards finding a satisfactory solution.

The representative of Honduras said that the EC's status report merely confirmed that it would not be possible for his country to restore its rights and that the new regime if adopted, could result in another dispute. The banana dispute had been under discussion for over seven years, the same number of years as the Uruguay Round negotiations, but without the same degree of progress and achievement. Six reports had ruled that the EC regime was inconsistent with the WTO rules. However, the EC had engaged in a complex and interminable "round" of negotiations enabling it to defer implementation. The most unsettling aspect of this "round of negotiations on bananas" was that a priority was given to solutions that were incompatible with WTO rules. It was not possible to envisage an extension of the time-limit or a new waiver. As long as the banana dispute remained unresolved, one could not support a new waiver. A genuine solution in order to meet all the interest involved had to be found. In order to bring this case into the WTO, his country had made considerable efforts and had devoted a lot of time. He noted that the work of panel members, arbitrators, DSB members and the Secretariat were of no less importance. Therefore, in order not to waste these efforts the EC should comply with the DSB's recommendations and rulings.

The representative of Mexico said that the EC's status report did not contain sufficient information on its new banana import regime. Mexico was concerned that this new regime, if implemented, would not settle the dispute. He reiterated that it was not necessary for the parties to reach agreement on how to implement a new regime provided that such a regime was compatible with

the EC's WTO obligations. Since the last DSB meeting, Mexico, which was an interested party in this dispute, had not been contacted by the EC to discuss the question of the allocation of licences or any other aspect of its regime. He reiterated that Mexico's preferred option was a tariff-only system with adequate market access.

The representative of the United States supported the statements made by previous speakers. The EC was out of compliance with its WTO obligations and had not provided any indications if, and let alone when, it would come into compliance. The EC's status report did not provide any details on the state of its internal deliberations. Furthermore, the status report did not indicate any information to the effect that the United States, the Caribbean and many Latin American countries had provided the EC with proposals dealing with key-elements of a new WTO-consistent banana regime. In particular, the Caribbean proposal had demonstrated that it was possible to put in place a WTO-consistent regime that would also protect the interests of the most vulnerable suppliers.

The representative of the European Communities objected to the US comment that "there was no indication if, and let alone when, the EC would come into compliance". The EC had made a proposal as well as many public statements on its implementation. The matter had also been discussed with the United States on many occasions. The EC was now consulting with the interested parties. He underlined that the interested parties in this case included not only the parties to the dispute but also over 40 other trading partners of the EC. No reference had been made at the present meeting to the fact that, at the beginning of 1999, the EC had modified its banana regime. At that time, some countries had stated that the EC should have consulted with the parties to the dispute in order to reach agreement on implementation. Although the DSU did not require such consultations, bilateral consultations and negotiations were now being held in Brussels in an effort to reach agreement. The EC was determined to come into compliance, but at the same time it already faced trade sanctions. Furthermore additional sanctions were being sought by one of the complainants. It was necessary to make changes that would lead to the elimination of trade sanctions. He noted that all the countries that had spoken at the present meeting had been given the opportunity to discuss this matter with the EC.

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

(b) United States – Import prohibition of certain shrimp and shrimp products: Status report by the United States

The Chairman drew attention to document WT/DS58/15/Add.4 which contained the status report by the United States on progress in the implementation of the DSB's recommendations concerning its import prohibition of certain shrimp and shrimp products.

The representative of the United States said that on 25 November 1998 her country had informed the DSB of its intentions in regard of implementation of the DSB's recommendations and rulings in this case. At that time, the United States had indicated that it would do so consistently with its firm commitment to the protection of endangered sea turtles. On 21 January 1999, the United States and the other parties to the dispute had reached an agreement on a reasonable period of time for implementation. In accordance with that agreement, the United States had been given 13 months for compliance and that period of time had expired on 6 December 1999. The United States was pleased to confirm that it had implemented the DSB's recommendations and rulings within the agreed reasonable period of time. Therefore, as provided for in Article 21.6 of the DSU, the United States was presenting its fifth and final status report on implementation. The US implementation of the DSB's recommendations and rulings had several distinct elements and had included opportunities for input from the other parties to this dispute. The implementing steps had both responded to the issues raised by the Appellate Body report, and - with the cooperation of the countries in the Indian Ocean

region - had advanced efforts to conserve endangered sea turtles. As the United States had noted in its first status report of 8 July 1999, the US Department of State had issued revised guidelines implementing its Shrimp/Turtle law. The revised guidelines were intended to: (i) introduce greater flexibility in considering the comparability of foreign programmes and the US programme; and (ii) elaborate a timetable and procedures for certification decisions, including an expedited timetable to apply in 1999 only. These changes had been designed to increase the transparency and predictability of the certification process and to afford foreign governments seeking certification a greater degree of due process. As the United States had noted in its third report, on the basis of the revised guidelines, and in response to a request from Australia, the United States had approved imports from the Spencer Gulf Region of Southern Australia. Based on complete and well documented information presented by Australia's Government and the State of Southern Australia, the US Department of State, in consultation with the US National Marine Fisheries Service, had found that the shrimp trawl fishery in the Spencer Gulf did not pose a threat of the incidental taking of sea turtles.

Another key element of the US implementation efforts had been to launch the negotiation of an agreement with the governments of the Indian Ocean region on the protection of sea turtles in that region. As noted in its fourth report, the United States had actively participated in a widely attended workshop on sea turtle conservation hosted by Australia in mid-October 1999. The Symposium had concluded with a resolution agreeing to hold further consultations aimed at concluding a regional sea-turtle conservation agreement. That resolution called for efforts to initiate negotiations within the first half of the year 2000. The United States strongly welcomed this cooperative effort, and would lend it its full support. The US implementation efforts also included its offer of technical training in the design, construction, installation and operation of TEDs. Any government wishing to receive such training could make a request to the United States in writing through diplomatic channels. The United States would make every effort to meet such requests. Based on its discussions with Thailand, the United States had also invited a team of specialists from Thailand and the Southeast Asia Fisheries Development Center to visit the US National Marine Fisheries Laboratory. The United States appreciated the constructive input received from the parties to the dispute and looked forward to continue working with all parties to advance the common goal of sea turtle conservation.

The representative of Malaysia reiterated his country's position stated in past DSB meetings, namely, that in order to give effect to the Appellate Body's rulings and recommendations, the US import prohibition should be lifted immediately. Malaysia regretted that the United States was not making any efforts towards lifting its import prohibition. By their exchange of letters, dated 22 December 1999, Malaysia and the United States had reached agreement on how to pursue this matter further. In accordance with that agreement: (i) Malaysia would not initiate proceedings under Article 21.5 or Article 22 of the DSU at this stage; (ii) if Malaysia decided to initiate an Article 22 proceeding, it would do so after the completion of an Article 21.5 process; (iii) Malaysia would provide the United States with an advance notice of any proposal to initiate proceedings under Article 21.5 and would consult with the United States before requesting an Article 21.5 panel; (iv) Malaysia would not request authorisation to suspend concessions or other obligations under Article 22 until the adoption of an Article 21.5 panel report; (v) both Malaysia and the United States preserved the right to appeal against the Article 21.5 panel's decision; and (vi) the rights of both parties under Article 22 would be preserved. In accordance with the above-mentioned agreement, Malaysia reserved its right to address this matter at an appropriate forum and time.

The representative of India said that his country believed that the full and faithful implementation of the DSB's recommendations implied a complete lifting of the import prohibition by the United States. In this regard, India wished to reserve all its right under the DSU.

The representative of the European Communities noted that the procedural agreement between Malaysia and the United States was aimed at ensuring the following elements: (i) the

sequence between Articles 21.5 and 22; (ii) consultations prior to requesting an Article 21.5 panel; and (iii) suspension of concessions or other obligations after adoption of an Article 21.5 panel report. He noted that it had not been possible to reach such an agreement with the United States in the context of the implementation in the Bananas case.

The representative of Australia welcomed the United States' decision to approve imports from the Spencer Gulf. Australia viewed this decision as the removal of an impediment to its exports which was entirely without environmental or other justification. Australia also welcomed the United States' reiteration of a commitment to introduce greater flexibility in considering the comparability between foreign and US programmes. Australia continued to have an outstanding market access concern that required resolution, and which would be a good litmus test of the US commitment in this area. Australia would be pursuing the issue of access for its northern prawn fishery and would be looking to the United States to allow exports from this fishery. Australia regarded this issue as an important test of the extent to which the guidelines had, in reality, changed as well as of the United States' commitment to flexibility.

On another element of the US implementation effort, Australia welcomed both the US constructive engagement in the sea turtle conservation workshop held in Australia in October 1999 and its stated commitment to support further negotiations leading to a regional agreement on turtle conservation. However, notwithstanding Australia's success at achieving access for shrimp from its own fisheries into the US market and the US constructive engagement in the conservation workshop, Australia continued to be concerned with the unilateral, trade-restrictive approach involved in the US import ban. The workshop clearly demonstrated the scope that existed to pursue turtle conservation through cooperative mechanisms and not through the imposition of unilateral trade restrictions. Australia would therefore continue to monitor closely the US actions in relation to implementation in this dispute.

The representative of the United States said that the US understanding with Malaysia did not reflect the EC's view on the sequence between Articles 21.5 and 22. On the contrary, if the EC's view was correct, it would not have been necessary to seek a procedural understanding. The United States maintained that an Article 21.5 proceeding was not required before one could resort to Article 22.6 and seek authorization to suspend concessions. The negative consensus rule applied with regard to requests under Article 22.6 made within the 30-day period specified therein. For this reason, a bilateral understanding with Malaysia was required to ensure the procedural sequencing. The United States considered that, under the particular circumstances of this case, it was appropriate to have such an understanding.

The DSB took note of the statements.

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

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

The representative of Japan said that pursuant to Article 21.6 of the DSU, on 14 January 2000 his country had submitted its status report on the implementation of the recommendations in this case. On 19 March 1999, the DSB had adopted both the Appellate Body Report on this matter and the Panel Report, as modified by the Appellate Body Report. On 15 April 1999, Japan had informed the DSB of its intentions with respect to the implementation of the DSB's recommendations. On that occasion, Japan had also informed the DSB that it would need a reasonable period of time in order to comply with the recommendations. On 4 June 1999, Japan and the United States had agreed on a reasonable period of time: i.e. 9 months and 12 days, starting from 19 March until 31 December 1999. That

agreement had been circulated in document WT/DS76/9. Pursuant to Article 21.6 of the DSU, "… the issue of implementation of the recommendations shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time." Thus the present meeting was the first opportunity for Japan to report to the DSB on this matter. He said that on 31 December 1999, Japan had abolished the varietal testing requirement as well as its "Experimental Guide" that were in force until that date. As it was still necessary to prevent the introduction of codling moth, Japan was now consulting with the United States on a new quarantine methodology on the eight products that were currently subject to import prohibition as those products were hosts of codling moth. Both parties were working faithfully and amicably on this matter and Japan expected that the consultations would result in a mutually satisfactory solution in the near future. It was his understanding that other countries also had interests in this matter. For the sake of transparency, Japan would notify the DSB of its agreement as soon as such an agreement was reached with the United States. Japan was also prepared to hold consultations with other Members if they so wished.

The representative of the United States expressed her country's appreciation to Japan for its cooperative approach during the implementation period. The United States looked forward to the continued close cooperation with Japan with a view to reaching an early agreement on some technical issues.

The representative of Hungary said that his country had participated as a third party in this dispute. Hungary welcomed Japan's decision of 31 December 1999 to abolish its varietal testing requirement as well as its "Experimental Guide". Hungary hoped that Japan would be shortly in a position to introduce a new quarantine methodology, which would be fully consistent with the provisions of the SPS Agreement. This would facilitate exports of the eight products currently covered by the import ban. Hungary hoped that in devising the new quarantine methodology Japan would consult with those Members who had export interests with regard to those eight products.

The representative of Australia welcomed Japan's decision to abolish the varietal testing requirements and its experimental guide at least in so far as they related to coddling moth in certain varieties of fruit. Australia wished to seek reassurance from Japan that the abolition of varietal testing in those fruits would be applied on a MFN basis. Australia noted the reference in Japan's status report concerning ongoing consultations on a new quarantine methodology for detecting coddling moth, and requested that Japan consult all affected importing countries, including Australia, on any proposed new quarantine methodology. Australia also sought clarification from Japan as to whether varietal testing requirements would continue to be in place for other fruits and for other pests affecting fruit varieties such as fruit flies.

The representative of Brazil said that his country had participated as a third party in this dispute. Brazil welcomed Japan's willingness to hold consultations with other countries. Brazil hoped that the Panel's findings would have a positive impact on other areas of Japan's regulations, which had a substantial effect on Brazil's exports of other fruits into Japan. In the past Brazil had held bilateral consultations with Japan on this matter and he hoped that the consultations referred to by Japan would take into account Brazil's interest.

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

(d) Korea – Taxes on alcoholic beverages: Status report by Korea

The Chairman drew attention to document WT/DS75/18 - WT/DS84/16 which contained the status report by Korea on progress in the implementation of the DSB's recommendations concerning its taxes on alcoholic beverages.

The representative of Korea recalled that on 17 February 1999, the DSB had recommended that Korea bring its Liquor Tax Law and Education Tax Law into conformity with its obligations under the GATT 1994. Subsequent arbitration had awarded 11 months and two weeks as a reasonable period of time for implementation, which was due to expire on 31 January 2000. Pursuant to Article 21.6 of the DSU, Korea was submitting a status report on the implementation of the DSB's rulings and recommendations in this case. In order to comply with the DSB's recommendations, Korea had amended the Liquor Tax Law and the Education Tax Law to impose flat rates of 72 per cent liquor tax and 30 per cent education tax on all distilled alcoholic beverages including soju (diluted and distilled) and whisky on a non-discriminatory basis. The amendments, which had been passed by the National Assembly on 7 December 1999, had entered into force on 1 January 2000, one month ahead of the expiry of the reasonable period of time. The Presidential Decree implementing the Liquor Tax Law had also been amended with effect on 1 January 2000. With the entry into force of these amendments, Korea considered that it had fully implemented the DSB's rulings and recommendations in this case.

The representative of the European Communities said that the EC welcomed the measures taken by Korea. He noted that as a result of the MFN rule some tax rates had been increased. However, the EC welcomed the fact that the Korean tax system was now non-discriminatory. The EC was still examining the results of Korea's decisions because in addition to the changes in taxes some other changes had been introduced with regard to Korea's domestic price system.

The representative of Mexico said that his country, had participated in this dispute as a third party. Mexico welcomed Korea's status report, which provided sufficient information to enable Members to assess Korea's actions regarding implementation. Although Mexico was not fully satisfied with the new rate, it recognized that Korea had removed inconsistent elements contained in the previous regime. Mexico would carefully examine the new Korean legislation and hoped that these modifications would give tequila equal market access conditions.

In response to the statement made by the EC, the representative of Korea, noted that the Panel and the Appellate Body reports had not recommended that Korea lower its tax rates on whisky rather than increase its tax rate on soju. Nevertheless, Korea had accommodated the EC's concerns by both lowering its tax rate on whisky and increasing its tax rate on soju. The question of how to implement the DSB's recommendations was left to the discretion of Korea.

The DSB took note of the statements.

(e) United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabit or above from Korea: Status report by the United States

The Chairman drew attention to document WT/DS99/6 which contained the status report by the United States on progress in the implementation of the DSB's recommendations concerning its anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabit or above from Korea.

The representative of the United States said that in accordance with Article 21.6 of the DSU her country was submitting its status report on implementation in this case. The United States had fully complied with the DSB's recommendations and rulings. The Panel had found that the regulations of the US Department of Commerce (US Department) was inconsistent with Article 11.2 of the Anti-Dumping Agreement. In order to solve this inconsistency, the US Department had amended its anti-dumping regulations in order to include the necessary standard of Article 11.2 of the Anti-Dumping Agreement. Subsequently, the US Department had made a new determination in the context of its third administrative review of the DRAMS order and had applied the new WTO-

consistent regulation to the facts of the case. The US Department had found that a resumption of dumping by the Korean companies was likely and had concluded that it was necessary to leave the anti-dumping order in place. The process of the US Department was completely open and transparent. Prior to the issuance of its amended regulation and its revised determination, the US Department had given both Korea and the Korean exporters the opportunity to comment on the amended regulation. Both the Government and the exporters had availed themselves of this opportunity and the US Department had taken their concerns and their comments into account. The fact that the result of the US Department's determinations remained unchanged should not come as a surprise. The evidence showed that a resumption of dumping by the Korean exporters was likely. Thus, it was necessary to leave the anti-dumping duties in place. In commenting on the US Department's analysis of the evidence, the Korean exporters had repeated the arguments that had been previously rejected by the Panel. Therefore, to the extent that the Panel had addressed factual issues, it had also upheld the US Department's consideration of the facts.

The representative of Korea said that after careful review of the US measures, his country had concluded that the United States had failed to implement faithfully the DSB's rulings and recommendations. This proceeding was the first completed WTO challenge to the US antidumping regime. It was therefore no surprise that the Panel had found the US regime to be inconsistent with the Anti-Dumping Agreement. The Panel had found that both the US regulation regarding revocation of anti-dumping orders and the US application of that regulation in the anti-dumping proceeding on DRAMS from Korea were inconsistent with Article 11 of the Anti-Dumping Agreement. The Panel had affirmed that despite US claims to the contrary, the US anti-dumping regime did not comply with WTO requirements. The Panel's findings and rulings had provided a positive contribution to the WTO system to the benefit of Members. The Panel had checked the long-standing US practice that could no longer be tolerated: i.e. the use of anti-dumping duties as protectionist tools. However, the United States had failed to faithfully implement the Panel's rulings and recommendations. First, the amended regulation promulgated by the United States did not implement the Panel's findings properly. Instead of adopting a standard conforming to the Panel's findings and rulings, the United States had adopted a very general standard that could be, and in fact was, misapplied. Rather than limiting the discretion of the Secretary of Commerce to conform US law to Article 11 of the Anti-Dumping Agreement, the amended regulation would increase the Secretary's discretion in disregard of the Panel's decision. In doing so, the United States perpetuated the WTO inconsistency of the original standard that the Panel had found to be inconsistent with Article 11 of the Anti-Dumping Agreement. More specifically, the amended regulation did not impose on the United States the burden to establish that continued imposition of the anti-dumping duty was necessary. In addition, the standard of the amended regulation: i.e. "otherwise necessary to offset dumping", that had replaced the "not likely" criteria in the previous legislation effectively was not a standard. This was inconsistent with the Panel's decision, which required the regulation to provide "a demonstrable basis for consistently and reliably determining" that maintaining the anti-dumping duty remained necessary to offset injurious dumping. Moreover, the amended regulation ignored the Panel's conclusion that the standard adopted should ensure that the conclusions reached had been based on "a foundation of positive evidence that circumstances demand" maintaining the duty.

Second, the United States had failed to implement the Panel's findings in applying the altered, yet still-flawed standard. The Final Results of Redetermination in the Third Administrative Review demonstrated that the US Department had failed to conduct any new analysis in its redetermination. The Final Results had simply restated the analysis in the US Department's earlier determination not to revoke the order. Indeed, the Results had repeated verbatim much of the text of the original determination. Moreover, the Results were not based on "substantial, positive evidence" that the order was necessary to offset dumping. Like the original results of the Third Administrative Review, they were based on conjecture and supposition. The United States repeatedly relied on "evidence" that was neither "substantial" nor "positive" to support its view of the market. The United States based its results on "appearances" that "indicate" or "suggest" something might or might not occur.

This was not substantial or positive evidence. Further flaws were evidenced by the US failure to accurately describe its implementation measures. In its status report, the United States misquoted the text of the new regulation. The word "otherwise" from the third revocation requirement in the regulation, which read as follows: "(c) whether the continued application of the anti-dumping duty order is otherwise necessary to offset dumping." For these reasons, Korea considered that the United States had not implemented faithfully the DSB's rulings and recommendations. In this regard, Korea wished to reserve its right to seek recourse to Article 21.5 of the DSU.

The representative of the United States said that the US Department had incorporated the "necessary" standard of Article 11.2 into its revised regulation. If Korea considered that Article 11.2 did not contain such a standard, she wondered how the United States could have been found to act inconsistently with Article 11.2 in the first place.

The DSB took note of the statements.

2. United States – Sections 301-310 of the Trade Act of 1974

(a) Report of the Panel (WT/DS152/R)

The Chairman recalled that at its meeting on 2 March 1999, DSB had agreed to establish a panel to examine the complaint by the European Communities. The Report of the Panel contained in document WT/DS152/R had been circulated on 22 December 1999, and it was now before the DSB for adoption at the request of both parties in this case. In accordance with Article 16.4 of the DSU, this adoption procedure was without prejudice to the right of Members to express their view on the Panel Report.

The representative of the United States said that her delegation was pleased that the Panel Report was before the DSB at the present meeting, and thanked the Panel and the Secretariat for their work. The United States supported the adoption of the Report which confirmed that Sections 301-310 were consistent with the US obligations under the WTO. The Panel Report had confirmed that Sections 301-310 did not compel US authorities to undertake WTO-inconsistent action, and that no changes to this legislation were required. The United States did not agree with all of the reasonings of the Panel, but was overall very pleased. It was also pleased that the Panel had recognized that the United States had long expressed its intention to follow DSU procedures when making WTO-related determinations under Section 301. The Panel had noted that the US commitment in this regard did not represent a new US policy or undertaking. Indeed, the Panel had recognized that the US views on this matter were made clear in its Statement of Administrative Action of December 1994. Equally gratifying was the Panel's support for the US statement that the United States had, in fact, made WTO-related determinations under Section 304 in accordance with WTO rules. The United States had commended the EC for choosing not to appeal the findings of the Panel. The United States hoped that this constructive approach to avoid needless litigation would also be followed in other disputes.

The representative of the European Communities said that the EC had received with satisfaction the Panel Report and had requested its inclusion for adoption at the present meeting. The EC was also pleased that the United States had requested the adoption of this Panel Report, which, he hoped, would bring it in the path of multilateralism. Although this case had been raised by the EC, the number of third parties (12), their wide geographical, political and economic situation and their interventions during these Panel proceedings, had clearly shown that Sections 301-310 (Section 301) were widely perceived by most Members as a tool used by the US administrations to put undue pressure on other Members in order to achieve unilateral trade policy objectives outside, and in disregard of, the multilateral mechanisms provided in the WTO Agreements. As the Panel had rightly stated in paragraph 7.89 of its Report: "… Members faced with a threat of unilateral action,

especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before the DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures." It would be useful, for the sake of clarity, to briefly recall the findings of the Panel in this case so that the important implications that the EC derived from it could be clearly understood. Moreover, it was important to clarify that the Panel had not examined, neither validated, the application made by the US of Section 301 in all previous cases, as had been indicated by the United States in certain press statements, mainly because individual determinations were not the subject of the dispute and therefore outside the terms of reference of the Panel.

The conclusions of the Panel were as follows. First, the Panel had found that key parts of Section 301 constituted a *prima facie* violation of Article 23 of the DSU. Second it was only because of the undertakings given by the United States in the Statement of Administrative Action, and more importantly, those given before the Panel that the Panel had concluded that Section 301 could be considered not to be in breach of the WTO obligations of the United States. These undertakings compelled the United States to respect the DSU rules and procedures when applying Section 301. The EC wished to draw attention to the important implications of this Panel Report for the use of Section 301 by the United States: (i) key parts of Section 301 were illegal and therefore the use of Section 301 towards other Members was only possible to the extent that the United States strictly followed, in each and every case, the DSU rules and procedures. The Panel Report gave assurances to all Members and economic operators that the United States would refrain from making determinations of violations of its WTO rights or from imposing trade sanctions against other Members before a panel of Appellate Body had ruled on the issue and the DSB had authorized them. Prior to the issuance of the Panel Report, Members and economic operators could only rely on the good will of the United States; (ii) furthermore, it was clear that these undertakings given by the United States before the Panel, and whose respect was a condition *sine qua non* for the lawful use of Section 301, would have to be considered repudiated or removed in case of threats of determinations or of imposition on trade sanctions pronounced by the US administration or another branch of the US Government before the ruling of a Panel or the Appellate Body or before the authorization of the DSB; (iii) the EC wished to emphasize that the undertakings given before the Panel by the United States were of such nature and were given in such context that they bound not only the present administration, but also any future US administration or branch of the US Government; (iv) Section 301 had, therefore, become an empty shell as the Panel Report did not only impose on the United States the clear obligation to follow the DSU rules and procedures when using Section 301, but it also impeded the use of Section 301 as a threatening tool. It seemed that, although Section 301 could remain in the books, the only lawful use of this piece of legislation was as a domestic mechanism for dealing with industry complaints that might result in dispute settlement procedures at WTO level.

The Panel Report was an important outcome for the preservation and the proper functioning of the WTO multilateral system. Section 301 was illegal and the possibility for the United States to maintain Section 301 in the books was subject to the respect of certain conditions. As the Panel had clearly stated in its conclusions, contained in paragraph 8.1 of the Panel Report: "Significantly, all these conclusions are based in full or in part on the US administration's undertakings given above. It thus follows that should they be repudiated or in any way removed by the US administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted." The EC would closely monitor the compliance of the United States

with the conditions imposed by the Panel. In this respect, the EC would not hesitate to avail itself of the possibilities open to it in the DSU to defend its rights.

The representative of Japan said that the Panel had first ruled that the relevant parts of the US Trade Act of 1974 were *prima facie* in violation of the DSU. It had then concluded that the Act could be considered as being in conformity with the DSU, when taking into account the Statement of Administrative Action, as well as the statements made by the United States before the Panel. The Statement of Administrative Action effectively set out that the US Administration acted in conformity with the WTO Agreement when exercising its power under the Act. At the same time, the US representatives had repeatedly confirmed their commitment to abide by the WTO rules when the United States acted under the Act. Japan attached importance to the Panel's conclusions which had confirmed that the United States shall not, in each and every case, take unilateral actions that were prohibited under Article 23 of the DSU. Since the Panel's conclusions were based on the premise that the United States shall adhere to the commitments made during the Panel's proceedings, Japan would continue to monitor the US actions in order to ensure its conformity with the WTO Agreement.

The representative of Brazil said that his country had participated as a third party in this dispute and had presented its views before the Panel (paragraphs 5.1-5.54 of the Report). At the present meeting, he did not wish to reiterate these views but only wished to make comments on the Panel's findings and conclusions. In his view, the Panel Report contained three separate parts. In the first part, the Panel had found that Sections 304, 305 and 306 violated Article 23 of the DSU. In the second part, the Panel had considered the US Government's undertakings not to exercise discretion that would lead to violation of Article 23 and had therefore conditionally reversed the findings made in the first part of the Report. Finally, in its conclusions, the Panel had merged its reasonings made in the first and second parts of its Report and had confirmed that the United States' compliance was conditional. The only element separating the United States from non-compliance was its public and formal commitment to respect its obligations under the DSU. Such a commitment was of great importance and should be taken seriously.

Brazil was pleased that the Panel had concluded in the case of Article 23 that Members had an obligation to adopt the legislation that was fully compatible with the WTO and not legislation that left compliance fully to the discretion of a Members. The Panel's findings on the impact of threats of violations for the rights of Members and the conduct of trade were also important. Brazil was not convinced by the weight it was given to intentions and public statements. However, this was a special case which had gone beyond the boundaries of a normal dispute brought before the DSB. As stated by the Panel, it was not its task to look at the issues before it in abstract. Brazil would monitor future determinations by panels and expect that the same yardstick based on the expressions of best intentions would be applied in cases involving complaints against developing countries.

This case was about predictability for trade and governments and about the prevalence of multilaterally agreed dispute instruments over domestic legislation that allowed for political and economic pressure as a means to achieving trade results. It was also about strengthening the multilateral system and the rule of law. Brazil was confident that the United States would keep its undertakings to proceed in accordance with the letter and spirit of the DSU. That was the responsibility of the United States both as a leading Member and a proponent of the DSU. Only by doing so, it would uphold the finding of compliance. He drew attention to the Panel's example in paragraph 7.65 of its Report which demonstrated some of its reasoning with regard to a failure to respect Article 23. That example was about negative effects of retaliation and counter-retaliations. He wished to take that example of two neighbours one step further and to refer to these parts of Section 301 that had affected Brazil in the past recognizing that these aspects were not strictly within the terms of reference of the Panel. In this regard, Brazil hoped that as of now its big continental neighbour would also refrain from putting up signs that "trespassers may be shot on sight" or be taken

to court if it did not keep to its best behaviour according to its own definition what should constitute such a behaviour.

The representative of Korea said that his country had participated in this dispute as a third party. Korea, as the third most frequent target of the US Section 301 actions after the EC and Japan, had a substantial interest in this case. Therefore, he wished to make a few comments on the Panel Report. After reviewing both its statutory and non-statutory elements, the Panel had concluded that Sections 301-310 were in conformity with the DSU. Correctly, the Panel had first found that the statutory language of Section 304 constituted a *prima facie* violation of Article 23.2(a) of the DSU. However, the Panel had further reasoned that such inconsistencies could be lawfully removed by the commitments undertaken by the United States in the form of administrative actions. Korea's view slightly differed from the Panel's conclusion and reasonings. The Panel's conclusion was conditional since it had stated that should the US Administration's undertakings "be repudiated or in any other way removed by the US Administration or another branch of the US Government the findings of conformity contained in these conclusions would no longer be warranted". This ruling of the Panel was particularly important as it had clearly limited the use of Section 301 of the US Trade Act. The United States could no longer unilaterally impose trade sanctions on other countries. Section 301 actions were warranted only when they were authorized by Members, in accordance with the DSU procedures. In this connection, the Panel had echoed concerns raised by a number of third parties, including Korea, with respect to the threat of unilateral actions. In paragraph 7.89 of its Report, the Panel had noted that "… merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick". Small countries were far more susceptible to the threat of unilateral actions than large ones.

The representative of Costa Rica said that the Panel Report before the DSB at the present meeting had examined the US domestic legislation on foreign trade. At issue was not its application in a specific case, but whether or not the legislation was consistent with the provisions of GATT, the DSU and the WTO Agreement. The Panel's recommendations in this case would have a wide-ranging effect on Members, economic operators and the security that the multilateral trading system was required to provide. Costa Rica wished to highlight some of the Panel's findings and conclusions, which were of particular importance. First, the discretion granted under Section 304 which gave the USTR the right to make a determination of inconsistency before exhaustion of DSB procedures, was not, *prima facie*, consistent with Article 23.2(a). This aspect of the legislation weakened and rendered uncertain the US commitment to resort to the dispute settlement mechanism, excluding any other mechanisms, and to refrain from unilateral determinations contrary to the DSU (paragraphs 7.57, 7.61, 7.96, 7.97 of the Panel Report). However, the Panel had concluded that, if the discretion granted to the USTR were lawfully curtailed, the *prima facie* inconsistency could be removed (paragraphs 7.102, 7.103 of the Panel Report). In this case, the US Administration lawfully curtailed the USTR's discretion by means of the undertakings given in the Statement of Administrative Action, which had been approved by the United States Congress and confirmed "explicitly, officially, repeatedly and unconditionally" (paragraph 7.115 of the Panel Report) in the statements "solemnly made" (paragraph 7.122) by the US representatives before the Panel. Thus, in fact, the *prima facie* violation in this case had been lawfully removed (paragraphs 7.104, 7.109, 7.112, 7.115, 7.117, 7.122 and 7.126 of the Panel Report). The lack of responsibility on the part of the United States in this case rest, therefore, on the Administration's undertakings and statements. If the United States were to repudiate those undertakings in any way, its law would be rendered inconsistent with the obligations under Article 23 (paragraph 7.126 of the Panel Report). The Panel had found that, if the USTR were to exercise, in a specific dispute, the right reserved under Section 304 to make a determination of inconsistency before exhaustion of DSU procedures, the US conduct would satisfy the four elements required for a breach of Article 23.2(a) (paragraph 7.50 of the Panel Report). The Panel's findings and conclusions clearly limited the scope for unilateral action, confirmed the solidity of the DSU and gave the multilateral trading system the security and predictability it required.

The representative of Cuba said that her country had participated in this case as a third party due to its systemic interest in the examination of this fundamental issue, namely, the principle of multilateral decision-making. That principle which was a cornerstone of the WTO was essential to its functioning and important to the entire system of trade relations among Members. Cuba respected and at the same time regretted the Panel's conclusions as well as the EC's decision not to appeal the Panel Report. For this reason, her delegation wished to record its views on this matter. Cuba maintained its position that the procedures under Sections 301-310 contributed to the introduction in international economic relations of a policy based on power. That in turn created an atmosphere of insecurity and unpredictability and made the United States both judge and party in international trade conflicts. The following arguments supported that position. First, Sections 301-310 established a unilateral procedure for sanctions against other States, including all Members, if the United States considered that its trade interests were affected. The time-limits provided for under those procedures were different from, and incompatible with, those contained in the DSU. The measures in question were adopted on the basis of unilateral determinations, outside the DSB and without its prior authorization. Their duration was also decided unilaterally by the United States. Second, the Act ignored the DSU procedures which protected Members' rights and obligations. It disregarded the undertaking to comply with the principles set out in Article 3 of the DSU, as well as the provisions on surveillance of implementation of the DSB's recommendations and compensation or suspension of concessions under Article 22 of the DSU. Third, by adopting these unilateral measures, the United States weakened the multilateral trading system and disregarded Article 23 of the DSU, which provided that Members shall not make a determination as to the existence of a violation or nullification or impairment of benefits, or the attainment of the objectives of the covered agreements. The above-mentioned legislation encouraged recourse to practices that were outside the international trade rules, and created a situation of uncertainty and disrespect for multilateral decisions. Fourth, the above-mentioned provisions violated the public international law principle of sovereign equality, under which all States, in the full exercise of their sovereignty, enjoyed equal rights and were equally obliged to respect the rules governing their mutual relations. Fifth, they also infringed another basic principles of public international law, the *pacta sunt servanda* principle governing the implementation of treaties. In accordance with this principle the signatories to an international agreement had to respect the agreed provisions. Sixth, pursuant to Article XVI:4 of the WTO Agreement, Members had the responsibility to ensure the conformity of their domestic laws and administrative procedures with their obligations under the covered agreements. The United States Trade Act was a violation of this provision. Finally, the legislation gave rise to the nullification or impairment of legitimate benefits accruing to Members directly or indirectly under the GATT 1994 and the WTO.

The representative of Hong Kong, China said that his delegation, which had a systemic interest in this dispute had participated therein as a third party. Hong Kong, China firmly believed that the cornerstone of the WTO legal regime - the principle of multilateral determination of the WTO consistency of measures - should not be undermined by domestic legislation that mandated or allowed unilateral actions. In order to preserve the security and predictability of the multilateral trading system, it was essential for Members to fully and faithfully comply with that principle. Therefore, his delegation was pleased to note that the Panel had clearly stated in paragraph 7.75 of its Report that "providing security and predictability to the multilateral trading system is another central object and purpose of the system" and that "the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators." Hence, "DSU provisions must be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it."

His delegation also welcomed the Panel's conclusive interpretation of Article 23 of the DSU as set out in paragraph 7.38 of its Report, in particular that "it is for the WTO through the DSU process - not for an individual Member - to determine that a WTO inconsistency has occurred". This underlined that when a Member imposed a unilateral measure in violation of Article 23 in a specific dispute, such a measure would cause serious damage to both other Members and the market place,

especially when the measure was taken by a powerful Member. His delegation was pleased that the Panel had endorsed the core arguments contained in its third party submission, i.e. that the DSU should be interpreted in good faith and in accordance with its context, object and purpose. More importantly, for the first time in WTO jurisprudence, the Panel had established the principle, which Hong Kong, China had advocated in its submission, that a nonmandatory legislation could also be challenged and found to be inconsistent with the WTO law.

The Panel's analysis was predicated on a self-imposed dichotomy between statutory and non-statutory elements of Sections 301-310. The Panel had found that the statutory language of Section 301 as such constituted a *prima facie* violation of Article 23.2(a) of the DSU, but such a *prima facie* violation had in fact been lawfully removed and no longer existed because of other "institutional and administrative elements". These elements in the present case were: (i) the Statement of Administrative Action; and (ii) the statements made by the United States before the Panel. In paragraph 7.132 of its Report, the Panel had stated that its conclusion was based on its reading of Section 304 as "a multi-layered law containing statutory, institutional and administrative elements". Furthermore, in paragraph 7.98, the Panel had stated that "to evaluate its overall WTO conformity we have to assess all of these elements together".

Hong Kong, China had serious reservations on the Panel's analysis and its conclusion. First, it strongly disagreed with the Panel's position on "overall WTO conformity". Article XVI:4 of the Marrakesh Agreement clearly stipulated that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". In other words, the WTO conformity was legally required at each and every level of the hierarchy. Article XVI:4 simply did not provide any room for the misleading notion of "overall WTO conformity", which not only defeated the object and purpose of the Article but also allowed the "chilling effect" of the nonconforming law, regulations or administrative procedures to persist. In addition, the concept of "overall conformity" was dangerous. He wondered whether that concept implied that as long as all aspects of a regulatory framework taken together were WTO-consistent in the so-called "overall" terms, one could turn a blind eye to possible inconsistency in specific aspects.

Second, his delegation was disappointed that the Panel had not been more clear in justifying the weight it had accorded to the Statement of Administrative Action and the US statements before the Panel. He was not sure why these non-statutory elements were sufficient to outweigh the inconsistency found and whether the curtailment of discretion by such elements, in particular the US statements, were considered as "lawful and effective". The fact that the Panel could bypass the simple reality of the Statement of Administrative Action was at best self-contradictory and unfortunately inconclusive, as rightly pointed out by the EC.

Third, the Panel had not made it clear how binding it was for the US statements made before it in the context of international law. Hong Kong, China believed that they were of little importance. The International Court of Justice (ICJ) accepted out-of-court promises by members of government as binding their respective government because of the circumstances under which they were made, officially, in response to specific questions. Such case law was simply irrelevant for the purpose of the present case. The US statements were not out-of-court declarations having the character of a settlement. Indeed, no settlement was sought and the opposite was true since no out-of-court settlement had taken place. Otherwise, there would be no panel proceeding. How could a USTR attorney defending his/her country ever bind through his/her statements his/her country's conduct in the future? Furthermore, why such statements could not be simply overturned in the future by a myriad of government officials hierarchically higher than the mentioned attorney? The Panel's analysis, from the legal perspective, were disappointing. It was puzzling that the Panel could not in an authoritative manner make up its mind about the actual ambit of its terms of reference. If the Statement of Administrative Action was not part of its mandate it should have limited its remarks to an examination of the statutory elements of Section 301. Whether that statement was an effective

remedy should be the subject matter of a separate litigation. The Panel had rightly pointed out in paragraph 7.11 of its Report that the political sensitivity of this case was self-evident. If any lesson should be learnt from this case, there was a pressing need for the DSB to expedite its work to resolve the long overdue problem of Articles 21 and 22 of the DSU. Hong Kong, China would continue to assume a positive and constructive role in this respect.

The representative of Thailand said that due to its systemic interest, his country had reserved its third-party rights and had closely monitor this case. Thailand's views were contained in the Panel Report. His country believed that the Report was an important contribution to the GATT/WTO jurisprudence, and wished to underline a number of points of systemic interest contained therein. First, the Panel had made it clear that at least one key provision of this US legislation constituted a *prima facie* violation of the WTO Agreement. That *prima facie* violation had been removed only by the aggregate effect of the US Statement of Administrative Action and the US statements made before the Panel that the discretion under Sections 301-310 shall be exercised in a way consistent with WTO obligations. In the Panel's view, only these undertakings could fulfil the guarantees incumbent on the United States under Article 23 of the DSU that no determination of inconsistency shall be made against a Member prior to exhaustion of DSU proceedings. The discretion of the US Government under Sections 301-310 was therefore limited by the US obligation to respect the WTO Agreement, and in particular the DSU. Second, the US undertakings were not without legal effect. In this regard, the Panel had stressed that should the United States repudiate or remove, in any way, these undertakings, it would incur State responsibility since its law would be rendered inconsistent with the obligations under Article 23. Third, according to the Panel, these undertakings were made as official US policy expressing United States' understanding of its international obligations as incorporated in its domestic law. They were to be followed as such by future US administrations. Finally, in order that the findings of conformity by the Panel could be warranted, these undertakings had to be respected by all the branches of the US authorities, namely the legislature, the executive and the judiciary.

The representative of St. Lucia said that her country's interest as third parties stemmed from the important systemic issues raised in this case and from what it perceived as the indirect impact of Section 301 procedures on small, vulnerable and often marginalized "non-players" in the global trading system. This case was about the strengthened multilateral system, about whether having agreed to have recourse to and, abide by, the DSU rules a Member might, nevertheless, continue to threaten unilateral measures irrespective of its commitment. In paragraph 7.68 of its Report, the Panel stated that "a promise to have recourse to and abide by the rules and procedures of the DSU, also in one's legislation, includes the undertaking to refrain from adopting national laws which threaten prohibited conduct" (paragraph 7.68). This commitment had led to the Panel's finding that the US legislation constituted a *prima facie* violation of the DSU. An interesting tale of two farmers was narrated in the Report. These two major disputants accustomed to settling their boundary disputes through force and threats of force subsequently agreed to settle their dispute in court. Nevertheless, one farmer erected a large sign on the contested boundary. "No Trespassing. Trespassers may be shot on sight" (paragraph 7.65). That large sign was the message written into Sections 301-310. To put it differently "merely carrying a big stick is in many cases, as effective a means to having one's way as actually using the stick" (paragraph 7.89). Those most threatened by the sign on the farmer's property were those who did not even possess a gun. The Panel had explicitly stated that the strengthened multilateral system had to provide "equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures" (paragraph 7.89). Yet in accepting that Member's word, even if solemnly and in good faith given, was sufficient to remove a *prima facie* violation of the DSU, the Panel appeared to show startling deference to the political sensibilities of a Member to an extent never been done for others before. The Panel had found as a matter of fact that the statements made by US representatives were made "with the intention not only that we rely on them but also that the EC and the third parties to the dispute as well as all Members of the DSB - effectively all WTO Members - place such reliance on

them" (paragraph 7.124). In those statements the US had solemnly promised that it would not apply Sections 301-310 inconsistently with DSU rules. As such, the DSU rules prevailed in disputes between the United States and other Members. The Panel had clearly stated that should the US repudiate or remove in any way these undertakings, the US would incur State responsibility since its law would be rendered inconsistent with the obligations under Article 23 (paragraph 7.126). It used to be said that "States don't mean what they say, and don't say what they mean". The Panel in this instance had rejected that. Some developing countries with serious concerns about unfulfilled Uruguay Round promises might have some difficulty accepting this. Perhaps the old era was coming to an end. The understanding was that the United States was not entitled to threaten unilateral action in violation of DSU rules as this in and of itself was a violation of Article 23 of the DSU, and therefore should the United States ever threaten any such measures against a Member, whether or not in keeping with Sections 301-310, this would be illegal. As a result of this ruling, all Members should have confidence that the Trade Act could not be used as a threat against them. It was on this basis that Saint Lucia support the Panel Report and its adoption at the present meeting.

The representative of Norway said that his delegation noted the statements made by previous speakers. Norway was pleased that the Panel had fully confirmed the principle of multilateral determination, in conformity with the DSU, of any alleged violation of other Members' rights and obligations. His delegation also noted that the United States had confirmed that its application of Sections 301-310 of the 1974 Trade Act would remain consistent with the DSU. Norway welcomed the adoption of the Panel Report, and noted that both parties had expressed their satisfaction with the outcome and had decided to accept the Report without appeal.

The representative of Canada said that her country had participated in the Panel's proceedings as a third party. In its submission to the Panel, Canada had stressed its firm belief that disputes arising between Members with respect to WTO obligations had to be addressed within the parameters and time-frames established by the DSU. Canada had indicated its view that the unilateral imposition of retaliatory measures without prior DSB authorization was fundamentally incompatible with the multilateral trading system and threatened the stability of the WTO dispute settlement mechanism. Her country welcomed the conclusions of the Panel that the relevant provisions of the statute constituted a *prima facie* violation of Article 23 of the DSU. Canada also noted the undertakings made by the United States to exercise the discretion granted to it by the law in a WTO-consistent manner. In particular, the US commitment never to make a determination of inconsistency contrary to Article 23. Canada looked forward to strict adherence to these undertakings by the United States, both now and in the future.

The representative of Poland, speaking also on behalf of the CEFTA countries and Estonia and Latvia, said that the mentioned countries had not participated in this dispute but wished to make a few observations on the Panel Report due to its systemic implications. He noted that it was the first time that the Panel had interpreted Article 23 of the DSU, which was one of the pillars of the multilateral trading system. The Panel was correct in finding that in cases of potential violation of obligations or other nullification or impairment of benefits the duty of Members under Article 23 was to have recourse to, and abide by, the rules and procedures of the DSU and to abstain from other than multilateral determinations of inconsistency. Any reference even to the mere possibility for taking the latter approach by itself was considered by the Panel to be a *prima facie* violation of Article 23.2(a). The above-mentioned countries welcomed that the United States had provided guarantees to the Panel, and in this way to the entire WTO membership, that it would make determinations of consistency solely in accordance with Article 23.2(a). These guarantees clearly constituted a key element of the conclusions reached by the Panel. Through its findings and conclusions, the Panel had made an important contribution to the strengthening of the multilateral trading system by reaffirming that concessions or other obligations could not be suspended unless a multilateral determination of inconsistency had been made in accordance with the DSU rules and procedures. Poland and the above-mentioned countries supported the adoption of the Panel Report.

The representative of the Dominican Republic underlined that although the Panel had concluded that Sections 301-310 were not in violation of the US obligations under the WTO Agreement, it had also clearly indicated that its conclusions were subject to the Statement of Administrative Action approved by the US Congress and the US statements made before the Panel. As a result, the United States was committed to ensure that under Sections 301-310 no determination of violation could be made which was inconsistent with Article 23. In this regard it was clear that the Panel had condemned the use of unilateral action or trade sanctions, which had not been previously authorized by the DSB. Her country hoped that the United States would keep these considerations in mind when applying Sections 301-310. Although her country fully respected the conclusions reached by the Panel it also maintained its arguments raised in the Panel's proceedings.

The representative of Jamaica said that, like previous speakers, her delegation also welcomed the Panel's reaffirmation of the dispute settlement mechanism as an exclusive medium for the adjudication of trade disputes between countries. The Panel had made it clear that each and every Member, by the very fact of being a party to the WTO Agreements, in particular the DSU, had committed itself to be bound by the provisions of these Agreements. Jamaica's interpretation of the Panel's ruling was that the Section 301 affecting the settlement of trade disputes was not consistent with the US obligations under the DSU. By the Panel's ruling, the US undertaking, comprising the Statement of Administrative Action confirmed by the US representatives during the Panel's proceedings, embodied the US efforts to remedy the inconsistency and to comply with its DSU obligations. That undertaking signified a definite recognition by the United States that it was bound by the DSU provisions, and the effect of the undertaking was a declaration by the United States that it was obliged to abide by the DSU rules and procedures as well as the time-frames prescribed therein. During the Panel's proceedings, some third parties, including Jamaica, had rejected the proposal that an official US statement would be sufficient to remove legislative inconsistency. Jamaica maintained the view that the most appropriate means of remedying inconsistent legislation would be to remove the inconsistency: i.e. modification of the now confirmed, inconsistent legislation. *Prima facie* consistency of laws could only enhance the maximum attainment of a WTO fundamental objective of predictability and security in the multilateral trading system. Jamaica was concerned with the apparent discrepancy between the Panel's ruling and the ruling of the panel and Appellate Body in the case on "India - Patent Protection for Pharmaceutical and Agricultural Chemical Products". In the latter the ruling was that WTO-consistent administrative instructions and practices were not sufficient enough to remove the legal uncertainty created by the existence of inconsistent primary legislation; whereas in the present case, an official statement and an oral assurance had been deemed satisfactory to cover the WTO contradictions arising out of the primary law. Jamaica firmly believed that where certain principles were set, they had to be applied universally not selectively. This consistent approach was vital to the process of building predictability and security in the multilateral trading system and towards ensuring the confidence of Members in the integrity of the dispute settlement mechanism.

The representative of India said that his country had participated as a third party in this important dispute. The WTO was expected to provide security and predictability to the multilateral trading system and was doing so through the DSU. Therefore, the DSU provisions should be interpreted in the light of this objective and purpose. India welcomed the Panel's characterization of Article 23 as an "exclusive dispute resolution clause". Article 23 required that all Members abide by the DSU rules and procedures, to the exclusion of any other mechanisms, in particular unilateral measures, for resolution of their disputes under the covered agreements. The Panel had concluded that certain key provisions of the Sections 301-310 of the US Trade Act were a "*prima facie*" violation of WTO law. However, the Panel had observed that the aggregate effect of the Statement of Administrative Action and the US statements before the Panel provided the guarantee that Article 23 of the DSU was intended to secure. India considered that the approach of examining legal provisions in conjunction with guarantees and assurances provided by the US administration was rather unusual and unprecedented, in particular in the light of the fact that that approach was not adopted in an earlier

case involving India, as pointed out by Jamaica. As many delegations had stated, the Panel's approach was legally questionable. However, India hoped that the final conclusion of the Panel, which was conditional, would achieve the objective of preserving the primacy and integrity of multilateral rules enshrined in the WTO Agreement.

The representative of Australia said that his country welcomed the adoption of the Panel Report, which served to reinforce for all Members the benefits of a secure and predictable multilateral trading system based on the rule of law. Like others, Australia was concerned to ensure that Members' domestic legal frameworks were applied in a way that supported the multilateral trading system, including the rights of all Members afforded under Article 23 of the DSU. As recognised by the Panel, domestic legal systems should not negate the security and predictability provided by a multilateral rules-based system. In this context, Australia endorsed the Panel's view that an ability to threaten unilateral action could be as effective a weapon, as the actual instigation of unilateral action. At the same time, Australia also endorsed the Panel's reasoning that the full policy context in which legal systems were applied was central to the security and predictability of the WTO system. The Panel Report clarified the importance and centrality of Article 23 of the DSU to the WTO system.

The representative of Argentina said that his country had a systemic interest in the case at hand and considered that the Panel's findings were important. He highlighted the fact that the Panel had concluded that certain parts of the Trade Act of 1974, in particular Sections 304, 305 and 306 constituted, or under certain circumstances could constitute, a *prima facie* violation of Article 23 of the DSU. This conclusion was a necessary corollary of the previous finding by the Panel to the effect that the discretion granted by the legislation in question, insofar as it provided the mere possibility of action inconsistent with the DSU, was a key factor for determining *prima facie* inconsistency with the WTO rules. Although Section 301 was not considered inconsistent with the DSU, the Panel had arrived at this conclusion on the basis of the US commitments, which Argentina recognized and welcomed. Argentina continued to have doubts about the possibility that legislation, which was found, *prima facie*, to be inconsistent with WTO rules, could be remedied by administrative means or by an undertaking given to the Panel, which was revocable by the same Administration. Nevertheless, it was Argentina's understanding that the consistency of the legislation in question was dependent on fulfilment of the undertakings to comply strictly with the DSU rules and procedures.

The representative of Egypt said that her country welcomed and supported the adoption of the Panel Report. Although the Panel had concluded that Section 301 was compatible with the DSU rules, its conclusion was conditioned on the US respect of the DSU rules and procedures in each and every Section 301 investigation. The United States had committed itself to do so in the Statement of Administrative Action and its statements made before the Panel. The Panel stressed the need to ban a threat of unilateral actions and that the statutory language of Section 304 constituted a *prima facie* violation of Article 23 of the DSU. The Panel had also found that US discretion under the key elements of Section 301 constituted a threat of unilateral determinations that were prohibited under Article 23.2(a). Egypt welcomed the Panel's rulings as it provided necessary assurances to all Members and confirmed the success and predictability of the system.

The representative of Guatemala said that her delegation noted the statements made by previous speakers. Although her country had not participated in the Panel's proceedings it would be carefully examining the Panel Report.

The representative of the United States said that her delegation noted the statements made at the present meeting. However, it seemed that some delegations were not clear with regard to the Panel's conclusions. She underlined that the Panel had concluded that Section 301 was consistent with the WTO. In particular, in its conclusions, the Panel had stated that the provisions of Section 301 were not inconsistent with the US obligations under the WTO. With regard to the US assurances given before the Panel, she said that the United States had committed itself five years ago

to abide by its WTO obligations. The United States had not indicated anything new in the Panel's proceedings and the Panel in paragraph 7.121 of its Report had stated that "the statements did not represent a new US policy or undertaking". Through Section 301, the US Congress had a statute which was used by the United States under the GATT and the WTO dispute settlement procedures when its rights were at stake. It also required that determinations of GATT or WTO violations be based on these procedures. The Uruguay Round Statement of Administrative Action also made this clear. With regard to the claims that the United States had used Section 301 inconsistently with the WTO, the Panel in paragraph 7.129 of its Report had expressly invited all third parties and the EC, in response to their criticism of Sections 301-310, to provide any evidence of WTO inconsistent conduct by the United States. Only three cases had been cited and the Panel had not been persuaded by them. The Panel had found that it did not consider that the evidence submitted was sufficient to overturn the US claim of a consistent record of compliance of Section 304 with Article 23.2(a).

The DSB took note of the statements and adopted the Panel Report contained in WT/DS152/R.

3. Canada - Measures affecting the importation of milk and the exportation of dairy products

(a) Agreement on a reasonable period of time for implementation

The representative of Canada, speaking under "Other Business", said that on 22 December 1999, his country had reached an agreement with New Zealand and the United States pursuant to Article 21.3(b) of the DSU on the reasonable period of time for the implementation of the DSB's rulings. Canada had agreed to a staged implementation process to bring export practices into conformity with its agriculture export subsidy quantity reduction commitments. With regard to the administration of the fluid milk tariff rate quota, all necessary regulatory amendments to remove the US$20 restriction would be completed by 1 February 2000. Canada would consult on a regular basis with New Zealand and the United States. Canada thanked the parties for their cooperation and believed this was an excellent example of cooperation between Members to further the implementation of the DSB's rulings. Canada would take the necessary steps to ensure that its measures were brought into conformity and remained fully consistent with its WTO obligations. His delegation would provide the DSB with status reports on implementation, in accordance with Article 21.6.

The representative of the New Zealand said that his delegation supported the statement made by Canada. The agreement reached on the reasonable period of time was an excellent example of cooperation between Members and a useful precedent for the implementation of DSB's rulings in future. New Zealand noted that this mutually acceptable agreement (WT/DS103/10-WT/DS113/10) contained clear time-frames for implementation. New Zealand welcomed Canada's indication that it would take the necessary steps to bring its measures into conformity and to ensure that they remained fully consistent with its WTO obligations.

The representative of the United States commended Canada for its approach in the implementation of the DSB's recommendations. Canada's decision to immediately implement significant aspects of these recommendations had set an excellent example for other Members while building confidence in the dispute settlement system. She noted that where immediate compliance was not possible, the parties had agreed to a staged implementation process, which would be completed by 1 August 2000. The United States looked forward to working with Canada to complete its implementation.

The DSB took note of the statements.

4. Appointment of Appellate Body members

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", recalled that the DSB had considered this matter at its meeting on 27 October and 3 November 1999 and had taken the following decisions: (i) to renew the terms of Mr. James Bacchus and Mr. Christopher Beeby for a final term of four years; (ii) to commence a process to ensure the rapid replacement of the two Appellate Body members who had expressed their desire to leave, following the process used in 1995 to select the original seven Appellate Body members, which would involve nominations by Members by 17 December 1999, and the establishment of a Selection Committee composed of the Director-General, together with the 1999 Chairs of the General Council, the DSB and the Councils for Trade in Goods, Services and TRIPS, with a view to a recommendations being made to the DSB for a decision at its meeting in March 2000; and (iii) to extend the terms of Mr. Said El-Naggar and Mr. Mitsuo Mattsushita until the end of March 2000.

He informed Members that by 17 December 1999 three countries: i.e. Bulgaria, India and Japan had submitted their candidates. After that deadline, on 18 January 2000, Egypt had submitted a candidate which had a support of the African Group. The Selection Committee, which had met in the week of 17 January 2000, had taken up the question of the late nomination. The Selection Committee had recognized that the period before and after the Seattle Ministerial Conference was a very busy one. For that reason, the Selection Committee had felt that the Egyptian candidate should be considered along with the three other candidates. However, in order to provide an equal opportunity for other delegations who still wished to make nominations there was a need to extend the 17 December deadline. He underlined that this extension should not constitute a precedent as it was important to respect deadlines in the WTO. The two new Appellate Body members had to be selected by the end of March. He believed that the deadline should only be extended for a short period to allow sufficient time for governments wishing to make nominations. He proposed that the deadline be extended by two months until 17 February 2000, on the understanding that that date would be final and that no other candidates would be considered after 17 February 2000. He would keep Members informed of any new developments in this regard. If his proposal was accepted, the Selection Committee could start its work shortly after 17 February 2000. Interviews would be arranged with candidates and arrangements would be made, to the extent possible, to enable delegations to meet with candidates, if they so wished. Consultations would also be held with a view to arriving at a consensus decision on this matter.

The representative of Japan said that there were two options with regard to the Chairman's proposal. The first option was to reject the proposal on the ground that the deadline of 17 December 1999 had been agreed unanimously by consensus, including by Egypt, who was requesting the extension of the deadline. The 17 December deadline provided sufficient time for any country to make necessary preparations in order to put forward their candidates. As a matter of principle it was not appropriate to alter that decision because that would have an impact on the credibility of WTO decisions taken by consensus. The other option would be to agree to the Chairman's proposal on the ground that if a considerable number of Members believed that it was necessary to amend this decision, it would be desirable for the WTO, which often adopted pragmatic solutions, to take this view into consideration. It was not easy for his delegation to decide which option should be chosen. However, Japan respected the Chairman's wisdom as well as his balanced judgment, and decided not to oppose his proposal. He stressed that, as indicated by the Chairman, it was very important to respect this new deadline in order to select the two individuals in time to allow for their smooth transition to a new team and to ensure the smooth functioning of the dispute settlement mechanism.

In connection with this matter, Japan also wished to raise concern with regard to a letter sent to the Chairman of the DSB by Egypt. That letter contained the following sentence: "Dr……..who has previously expressed his willingness not to sit for reappointment for a second term on the seat reserved to Africa and the Middle East." He believed that it had never been agreed that some seats were reserved for certain countries or regions. While Japan was willing to agree to the Chairman's proposal it would not accept the above interpretation.

The Chairman welcomed the fact that Japan had supported his proposal. It was his understanding that no seat was reserved for any particular region in the Appellate Body. The criteria for selection were specified in Article 17 of the DSU and some precedents were involved in the 1995 selection process.

The representative of Canada said that his country fully supported the Chairman's proposal. Canada was also concerned about the notion of a seat being reserved. He noted that Article 17.3 of the DSU stipulated that: "The Appellate Body membership shall be broadly representative of membership in the WTO." Canada rejected the notion of the seat being reserved for any particular Member or a particular region.

The representative of the United States said that her country accepted the Chairman's proposal. The United States supported the statements made by Japan and Canada, namely, that there was no provision to the effect that there was a seat reserved for any country.

The representative of Slovenia associated his delegation with the statements made by previous speakers. He believed that to indicate that there was a seat reserved for the Middle East and Africa could put some pressure on the Selection Committee to select a candidate from that region. He believed that this was not acceptable.

The DSB took note of the statements and agreed to extend the deadline for submission of candidates for the Appellate Body members until 17 February 2000.