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Held in the Centre William Rappard
on 20 March 2000

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

Prior to the adoption of the Agenda, the Chairman drew attention to a press release issued by the Director-General, which noted with great sadness the unfortunate passing away of one of the Appellate Body members, Mr. Christopher Beeby of New Zealand. This was a great loss to all Members, and his colleagues on the Appellate Body would also miss his wisdom. He was a very distinguished public international lawyer. As a result of the loss of Mr. Beeby, the task of adjudicating between Members would be made even more difficult. He asked delegations to join him in a minute of silence as a mark of respect and tribute to Mr. Beeby.

Also prior to the adoption of the Agenda, the Chairman said that with respect to the item concerning Korea's request under Article 21.5 of the DSU on "United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea", he had been informed that the parties wished to have some further contacts and accordingly it would not be useful to retain this item on the Agenda of the present meeting.

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.6)

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.2)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the two sub-items be considered separately.

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

2. The Chairman drew attention to document WT/DS27/51/Add.6 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that at the 24 February DSB meeting his delegation had reported on the on-going consultations. Since then the consultations with the most concerned third country partners continued. A meeting had been held in Brussels with eight Latin American countries which enabled the EC to have an in-depth discussion on various aspects, including the technical issue with regard to different options. At that meeting the EC had also provided information on the ongoing discussion with other partners. Further consultations were envisaged.

4. The representative of Panama said that, as indicated in the press, the Arbitrators had just given their ruling concerning the arbitration procedure in relation to the Bananas case. Although the Arbitrator's decision had not yet been officially circulated, Panama was aware that that decision upheld the view that the EC's banana regime was causing serious injury to developing countries. As Panama had stated previously, this case was about multinationals trying to undermine the economies of developing countries. Panama, together with other banana exporting countries, had provided detailed reasons as to why the EC's proposal of November 1999 was WTO-incompatible and why it should be rejected. Furthermore, the proposal had not been supported by the EC member States. Panama believed that the proposal would neither bring a definitive solution to this dispute, nor would it enable the EC to come into compliance with its WTO obligations.

5. The EC had reported that the consultations with interested parties were ongoing. However, the EC's status report did not reflect the real situation with regard to its contacts with those parties. Panama, on several occasions, had expressed its willingness to enter into a constructive dialogue with the EC on the implementation of a new regime. In this constructive spirit, Panama together with other Latin American countries, had submitted proposals which had been supported by many countries,

including some ACP countries. The EC had not responded to any counter proposal and had rejected the proposals made by the Latin American countries.

6. He said that at the meeting held in Brussels on 15 March 2000, the EC had reported to several Latin American countries on its discussions with the United States and Ecuador. However, no details had been provided. As a result, it had not been possible to evaluate the scope of those discussions and it was not clear what efforts were being made by the EC. Furthermore, the EC had ignored repeated appeals made during that meeting to discuss the Latin American proposal, in spite of the fact that the proposal had been made in October 1999. This was not a real dialogue but a series of meetings during which the EC continued to inform the parties how it intended to proceed. The attitude of the EC showed that it did not have much interest in finding an acceptable solution to this dispute. Panama urged the EC and its member States to respect their WTO obligations.

7. The representative of Guatemala said that his delegation noted the status report submitted by the EC. It was clear that the obligation to implement the DSB's rulings and recommendations was with the respondent and the respondent alone. At the end of 1999 the Latin American banana-producing countries had put a number of proposals to the EC. However, the months had passed and their contributions continued to be ignored.

8. He said that on 15 March 2000, a meeting had been held at the request of the EC in Brussels to discuss the Bananas case. The Latin American countries had not been given clear and precise information or a specific proposal to settle the dispute. On the contrary, the EC had resorted to the tactic of putting forward a list of the difficulties it had encountered in bringing its regime into conformity, and of the failed efforts to negotiate a solution with two of the five complainants. This was the reason why none of the countries present at that meeting had accepted any solution formula.

9. He drew attention to the fact that on 17 March 2000 a report had been issued concerning arbitration in the Bananas case in relation to Ecuador's request. Even though the report had not yet been circulated officially, the press had reported that Ecuador's request to take retaliatory action against the EC was accepted by the Arbitrators. His delegation wished to stress what this decision represented. Although Guatemala was sure that all Members attached the greatest importance to this matter in order to appreciate it fully a Member had to have experienced − or be able to imagine that one day it might experience − what the complainants in the Bananas case had undergone. Any Member whose expectations were frustrated when a ruling was not implemented, particularly developing countries, should welcome the fact that this decision contributed in some way to restoring the credibility of the dispute settlement system. It was clear, however, that this was not enough. Guatemala considered that after two rulings under the GATT, one ruling under the WTO pursuant to Article 21.5 and two arbitrations establishing that the EC regime was causing injury, the system's credibility would only be restored when the EC brought its banana import regime into conformity.

10. The representative of Honduras said that his delegation noted the status report but did not wish to point out again the lack of progress, frustration or the damage to the dispute settlement system resulting from this prolonged case. At the present meeting, Honduras wished to refer to two specific developments. First, an information meeting with the EC had been held in Brussels on 15 March 2000. At that meeting, the EC had not made any proposal, but had merely provided information on the alternatives which were being considered and discussed with some countries. Although Honduras was a party to this dispute it had not received any response to the joint proposal which had been put forward to the EC in October 1999 together with many other Latin American countries.

11. Second, he wished to raise one matter of the greatest importance for all Members and in particular for developing country Members. In accordance with information disclosed in the press, the report authorizing Ecuador to take retaliatory action against the EC had just been issued. He

recalled that Honduras had supported the request made by Ecuador under Article 22 of the DSU. Therefore, as one of the countries which had brought this historic case forward and as a developing country, Honduras welcomed the result of the arbitration in Ecuador's case. Together with the arbitration decision in the case brought by the United States, this was clear proof of the injury that the EC's banana import regime caused to those countries.

12. The report represented the first encouraging sign in many months in relation to this case. Honduras hoped that as a result of the Arbitrators' decision even those Members whose weak economies made it difficult for them to withdraw tariff concessions would be able to obtain the implementation of rulings and recommendations adopted by the DSB by taking measures in other sectors. The system would be strengthened if no other complainant was obliged to make its own request under Article 22.

13. The representative of St. Lucia, speaking also on behalf of Dominica and Saint Vincent and the Grenadines, noted that following the present discussion, one could be misled into assuming that there was no serious attempt to devise a new WTO-consistent banana import regime. If any party had an interest in the matter remaining unresolved, it evidently could not be the EC which remained subject to substantial and damaging trade sanctions. In the view of the above-mentioned countries, progress was being impeded by a basic contradiction; i.e. many companies and countries wanted the new system to permit them increased sales of bananas, but should they all succeed, there would be an over-supply of bananas, leading to a collapse in prices. This would hurt all suppliers and would be a disaster for the weakest and most vulnerable. Particular suppliers might argue that stability of the market could be maintained despite their own share being increased if there was a simultaneous reduction of the shares of others.

14. The above countries categorically rejected this approach which regrettably was implicit in some of the proposals being made: the legitimate trading rights of traditional suppliers had to be respected in the new regime. She assured that the above countries had no designs on the shares of anyone else. They had only a minuscule share of the EC's banana market but their ability to continue selling even that limited volume at remunerative prices was essential for their well-being. They had neither the intention nor the ability to encroach upon the shares of others. They were aware that their survival rested on continued stability. They urged the parties to put an end to acrimonious, unhelpful bickering and accusations which, like the continuing trade sanctions, spoiled the atmosphere and undermined the prospects for an amicable and constructive approach essential for working out a compromise which could be reasonably acceptable to various parties.

15. The representative of the United States noted that there had been no new recent developments in the long saga of this dispute. In the interest of resolving this dispute, the United States had demonstrated considerable flexibility in its bilateral discussions with the EC; the EC had not. As a result, there had been no movement toward a resolution. At the end of 1999, the United States, as well as most of the Latin American banana exporting countries, had endorsed a proposal put forward by Prime Minister Edison James of Dominica on behalf of Caribbean exporters. The EC had not accepted this proposal.

16. In its status report, the EC continued to cite differences among the complaining parties, but that was not where the real differences lay. The United States asked that the EC refrain from yet again blaming the complaining parties for its failure to implement a WTO-consistent banana regime. The EC was aware that its obligation was to come into compliance with WTO rulings and recommendations. It was also aware that the reason it could not come into compliance was the divergent views among its 15 member States. The EC knew that the reason for this divergence among its member States was because some of them insisted on maintaining provisions that discriminated in their favor and that benefited their interests. The next time the EC intervened on bananas, the United

States would ask that it assumed responsibility for its own failure to comply with its WTO obligations and not try to shift it to others.

17. The representative of the European Communities said that the report of the Arbitrators to which some delegations had referred was confidential until 24 March 2000. It was unfortunate that some delegations had referred to press reports. The EC did not wish to comment on this subject in order to preserve confidentiality of the report. He asked the Chairman to exercise his authority in this respect. He regretted that on the basis of some comments from the press, conclusions were being drawn on the meeting held in Brussels. That meeting which had lasted for several hours enabled the parties to discuss in depth technical issues. The participants had been asked specific questions and some had provided positive replies. Others, who had refused to enter into discussion at that meeting, had stated at the present meeting that it had not been possible to make progress. He underlined that it was necessary to be open and to hear other views in order to find a solution which, as stated by Saint Lucia, would satisfy all partners, including the parties to the dispute.

18. The Chairman said that at the present meeting, he did not expect delegations to make statements in relation to the arbitration procedure between the EC and Ecuador since this was a separate matter.

19. The representative of Ecuador said that his delegation noted the EC's status report and the statements made by previous speakers. At the present meeting, Ecuador wished to reiterate a number of considerations which should be taken into account by the EC when amending its current regime. He did not only wish to refer to market access conditions in the EC market, but also to the issues arising from the DSB's recommendations and rulings. Ecuador's position and its interests were based on fully justified legal considerations in relation to different stages in the Bananas dispute.

20. He noted that the following elements should be considered by the EC in amending its current banana import regime: (i) a tariff-rate quota system could not be implemented through the allocation of country quotas unless there was an agreement with the substantial suppliers on this matter. Ecuador, as the main supplier, considered that such a distribution was unacceptable and reiterated that the EC had to eliminate the system immediately; (ii) the EC had to implement a regime for the distribution of licences that would conform to WTO rules. A method for implementation should be based on recent licence distribution, and not on an illegal reference period. There should be no system or reference period that would preserve a highly distorted situation such as the one which existed prior to 1993. The EC might avoid the difficult decision of choosing an appropriate system of licence distribution by adopting the most recent reference period and by using a definition of operators which reflected those importers who took the risk of transporting bananas to Europe; (iii) the quota system had to reflect the recent growth in the demand for bananas by increasing the quantity of fruit entering the EC; (iv) the EC had to respect the tariff levels bound in its Uruguay Round Schedule; (v) the tariff quotas had to be applied according to the most-favoured-nation principle; all Members had to have access to all tariff rate quotas; (vi) the allocation of a tariff preference to ACP countries had to go hand in hand with a new waiver. Under no circumstances could such a waiver exceed the conditions of the waiver which had expired. The EC could not, therefore, make a collective allocation to ACP suppliers, neither could these countries have access to individual bilateral preferences which would exceed their exports prior to 1991. The preference that the EC was currently granting to ACP countries exceeded the real scope of the waiver which had expired and which had been granted by the WTO solely to implement the access conditions laid down by Protocol No. 5 of the Lomé Convention with respect to Article I of GATT 1994, as specified by the Panel and the Appellate Body; (vii) the tariff rate quota system should be applied during a relatively short transition period. A transition period could not be considered as such if it was longer than the duration of the banana regime which had caused considerable injury to Ecuador and various other developing countries. The EC's illegal regime had been in force for seven years, and a transition regime to put an end to this system had to be relatively short.

21. The representative of Panama said that he wished to make some comments with regard to the second statement made by the EC. Panama maintained its view with regard to the meeting held on 15 March 2000 in Brussels. The fact that some delegations had stated that they would convey information to their capitals was different from accepting or supporting the EC's proposal.

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

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.2)

23. The Chairman drew attention to document WT/DS76/11/Add.2 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations concerning its measures affecting agricultural products.

24. The representative of Japan said that, as indicated in the status report, consultations had been held with the United States in a constructive and friendly manner. Some technical issues still remained to be resolved, but the parties expected to reach a mutually satisfactory solution in the very near future. Japan would notify the DSB of its agreement with the United States once such an agreement had been reached.

25. The representative of the United States thanked Japan for its status report and its continued cooperation on implementation issues. The United States also hoped to resolve the remaining technical issues in the very near future.

26. The representative of Australia said that given his country's interest in this case, he was pleased that Australia had been able to hold technical discussions recently in Tokyo with the Japanese Ministry of Agriculture, Forestry and Fisheries. Australia looked forward to continued detailed discussions with Japan in the near future.

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

2. Mexico - Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States

(a) Implementation of the recommendations of the DSB

28. The Chairman recalled that in accordance with the DSU provisions, the DSB kept under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that on 24 February 2000, the DSB had adopted the Panel Report on "Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States". He invited Mexico to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

29. The representative of Mexico said that his delegation had requested the inclusion of this item on the agenda of the present meeting in order to inform the DSB of its intentions with regard to the implementation of the DSB's recommendations in this case, in accordance with Article 21.3 of the DSU. He recalled that the Panel had concluded that the anti-dumping investigation initiated by Mexico on imports of high fructose corn syrup from the United States was consistent with the

requirements of Articles 5.2, 5.3, 5.8, 12.1 and 12.1(iv) of the Anti-Dumping Agreement. On the other hand the same Panel had concluded that in the course of the investigation there had been some inconsistencies with specific provisions of Articles 3, 7, 10 and 12 of the Anti-Dumping Agreement, and had therefore recommended that the DSB request Mexico to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

30. Mexico intended to implement the DSB's rulings and recommendations in accordance with its WTO rights and obligations. Following the adoption of the Panel Report on 24 February 2000, the competent Mexican authorities had begun an assessment of the most appropriate means to remedy the inconsistencies which, according to the Panel, had taken place in the course of this arduous and complex investigation. In accordance with the DSU provisions, Mexico would require a reasonable period of time to be able to comply with the DSB's rulings and recommendations in this case.

31. The representative of the United States said that the Panel had confirmed what the United States had alleged in this case, namely, that Mexico's imposition of antidumping duties on imports of high fructose corn syrup from the United States was inconsistent with the Anti-Dumping Agreement. The Panel had established a number of violations of the Anti-Dumping Agreement. It had found Mexico's threat of injury determination to be inconsistent with the Agreement. Mexico had given inadequate consideration to the impact of dumped imports on its domestic industry; it had considered only part of the domestic industry's production; and it had given inadequate consideration to the effect of an anti-competitive arrangement between sugar producers and bottlers of soft drinks in determining whether there was a likelihood of substantially increased imports.

32. The Panel had also found that Mexico had improperly imposed antidumping duties for the period of its provisional antidumping measure, and had failed to release the bonds or return the cash deposits securing liability for duties on entries during the same period. Mexico had also failed to set forth findings or conclusions regarding its application of duties for that period in its determination. Furthermore, the Panel had found that Mexico had applied its provisional measure beyond the applicable six-month limit.

33. In the United States' view these were serious violations of the Anti-Dumping Agreement. Members were not to impose antidumping duties without properly examining and determining injury. Mexico's threat of injury determination was not just flawed - it had been found to be fundamentally inconsistent with the bedrock principles set out in the Anti-Dumping Agreement pertinent to determinations of injury. The United States believed that Mexico could comply with the Panel's findings in a very short period of time since no changes in Mexico's laws or regulations were needed for compliance. The United States stood prepared to work immediately and constructively with Mexico on the substance and the timing for its implementation of the DSB's recommendations and rulings. The United States believed that discussions now could avert problems and misunderstandings and had made this known to Mexico. The United States looked forward to reaching a prompt resolution to this dispute.

34. The DSB took note of the statements, and of the information provided by Mexico regarding its intentions in respect to the implementation of the DSB's recommendations.

3. Argentina - Transitional safeguard measures on certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil

(a) Request for the establishment of a panel by Brazil (WT/DS190/1)

35. The Chairman recalled that the DSB had considered this matter at its meeting on 24 February 2000 and had agreed to revert to it. He drew attention to the communication from Brazil contained in document WT/DS190/1.

36. The representative of Brazil said that at the 24 February DSB meeting, Brazil had requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Article 6 of the DSU and Article 8 of the Agreement on Textiles and Clothing (ATC) with respect to transitional safeguard measures established by Argentina under Article 6 of the ATC on certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil. The full basis of Brazil's complaint was contained in document WT/DS190/1. On 10 March 2000 an arbitral tribunal established under the Brasilia Protocol - which was the dispute settlement mechanism for MERCOSUR - had made findings and recommendations that met Brazil's concerns with regard to this matter. However, the deadlines under the Brasilia Protocol had not yet expired. Therefore, due to the legal requirements under the WTO dispute settlement mechanism, Brazil was compelled to reiterate its request for a panel. At the same time, Brazil was confident that, before the composition of the panel, the matter would be settled in a manner satisfactory to his country following the conclusion of the Brasilia Protocol process.

37. The representative of Argentina said that his country recognized that Brazil had a right under Article 6.1 of the DSU to request a panel. He pointed out that the arbitral tribunal under the Brasilia Protocol was a distinct legal framework. That arbitral tribunal had ruled on the compatibility of Argentina's safeguard measures with MERCOSUR not with the WTO Agreement, including the ATC. The case with regard to the consistency of Argentina's safeguards measures with the WTO rules had not yet been considered by any jurisdictional body. He recalled that at the DSB meeting on 24 February 2000, his delegation had already expressed its views with regard to Brazil's allegations contained in WT/DS190/1.

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

39. The representatives of Pakistan, Paraguay and the United States reserved their third-party rights to participate in the Panel's proceeding.

4. United States - Anti-dumping measures on certain hot-rolled steel products from Japan

(a) Request for the establishment of a panel by Japan (WT/DS184/2)

40. The Chairman recalled that the DSB had considered this matter at its meeting on 24 February 2000 and had agreed to revert to it. He drew attention to the communication from Japan contained in document WT/DS184/2.

41. The representative of Japan said that it was for the second time that his delegation was requesting the establishment of a panel to examine this matter. As outlined in document WT/DS184/2, Japan considered that the determination made by the United States in its investigations of dumping and injury of hot-rolled, flat-rolled carbon-quality steel products originating in Japan, as well as the underlying laws and regulations policies and procedures, were inconsistent with the WTO Agreement. As indicated at the 24 February meeting, the consultations had not resulted in a resolution of the dispute. Therefore, Japan wished to reiterate its request for the establishment of a panel with standard terms of reference.

42. The representative of the United States said that his country accepted the establishment of a panel at the present meeting. However, the United States believed that the determinations referred to by Japan fully complied with the US obligations under the GATT 1994 and the Anti-Dumping Agreement. The United States would be making that case before the Panel.

43. The representative of Brazil said that his country attached importance to this case and had a substantial interest in this matter. The anti-dumping measures in question raised a number of

systemic issues in relation to the implementation of the Anti-Dumping Agreement and the interpretation of certain provisions of that Agreement. Brazil's interest in this dispute was not only limited to systemic issues. It was also related to the way the US authorities applied the Anti-Dumping Agreement in general and, in particular, with regard to steel products.

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

45. The representatives of Canada, Chile, the EC, and Korea reserved their third-party rights to participate in the Panel's proceeding.

5. Australia - Measures affecting importation of Salmon - Recourse to Article 21.5 of the DSU by Canada

(a) Report of the Panel (WT/DS18/RW)

46. The Chairman recalled that at its meeting on 27 and 28 July 1999, the DSB had agreed to refer to the original Panel the Article 21.5 request by Canada for determination of consistency of implementation measures in this dispute. The Report of the Panel which had been circulated on 18 February 2000 in document WT/DS18/RW was now before the DSB for adoption at the request of Canada.

47. The representative of Canada recalled that in July 1999 his country had sought a determination on the consistency of the measures taken by Australia to comply with the 6 November 1998 rulings and recommendations of the DSB with respect to the importation by Australia of fresh, chilled and frozen salmon. At that time, Canada had asserted that the measures announced by Australia on 19 July 1999 were not consistent with the SPS Agreement. Canada was pleased to note that the Article 21.5 Panel had supported its position. The Panel had found that, not only were there significant delays in the entry into force of several of the measures announced by Australia on 19 July, but that some of the measures were more trade restrictive than required to achieve Australia's appropriate level of protection. The Panel had also found that measures enacted by the Government of Tasmania, for which Australia was responsible, were contrary to Australia's obligations under the SPS Agreement. Canada and Australia had initiated discussions on implementation with a view to arriving at a mutually satisfactory solution. The discussions were continuing and Canada would keep the DSB informed of any new developments.

48. The representative of Australia said that the findings against Australia's measures were very narrowly cast, in particular in regard to salmon that was "consumer-ready" as specifically defined. There were many findings in Australia's favour: (i) the consistency of Australia's risk assessment with the provisions of Article 5.1 of the SPS Agreement; the first risk assessment to have been validated through WTO dispute settlement processes; (ii) ten out of 11 of Australia's measures applying to Canadian salmon in excess of the international standards had been found not to be WTO-inconsistent; and (iii) consistency with the provisions of Articles 5.5 and 2.3 of the SPS Agreement, which clarify that equivalence of measures should not be the legal determinant of conformity with those provisions. Australia had some reservations about the Report. First, because there had been no interim review, Australia had not had the opportunity to rectify certain errors of fact or errors in factual conclusions. Second, the mandate assumed by the Panel in relation to measures "taken to comply", in particular in regard to a measure on which Canada had not specifically sought a ruling. Third, the observations in paragraph 7.129 of the Report. Australia had had discussions with Canada on options for reaching a mutually satisfactory solution and those discussions were continuing. Australia wished to draw to the attention of other interested Members that any such solution which might be found as a result of those discussions would be fully in accordance with the provisions of Article 3.7 of the DSU, in particular the third sentence of that provision.

49. The representative of the United States said that it should not come as a surprise that his country had an abiding interest in removal of all WTO-inconsistent barriers to trade in salmon with Australia. He recalled that a panel had been established in a parallel complaint brought by the United States concerning the same measure, and the work of that panel had been suspended, as the panelists were not available due to their involvement in the Article 21.5 review. The United States did not wish to litigate this case again; it was already clear what the outcome would be and his country trusted that those interested in this issue in Australia also understood that. The United States would much prefer to negotiate a constructive, market-opening solution to this long-standing problem. The United States looked forward to Australia's prompt compliance with the DSB's recommendations. His country hoped to continue a dialogue with Australia on its response to the Panel Report.

50. The representative of the European Communities said that the Panel Report under consideration was one of the first reports under Article 21.5 of the DSU. The EC believed that as a whole the approach taken by the Panel to resolve this matter in accordance with the accelerated procedures was balanced. However, the EC noted that in some respects, and in particular with regard to the determination of the existence of the implementing measures, the Panel had chosen to ignore certain legally relevant criteria in favour of practical and highly subjective considerations. The EC hoped that any future procedures under Article 21.5 would enable it to establish an approach which would be more in conformity with the WTO Agreement and with general principles of law.

51. The representative of Norway said that his country, which had participated in this dispute as a third party, noted the outcome in this case. Norway believed that the Panel Report was balanced and welcomed its adoption. His country looked forward to the implementation of the recommendations by Australia as soon as possible.

52. The DSB took note of the statements and adopted the Panel Report contained in document WT/DS18/RW.

6. United States - Tax Treatment for "Foreign Sales Corporations"

(a) Report of the Appellate Body (WT/DS108/AB/R) and Report of the Panel (WT/DS108/R)

53. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS108/9 transmitting the Appellate Body Report on United States - Tax Treatment for "Foreign Sales Corporations", which had been circulated in document WT/DS108/AB/R in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev., both Reports had been circulated as unrestricted documents. He drew attention to Article 17.14 of the DSU which required that "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

54. The representative of the European Communities said that the EC was satisfied with the outcome of this case as both the Panel and the Appellate Body had clearly ruled that the FSC scheme constituted a prohibited export subsidy incompatible with the disciplines of the Subsidies Agreement. He underlined that, as the Appellate Body had clearly recognised, this was not a ruling on the relative merits of "world-wide" and "territorial" systems of taxation, but simply a ruling on an export subsidy granted through a tax measure. This ruling had recognised that Members had the sovereign authority to tax or not to tax any particular category of revenue they wished. But in doing so they had to respect their WTO obligations. The economic importance of this case for the EC was considerable as the amount of subsidies granted through the FSC and its impact on US exports was substantial. The

FSC had worked for many years to the detriment of EC companies both in the EC and third markets. Therefore, the EC expected now the United States to comply with this ruling by 1 October 2000, as established by the Panel. He underlined that, in fixing this date, the Panel had followed the US proposal and had taken into account that the FSC, being a tax measure, could not be withdrawn without delay, as required by Article 4.7 of the Subsidies Agreement, earlier than at the beginning of the next US fiscal year; i.e. 1 October 2000. Therefore, the EC was expecting a proposal from the US on the implementation of the recommendations and was ready to work on this with the United States.

55. The representative of the United States said that his country was disappointed with the Appellate Body Report, and disagreed with its content. The United States view remained that the FSC provisions of the US Internal Revenue Code had been designed to comply with the principles set forth in the Understanding adopted by the GATT Council in 1981, and that those principles had been incorporated into the Subsidies Agreement and were meant to apply generally. Nevertheless, the Appellate Body had spoken, and the United States would not engage in a detailed critique of the Appellate Body's reasoning. It would leave that to scholars, who undoubtedly would find much to write about the Appellate Body's treatment of certain arguments and its failure to address other arguments at all. At the present meeting, the United States simply wished to highlight certain aspects of the Appellate Body Report that should give other Members cause for concern.

56. The first aspect of the Report related to the Appellate Body's rejection of the 1981 Understanding of the GATT Council as an "other decision" of the CONTRACTING PARTIES within the meaning of paragraph 1(b)(iv) of the language incorporating GATT 1947 into the WTO Agreement. The United States had argued that the 1981 Understanding constituted an authoritative interpretation of GATT Article XVI:4, as confirmed by the statement of the Council Chairman that the Understanding did "not affect the rights and obligations of contracting parties". The United States distinguished between an interpretation of a provision − which clarified, but did not change, rights and obligations - and an amendment of a provision − which did change rights and obligations. According to the Appellate Body, however, an authoritative interpretation was something that did affect rights and obligations. In so ruling, the Appellate Body appeared to have unjustifiably expanded the scope of action that might be taken under Article IX:2 of the WTO Agreement with respect to authoritative interpretations by the Ministerial Conference or the General Council. The United States had been of the view that the last sentence of Article IX:2 - which provided that Article IX:2 shall not be used in a manner that would undermine the amendment provisions in Article X - prevented the use of the authoritative interpretation process in a manner that would change (or "amend") rights and obligations. However, the Appellate Body had now declared that an authoritative interpretation, by its very nature, was something affecting rights and obligations. At a minimum, the Appellate Body had managed to confuse the distinction between an authoritative interpretation under Article IX and an amendment under Article X in a manner that was not helpful to the WTO system.

57. The second aspect related to the Report's discriminatory outcome. A GATT panel had established 24 years ago that the territorial tax systems of certain European countries subsidize exports by taxing exports more favorably than comparable domestic transactions. Although that panel's legal conclusions had been overturned - at least at the time - by the 1981 Understanding, the Panel's economic conclusions remained as valid today as they were then. The record of the FSC dispute made clear that the US Congress designed the FSC system so as to emulate the tax treatment afforded exports under a territorial system. The Appellate Body and the Panel effectively had stated that a Member could not level the playing field by limiting territorial-type tax treatment to exporters. In the view of the United States, this outcome unjustifiably discriminated between Members on the basis of their tax systems. It was sufficiently troubling that the WTO subsidy rules discriminated between direct and indirect taxes on the basis of what increasingly appeared to be outmoded economic assumptions. It was intolerable to find that those rules also discriminate between direct tax systems, treating territorial tax systems more favorably than others. Of course, both the Appellate Body and

the Panel had gone to great lengths to try and convince the reader that WTO Members were free to adopt whatever type of tax system they wished. However, any such "freedom" was manifestly a false one when the consequences of choosing one tax system over another might be to place one's exporters at a disadvantage *vis-à-vis* their foreign competitors.

58. The third aspect was the Appellate Body's decision that it would not examine whether the EC's consultation request had failed to comply with the obligations of Article 4.2 of the SCM Agreement. The Appellate Body had declined to make this examination because the Appellate Body had claimed that the United States had breached its obligations under Article 3.10 of the DSU. Of course, the United States did not agree with that finding, but that was not even the most troubling aspect of the finding. The Appellate Body's finding was remarkable in a number of respects. The EC had not even made this claim in its appeal to the Appellate Body. Instead, the Appellate Body appeared to have taken on itself the task of claiming and finding a breach of the DSU by a Member. This appeared at odds with the mandate of the Appellate Body, particularly in light of the Appellate Body's statements in the Japan Varietals case[1] to the effect that panels should not make findings in favor of a party based on claims that the party had not even made. Furthermore, there was nothing in the SCM Agreement or the DSU that imposed a time limit on claims under Article 4.2 of the SCM Agreement or that excused a breach of that Agreement due to a claim of a breach of Article 3.10. There was simply nothing in the text of the DSU that would permit the Appellate Body to overlook or ignore an express requirement in the SCM Agreement. The Appellate Body seemed to have departed here from the textual approach that it had legitimately and successfully advocated in so many other areas. Finally, Article 3.10 of the DSU, the very same provision cited by the Appellate Body in its Report, stated that complaints and counter-complaints in regard to distinct matters should not be linked. If the EC had felt the United States was in breach of Article 3.1 it could have brought its own complaint which would have been heard in a separate proceeding. The outcome of that proceeding would not, and could not, have affected the examination of the EC's compliance with Article 4.2 of the SCM Agreement. This portion of the Appellate Body's report presented a very troubling precedent indeed, and one the United States hoped was not extended to other disputes or other Members. While the United States was pleased that the Appellate Body had reversed the Panel's reasoning with respect to the EC's claims under the Agriculture Agreement, this aspect of the report could not offset the Appellate Body's erroneous conclusion on other issues. Thus, the United States could not support the adoption of the Appellate Body and the Panel reports in the FSC dispute.

59. The representative of Canada said that his country had long been concerned with the trade-distorting effects of the FSC programme, particularly in third markets. It was for this reason that Canada had participated in the proceedings as a third party, at both the panel and appeal stage. Canada was broadly supportive of the EC position. In particular, it had stated its view that the FSC measure constituted a prohibited export subsidy under Article 3 of the SCM Agreement, and had noted with satisfaction the determinations of both the Panel and the Appellate Body on this issue. Canada urged the United States to take the necessary steps to brings its measure into conformity with its WTO obligations. Finally, Canada noted that Article 3.5 of the DSU provided that any solution to this dispute had to be consistent with covered agreements, and should not nullify or impair benefits accruing to any Member under those agreements.

60. The representative of Australia said that his country would follow the implementation of the recommendations in this case very closely. In this respect he wished to note, in particular, Australia's trading interest in agricultural products which have received export subsidies. He recalled that the United States had supported the adoption of the Panel Report under Article 21.5 in the case of Automotive Leather which called for the withdrawal of past payments. He noted that the United States had argued before the Panel for the repayment of any benefit received after the date of the adoption of the Panel Report rather than after the date for implementation. In this light, Australia

[1] WT/DS76.

looked forward to hearing from the United States exactly what it intended to do in order to bring itself into conformity and the basis for whatever action that was proposed.

61. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS108/AB/R and the Panel Report in WT/DS108/R, as modified by the Appellate Body Report.

7. Proposed nominations for the indicative list of governmental and non-governmental panelists

62. The Chairman drew attention to document WT/DSB/W/126 and Corr.1 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/126 and Corr.1.

63. The DSB so agreed.

8. Indonesia – Certain Measures Affecting the Automobile Industry

(a) Statement by the European Communities

64. The representative of the European Communities, speaking under "Other Business", said that his delegation wished to raise again the issue of implementation of the DSB's recommendations in the case "Indonesia – Certain Measures Affecting the Automobile Industry". The EC continued to be very concerned by the new luxury tax introduced by Indonesia in July 1999 as part of the new policy to implement the DSB's recommendations. In February 2000, the EC had raised this matter with Indonesia, but had not yet received any reply. The EC hoped to settle this matter bilaterally. However, should this not be the case the EC would not hesitate to exert its WTO rights.

65. The representative of Indonesia regretted that due to the fact that his delegation had received its response from the capital in the Indonesian language and needed time to translate it, his delegation was not in a position to provide that response to the EC. However, due to the importance of this issue, Indonesia would provide the EC with the response in the Indonesian language. Indonesia looked forward to discussing the matter once the EC had examined its response.

66. The DSB took note of the statements.

9. Argentina – Safeguard Measures on Imports of Footwear

(a) Statement by the European Communities

67. The representative of the European Communities, speaking under "Other Business", said that EC was very concerned with the implementation, or a lack thereof, undertaken by Argentina in the case on "Argentina – Safeguard Measures on Imports of Footwear". In particular, he wished to refer to Resolutions 122/2000 and 123/2000 introduced by Argentina at the end of February 2000. Instead of allowing the safeguard measures, which had been found to be inconsistent with Argentina's obligations under the Agreement on Safeguards, to expire on 23 February 2000, Argentina had adopted Resolution 122/2000. That Resolution had extended the illegal safeguard measures for sport footwear for an additional period of five months (150 days).

68. With respect to resolution 123/2000 which had imposed minimum specific duties on non-sport shoes, the EC wished to know how Argentina intended to keep the minimum specific duties under the bound rates. The EC considered that these measures, in particular Resolution 122/2000, did not constitute proper implementation of the DSB's recommendations. On the contrary, the EC

believed that in this case, in which the investigation and thus the very basis of Argentina's measures had been condemned by both the Panel and the Appellate Body, an extension of such measures was an outright breach of the WTO basic rules. The EC reserved its WTO rights to take further action against Argentina.

69. The representative of Indonesia said his country had noted Ministry of Economy's Resolutions 122/2000 and 123/2000 of 23 February 2000 through which Argentina had extended its safeguard measures on imports of athletic footwear. Indonesia had also noted that Argentina had neither notified the Committee on Safeguards immediately upon taking its decision to extend its safeguards measures, pursuant to Article 12.1(c) of the Agreement on Safeguards, nor had it provided the adequate opportunities for prior consultations with Members with a substantial interest as exporters, in accordance with Article 12.3.

70. Without prejudice to the position of Indonesia, as to whether the action taken by Argentina was consistent with its obligations under the GATT 1994 and the Agreement on Safeguards, Indonesia wished to reserve its WTO rights on this matter, including its rights under Article XIX of the GATT 1994 and Article 8 of the Agreement on Safeguards. Furthermore, it was Indonesia's understanding that in the absence of Argentina's notification and to the extent that consultations provisions under Article 8.2 of the Agreement on Safeguards applied to these measures, the consultation period had begun on 24 February 2000, the date on which the extension of the safeguard measures had entered into effect. He underlined that Indonesia had a substantial trade interest as an exporter in the product concerned.

71. The representative of Argentina said that his delegation noted the statements made by the European Communities and Indonesia. He said that the issues related to bound rates and the imposition of specific duties were outlined in Article 3 of Resolution 123/2000. Argentina did not agree with Indonesia's interpretation that no prior consultations had been held with regard to the measures in question.

72. The DSB took note of the statements.

10. Appointment of Appellate Body members

(a) Statement by the Chairman

73. The Chairman, speaking under "Other Business", said that he had prepared his statement prior to being informed that Mr. Christopher Beeby had passed away. Therefore, in his statement he would only refer to the two vacancies arising as a result of the fact that the terms of office of the two members of the Appellate Body were expiring at the end of March 2000. As a mark of respect for the late Mr. Beeby, he proposed not to raise at the present meeting the question of how to fill the additional vacancy in the Appellate Body which had rather tragically and suddenly just arisen.

74. He recalled that the DSB had set in train a process to identify replacements for the two Appellate Body members whose terms expired at the end of March 2000. This process involved a Selection Committee drawing up recommendations to the DSB on these appointments. The Selection Committee ("the Committee") was comprised of the 1999 Chairs of the DSB, the General Council, and the Councils for Trade in Goods, Trade in Services and TRIPS as well as the Director-General. The Committee was being chaired by Mr. K. Bryn, the 1999 DSB Chairman. The Committee had conducted thorough interviews with each of the seven candidates for appointment. It now had a very sound basis on which to continue its deliberations. The Committee had also made itself available to hear delegations wishing to express views and advice on the appointments. A number of delegations had so far taken advantage of this opportunity and the Committee was grateful for the additional perspectives it had thus obtained. He was pleased to say that, based on the views the Committee had

heard, delegations had clearly approached this exercise in an appropriate spirit. There seemed to be an acknowledgement that this should not involve what one might call "political style campaigning", but simply helping the Committee to identify the best all round candidates for the WTO highest judicial body, taking into account all the criteria set out in the DSU. Some delegations indeed had concentrated mainly on expressing views on those criteria, leaving the Committee with reasonable flexibility as to its precise recommendations. It was the intention of the Committee to proceed shortly to its in-depth deliberations on those recommendations. The Committee hoped that the matter could be taken up for decision by the DSB at its regular meeting scheduled for 7 April 2000, or at a special meeting to be convened for this purpose at the earliest possible date thereafter.

75. The DSB took note of the statement.