WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/84
24 July 2000

(00-3060)

Dispute Settlement Body
19 June 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 June 2000

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

Prior to the adoption of the agenda, the item concerning the Panel Report on "Canada - Term of Patent Protection" (WT/DS170/R) was withdrawn from the agenda following Canada's appeal of the Report.

Subjects discussed — Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sales and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.9)

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.5)

(c) Canada - Measures affecting the importation of milk and the exportation of dairy products (WT/DS103/12 - WT/DS113/12)

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 three sub-items be considered separately.

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

2. The Chairman drew attention to document WT/DS27/51/Add.9 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, as it had already been reported to the DSB over the past couple of months, the EC had continued its ongoing bilateral discussions with the Members concerned. The EC had been criticised for the lack of progress in the consultations and for delaying the process of finding a mutually acceptable solution. It had therefore prepared a calendar of the main discussions carried out over the past twelve months. He highlighted that, during that period, 57 meetings had been held, which meant, on average, about one high-level meeting per week. Four commissioners and the EC President had been actively involved in the matter. It was therefore fair to state that the EC had made efforts at all levels, and had spent endless hours in search of an acceptable solution to this dispute. The EC had always wished to find a solution which could be accepted by all stakeholders on this issue. He regretted that it had not been possible to bridge the very divergent positions expressed by the main parties concerned. The EC would keep the DSB informed of further developments.

4. The representative of Ecuador said the EC had not yet complied with its WTO obligations despite the efforts made by the parties involved in the Bananas dispute. The EC's regime continued to cause serious economic and social damage to countries such as Ecuador, whose economy was dependent on the exports of bananas. Ecuador did not understand why the EC had circulated the list of consultations. That list only showed that Latin American countries, the United States and the ACP countries had made great efforts to ensure that the EC complied with the WTO rules. Far from demonstrating the EC's interest in resolving the problem, the list reflected the frustration of countries such as Ecuador. His country had sent to Brussels its ministers, secretaries of State, diplomats, representatives of exporting companies and producers of bananas and technical experts who in good faith had tried to resolve this dispute. In those meetings, Ecuador had put forward constructive proposals and had demonstrated its flexibility. However, no results had been produced.

5. Ecuador's position reflected the interest of its banana industry. However, it had also made great efforts towards bringing its position closer to that of other countries. The EC had disregarded those efforts and had not removed the protectionist elements of its banana import regime. The EC continued to reiterate its position which could only mean that it wished to maintain the current state of affairs since it was unable to resolve internal differences among its member States. Ecuador had not accepted the proposal on import licences because that proposal was not in line with the DSB's recommendations. Furthermore, the status reports provided by the EC did not contain any new information and the EC continued to disregard the efforts made by the parties concerned aimed at resolving the dispute. The EC had demonstrated its intransigence and its lack of willingness but had not referred to its internal problems. It had not informed the parties of the differences among its member States, the EC Commission and the European Parliament. It was not the absence of a joint position among the parties concerned that prevented the EC from finding a solution, but its insistence

on maintaining its protectionist banana regime and its disregard for the damage caused to exporting countries.

6. The representative of Panama said that, like Ecuador, his country believed that the EC was not interested in resolving the problem and was delaying implementation. The EC was not interested in constructive negotiations with Panama. He noted that meetings with Panama, with one or two exceptions, had been scheduled at the request of his country in an effort to move the process forward and to discuss constructive solutions. In meetings held at its initiative, the EC had only reported on consultations with other countries but had no intention to negotiate with Panama. He noted that the EC had referred in the title of its annex to "Calendar of Negotiations with Interested Third Countries". However, Panama believed that when the EC had referred to interested third countries it had only referred to those countries who had requested the DSB authorization to retaliate and had not taken into account other countries. The EC had also stated that it would continue to protect the ACP producers and considered its WTO obligations only in third place. The EC had failed to recognize that it was not the responsibility of the countries affected by its banana regime but its own responsibility to meet the WTO obligations. The EC had continued to claim that the differences among the complaining parties were preventing it from meeting its obligations. But in fact differences among its member States were preventing the EC from doing so. Panama hoped that the list of meetings to demonstrate the EC efforts to resolve the dispute quickly would not be used as an excuse to further delay implementation.

7. The representative of Honduras said that the EC's status report raised the same concerns as those indicated by her delegation in previous DSB meetings. The report contained merely a schedule of meetings and did not provide any information on the content of those meetings. In the meetings in which her country had participated no suitable solution had been proposed by the EC. On the contrary, rather than entering into a constructive dialogue, the EC had stated that Honduras did not understand the WTO rules. This was unacceptable because her country's conduct in this dispute was serious and technical. Honduras had won this case which constituted an important contribution to the system. Any sovereign State, whether a developing or vulnerable country, had the right to reject an attempt by any country to avoid compliance with the DSB rulings and had the right not to accept a regime which would only replace one illegality with another.

8. Similarly, Honduras had the right to propose solutions and the EC should hear the views of the complaining parties who, once the recommendations had been adopted by the DSB, spoke on behalf of all Members. Regrettably, the proposals made by some Latin American countries had not been taken into account by the EC. It did not matter how many meetings had been held because those meetings had not enabled the EC to bring its regime into conformity. It was unacceptable that, in the system which provided clear rules and binding decisions, 39 months after the adoption by the DSB of the recommendations of the Panel and the Appellate Body and 18 months after the expiry of the reasonable period of time for implementation, the EC continued to claim that the complaining parties were responsible for its failure to comply. His country was not satisfied only with a favourable ruling in this dispute. Honduras would not be satisfied with an academic victory since its banana industry had been severely damaged by the EC's regime and was prepared to use other means available to it under the dispute settlement mechanism. She noted that two complaining parties had already been granted authorization to do so. Honduras had decided to bide its time because it believed that the EC would change its attitude and that it would no longer be necessary to invest any more time and effort in order to restore its rights which had been violated for a long period of time.

9. The representative of Guatemala said that her delegation wished to make some comments on technical and systemic issues resulting from the status report. In accordance with Article 21.6 of the DSU, the EC had an obligation to submit a status report on progress in its implementation to resolve this long-standing dispute the deadlines for which had already expired. It was contrary to the spirit of the DSU that the Member at fault shifted responsibility for bringing its regime into conformity with

the WTO rules onto the complaining parties. The time-period within which a solution could be negotiated had lapsed several years ago and, pursuant to Article 3.7 of the DSU, the foremost objective of the dispute settlement mechanism was to remove inconsistent measures. That provision was also reinforced by Article 21 of the DSU, which referred to the prompt and complete compliance with the DSB rulings. It was unacceptable for a Member, which had to bring its regime into conformity with the WTO rules, to confine itself to holding negotiations in the legal framework which should provide security and predictability for the multilateral trading system, overcoming the inefficiency of the previous GATT system. On the contrary, like other Members, the complaining parties expected that disputes would be resolved promptly and in full compliance with the DSB rulings. Therefore, Guatemala objected to the content of the status report submitted at the present meeting since the meetings in which her country had participated were only limited to the provision of information on various options, which according to the EC public statements were designed to reproduce or replicate the effects of the WTO-inconsistent regime. Furthermore, Guatemala had not been able to establish a legitimate dialogue in order to address its legal objections and to examine proposals. In fact in those meetings, the EC had attempted to impose a regime as illegal, if not more so, as the one found to be WTO-inconsistent. Guatemala urged the EC member States to reject delaying tactics which did not help to maintain the credibility of the system.

10. The representative of the United States said that the EC's expanded status report was in essence no different from its previous reports. The EC was simply continuing to blame the complaining parties for its failure to come into compliance with its WTO obligations. Regrettably, the EC was attempting to substitute process for substance. Meetings might be held but the objective was to comply. While it was good that the EC was discussing with the parties concerned, the heart of the matter was its failure to comply, not the failure of the complaining parties to reach an agreement with the EC. The United States believed that the positions of most Members were quite close to the proposal made by the Caribbean countries. That proposal should be the basis for a settlement of the dispute.

11. The representative of Saint Lucia said that her delegation noted the record of quite extensive consultations which the EC had conducted with all interested parties. The appended list of meetings, video-conferences and other contacts provided some limited insight into the substantial effort which had been expended in the attempt to design a new banana regime which would "turn the page" on this long-standing dispute. This would be a new banana regime which would not be subject to further challenge under the DSU: i.e. one that was not only WTO-compatible but also acceptable to all parties. Some delegations had suggested that the WTO-compatibility was not an objective standard as evidenced in the differences between panel and Appellate Body rulings and the views of arbitrators in various dispute settlement cases, not least of all the Bananas III case. Moreover, unless the parties went beyond the repeated accusations and acrimony and exercised restraint in the use or abuse of trade sanctions, the prospects for an amicable and constructive compromise would continue to elude them. Those with the most to lose in this dispute were countries such as Saint Lucia and other ACP States which were heavily dependent on bananas and had no immediate alternative source of income. Although they did not meet the panel and Appellate Body's criteria of a "substantial supplier" defined in terms of EC market share in the context of Article XIII of GATT 1994, 50-60 per cent of their export earnings came from bananas. Moreover, given their particular vulnerabilities as a small island state, a bad result would not simply lead to a drop in the export tonnage of bananas but rather the loss of the banana export industry itself with calamitous consequences in the case of Saint Lucia. Her delegation continued to hope that the parties would adopt a positive and constructive approach in the search for, and the fashioning of, a new regime which would safeguard the legitimate trading interest of all suppliers.

12. The representative of Mexico said that his delegation noted that the status report submitted by the EC contained a list of meetings. As indicated in the list, the EC had only held two meetings with Mexico while about 20 meetings had been held with other Members. As his country had repeatedly

stated, the EC did not need to seek an agreement with all the parties, but to put in place a WTO-compatible banana regime. He recalled that Mexico preferred a tariff-only system with adequate access for its bananas to the EC's market.

13. The representative of the European Communities said that his delegation had circulated the list of meetings and contacts because Members had continued to complain in DSB meetings that they had not been informed and that the EC had not discussed with them. Statements made by delegations at the present meeting contained a selective version of events. For example, Honduras had stated that it did not matter how many meetings had been held because the EC had nothing to contribute. It was true that the parties maintained fairly intransigent positions, but at least four different and opposing interests were involved in the Bananas case: i.e. the interest of the Latin American countries which produced and exported bananas, the interest of the ACP countries which also produced and exported bananas, the interest of the EC and the interest of the United States as a supplier of services. It was not easy to deal with those different and conflicting interests. The EC was simply trying to square the circle. Honduras had also stated that 39 months had already lapsed since the DSB had adopted the Panel and the Appellate Body Reports. However, Honduras had not referred to developments in 1998 and in the beginning of 1999. Its statement was selective because the EC had made its first attempt to comply with the DSB's recommendations, which it believed was correct, but the new regime had been challenged. All were aware of subsequent developments until it had been found that the new banana regime was not satisfactory. The EC should not be accused of bad faith or inactivity and the record should not be quoted selectively.

14. Guatemala had referred to a removal of incompatible measures as if that was the only objective under the DSU provisions. He recognized that this was a fundamental objective for a country which was in violation of WTO rules. However, in situations in which implementation could not be done immediately, the DSU allowed other options such as compensation or retaliation. It was not always easy politically or legislatively to adopt required measures immediately, which was the case in the Bananas dispute. It was not easy for the EC to do so politically and legislatively. References had been made to the position of the European Parliament. This was a problem as the Parliament did not necessarily share the Commission's approach. The DSB allowed another option which, in a sense, could redress the situation. On one side, there was a violation and damage and, on the other, countermeasures and compensation. Unfortunately in this case, the main activity had been shown by services suppliers rather than goods suppliers. That had distorted the whole picture because more importance was given to services than to goods. This could be a potential issue for consideration in the DSU review. It was selective to refer to a removal of incompatible measures without referring to other options provided for in the DSU. The EC's approach was consistent with the DSU but was short of a long-term goal of coming into compliance. The EC was not trying to blame the complaining parties but the fact was that their positions were different. As indicated by the representative of Saint Lucia, her country had a strong interest in this case. However, Saint Lucia's interest was not the same as the interest of the Central and Latin American countries or the United States where multinational companies were servicing the exports from some of those countries.

15. Panama characterized the EC's position as its ACP obligation coming first with its WTO obligations in a distant third place. It had also stated that the EC would continue its current practice. That was not correct. The EC recognized its obligation to come into compliance and to remove any incompatible measure. That meant that the EC would either adjust its licencing system or remove it. A decision on this matter would be taken in the next few weeks. However, the EC would maintain preferential access for its ACP partners. If by stating that the EC would continue its current practice it was meant that the EC would have a tariff system with preferences for the ACP countries, that was correct. However, if it was meant that the EC would continue the current practice to do nothing then that was incorrect. The preferential system would not disappear as the EC had already explained in another context. Panama had also referred to discrimination. In this context, Panama could have only meant tariff preferences because the other form of discrimination in the area of services was not

Panama's main interest. Tariff preferences would continue to exist. Their scope would have to be defined and a WTO waiver would have to be secured.

16. Ecuador had expressed its frustration that its ministers and secretaries of State had to travel to Brussels frequently. On the list, Ecuador appeared as one of those countries which had taken advantage of the EC open door to all the parties with the main interest. It had been stated that the EC's position was intransigent, but four mutually exclusive sets of interests had to be reconciled. From the very beginning, the complaining parties were aware that this was not going to be an easy case. However to claim that the EC problems were not so much due to a lack of a joint position among its suppliers - Ecuador, United States, Panama and ACP countries - but a result of the EC's lack of interest in finding a solution was not exactly correct. The EC was doing its best and continued to make efforts in good faith at all levels. This was shown by the calendar of meetings and contacts that the EC had held thus far. Those who had been willing to discuss with the EC were better informed and more satisfied than those who had not or those who had sent ambassadors to Brussels. But the fact was that there were limitations. The EC could consult with the parties and could take into account their interests, but if those interests were mutually divergent then there was a limit to what extent one could satisfy all the parties.

17. Saint Lucia had made the point that sanctions changed subtly the interest of negotiations because the interest in finding an agreed solution was to remove sanctions which redressed the balance of rights and obligations temporarily until a permanent solution was in place. One would therefore wish to remove those measures, otherwise a balance would be completely skewed. This was an issue for consideration in the DSU review. It was true that in negotiations one would concentrate on those who imposed sanctions and, in this case, it was the services supplier rather than the goods supplier because, thus far, Ecuador had not taken any action. Saint Lucia had pointed out that in strict WTO terms it was not a substantial supplier. However, 80 per cent of the EC imports were from Latin and Central America and 20 per cent from the ACP countries. Therefore, the ACP countries collectively should enjoy a substantial supplier status. This was different from their bilateral and contractual obligations with the EC.

18. The United States had stated that the EC should concentrate on substance rather than on process. He believed that the EC was not out of line with the DSU because sanctions had been authorized to redress the balance of rights and obligations and the EC intended to do more. In the next six weeks some new proposals would be tabled which would probably be criticized because whatever the EC did in this area would always be criticized. However, if new proposals were made at least the parties could not complain that the EC was not doing anything. The calendar of meetings had been circulated because delegations had complained that they had not been informed by the EC. The United States had less to complain about than other delegations but it was true that the calendar was simply a factual record of what the EC had been trying to do. Almost 30 meetings had been held in Brussels and Geneva in the past six months: i.e. since the beginning of this year. As the EC had already stated at the outset of this item it had always been its wish to find a solution that could be accepted by all stakeholders on this issue. He reiterated that that was the EC's intention.

19. Finally he wished to mention one point relating to the fraudulent imports of bananas into the EC in order to demonstrate some of the difficulties the EC had to face and some of the pressures to which it was subject. On 9 June 2000, a joint team of Italian finance inspectors and investigators of the EC fraud branch had carried out on the spot checks in the port of Catania (Italy). A vessel transporting approximately 4,000 tonnes of bananas had been presented to customs for importation. Further to a verification of the import documents presented for customs clearance, the investigators had established that since March 1998 - over two years - 101 false import certificates had been presented in order to fraudulently import into the EC over 160,000 tonnes of bananas from Ecuador. In practice this meant that certificates for entry had been given under a tariff quota with reduced duty payments when the quota had been substantially exceeded. Neither the Panel nor the Appellate Body

had ever stated that the tariff quota system was illegal. He just wished to point out that the EC had other problems to deal with and the pressures of its market where the profits were very good and one could double the profit of exporting to the EC and to the United States, the two mass markets for bananas. The profits in the EC's market were very good and this generated its own sets of problems. Therefore, if a tariff-only system was introduced then much less profit would be made in the EC's market and that was one reason why the parties might be disappointed with new proposals.

20. The representative of Panama wished to refer to some points raised by the EC. The representative of the EC referred to the three priorities outlined by Panama in its initial statement. He said that the first priority of the EC was to protect the ACP producers and then to meet its WTO obligations. He reiterated that Panama had never objected to the ACP preferences. In fact, together with other countries, Panama had made a proposal in which the ACP preferences were recognized. The ACP countries had also put forward a similar proposal which had been supported by Panama but had been rejected by the EC.

21. With regard to the argument that sanctions changed the dynamics of negotiations in a subtle way, the EC had also stated that those who were involved in this dispute knew that the case was going to be difficult and that the process would be complicated. He had already made some comments on this subject at the DSB meeting on 18 May. The EC was not making things easy for the complaining parties but the process under the DSU was more difficult than negotiations. The longer one had to wait, the more retaliatory measures would be in place and this did not help the EC's position. Panama hoped that it would not continue to be told that those who suffered discrimination were the ones that were in disagreement. He recalled that in 1993, Panama, which was not yet a Member of the WTO, did not have a right to have recourse to the DSU provisions.

22. The representative of the United States said that her country was concerned that the EC had used the list of meetings to argue that it had been forthcoming to resolve the matter in substance. It did not matter how many meetings had been held. What was important was what had been discussed in those meetings. The list showed the level of frustration of the complaining parties. The United States wished to see an early progress so that its right to use sanctions would not be necessary. It did not wish to impose sanctions but had done so because of its earlier frustration. The good news was that in the next six weeks a proposal would be made but the bad news was that the EC already knew that the parties would not like such a proposal and that they would not be able to accept it. It was therefore difficult to see a constructive process.

23. To state that the EC had to work with one particular country over another was just another excuse. A group of countries was trying to find a way that the EC's regime was WTO-consistent. Different approaches could be taken instead of saying that the EC had to work with the United States because of services. The EC should not single out one country but should comply with its WTO obligations. At the present meeting, the EC had made a list of excuses along with a list of meetings.

24. The representative of Ecuador said that the EC had stated that it was trying to square the circle and that Ecuador's position was intransigent. The EC had also stated that in the next six weeks a proposal would be made which the complaining parties would not like. It had accused one of its member States - Italy - of fraud. Ecuador hoped that Italy would be able to defend itself adequately. He regretted that such fraud, which involved a product from Ecuador, had taken place. However, no Ecuadorian company had participated in that fraud. His country hoped that in the forthcoming weeks the EC would shed some light internally on this subject with Italy.

25. The representative of Honduras wished to highlight the fact that the efforts made by the EC in an effort to comply with its WTO obligations had not led to any progress in relation to the situation in Honduras. While the EC was seeking a solution for all parties and was trying to square the circle, Honduras' banana industry continued to lose.

26. The representative of the European Communities said that he was trying to provide a two-sided version of what appeared to be a one-sided discussion. As he had already stated, four different and mutually conflicting interests were involved in the Bananas case. For example, some ACP countries had traditional exports which were protected under the previous agreement, some had gone beyond that and some had never provided the same quantities as in the past due to climate or hurricane conditions which had spoiled plantations. In Latin America and Central America at least two different interests were involved. Some were selling bananas and reaped the profit and some were selling bananas through multinational companies in the United States. With regard to the United States as a services supplier, two sets of interests were also involved. Amongst the EC interests another set of double interests was involved. Some had little production in the EC, in the Caribbean or in the Southern part of Europe and some wished to have the cheapest possible bananas with the least possible duty on entry. It was therefore important not to underestimate the complexity of what the EC was trying to do. This was not an excuse but an explanation. He noted that sensitive issues such as changes of legislation in relation to US tax matters might be found to be very complex by the United States. Those countries who had not imposed sanctions should not do so in the interests of an early solution.

27. The representative of Panama said that with regard to the EC's suggestion that the countries who had not imposed sanctions should rather not do so, his country had already discussed this matter with the EC on many occasions. He said the complexity of the matter should not prevent the EC from finding a solution to the problem in order to bring its regime into line with the WTO rules.

28. The representative of the United States said that the EC's comment about US sanctions or legislation were inappropriate. The United States had always complied on time in some very difficult cases that it had lost. The only thing that the parties were asking was compliance by the EC. It would be good for the functioning of the WTO and its success if the EC complied with its obligations and put its dispute behind it.

29. 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

30. The Chairman drew attention to document WT/DS76/11/Add.5 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations with regard to its measures affecting agricultural products.

31. The representative of Japan said that, as indicated in the status report, his country had held consultations with the United States in a constructive and friendly manner. Although some technical issues still remained to be resolved, Japan expected that the parties would be able to reach a mutually satisfactory solution in the near future.

32. The representative of the United States said that her country continued to work with Japan on the few remaining technical issues and hoped to finish that work in the very near future.

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

(c) Canada - Measures affecting the importation of milk and the exportation of dairy products: Status report by Canada

34. The Chairman drew attention to document WT/DS103/12 - WT/DS113/12 which contained the status report by Canada on its progress in the implementation of the DSB's recommendations with regard to its measures affecting the importation of milk and the exportation of dairy products.

35. The representative of Canada said that his country welcomed the opportunity to present its first status report on its implementation of the DSB's recommendations. He recalled that on 27 October 1999, the DSB had adopted the Panel and the Appellate Body Reports in this case under consideration. The Appellate Body had found that Canada's measures provided export subsidies in excess of the export subsidy commitment levels specified in its Schedule inconsistent with Canada's obligations under the Agreement on Agriculture. The Appellate Body had also found that by restricting access to the tariff-rate quota for fluid milk in its Schedule to entries valued at less than Can$20.00, Canada had acted inconsistently with its obligations under Article II:1(b)of GATT 1994. At the outset of its implementation process, Canada had stated its unqualified intent to fully implement the DSB's recommendations and rulings. In addition, Canada was implementing in an open and transparent manner.

36. Following consultations, and pursuant to Article 21.3(b) of the DSU, the United States and New Zealand, the parties to the dispute, had entered into an agreement on the reasonable period of time for implementation. This agreement had been reached on 22 December 1999 and had been circulated to Members in document WT/DS103/10-WT/DS113/10. The terms of the implementation agreement called for a staged implementation process to be concluded on 31 December 2000. Canada was pleased to report to the DSB that it was fully meeting the terms of that agreement. Canada had complied with each element of the staged implementation process to date and was well on course to implement fully all the terms of that implementation agreement by the conclusion of the implementation period at the end of 2000. The details of Canada's implementation had been set out in full in its written status report, he therefore did not wish to repeat them at the present meeting.

37. Canada had kept the United States and New Zealand fully informed on the progress of the development of possible new dairy export mechanisms that would be consistent with its WTO obligations. Furthermore, Canada had taken the step of calling for an additional meeting with the United States and New Zealand - a meeting which was not required under the terms of the implementation agreement - to keep them fully apprised of the most recent developments with respect to possible new mechanisms. That meeting was scheduled for later in the week in Geneva. Canada would continue to keep the parties fully informed of future developments and remained open to any additional meetings or consultations. Canada would continue to provide status reports to the DSB on a regular basis, pursuant to its obligations under Article 21.6 of the DSU.

38. The representative of the United States said that her country commended Canada for its prompt implementation of the DSB's recommendations on its milk tariff-rate quota as well as the progress to date on implementation related to the export subsidies on dairy products. However, the United States had grave reservations about Canada's commitment to completion of its implementation process. Canada could not continue to export dairy products at past levels with the benefit of export subsidies without violating its reduction commitments. Canada's subsidized exports of cheese remained at twice the level permitted under its commitments pursuant to the Agreement on Agriculture. The United States was concerned that Canada had embarked on a course that would result in the matter being brought back to the DSB. The concern was increased by the information that Canada had recently shared about new export schemes under discussion in Ontario, Quebec and other provinces. That information indicated that the proposed export regimes would provide milk at reduced export prices like the special milk classes that had been found to be export subsidies. Moreover, milk produced outside the domestic production quota would be required to be exported just

as it was required under the Special Class system. Only the form of the government's action and intervention would change; the nature of such involvement, however, would remain the same in substance. The United States considered that there was no need for such programmes. Indeed, elements of the Canadian dairy industry had severely been criticized the provincial proposals as being basically the same as the Special Class system, which the DSB had found to be an export subsidy. The United States urged Canada not to ignore these industry voices to the effect that the new proposals simply sought to change the form, but not the substance, of the export subsidies available to Canada's dairy processors. The export subsidy disciplines in the Agreement on Agriculture were far too important to allow them to be undermined by new provincial programmes that had the same legal and economic effects as the export subsidies that they were designed to replace.

39. Moreover, Canada had informed the United States that exports of cheese and products like evaporated milk under its Optional Export Programme, had significantly exceeded corresponding levels from 1999. In this programme, the government was involved in basically the same fashion to ensure that milk was provided at reduced prices for export as it was under the Special Class export subsidies. In the case of cheese, combined exports through the Special Classes and the Optional Export Programme were three times the level permitted by Canada's export subsidy obligations. There was every indication that Canada had not accepted the fact that programmes with the same economic effect and government role as the existing export subsidies were also export subsidy regardless of how they were disguised. The United States encouraged Canada which had always been at the forefront in developing multilateral disciplines on export subsidies, to fully comply with the DSB's recommendations and rulings. With discussions already beginning about further reform in agriculture, Members did not have the luxury of allowing the existing disciplines to go unheeded.

40. The representative of New Zealand thanked Canada for its status report on implementation in the case under consideration. It was now the approximate mid-point in the period provided for implementation of 22 December 1999 Agreement between Canada, the United States and New Zealand. Therefore, it was a timely opportunity to set out views on what had been done to date as well as to highlight New Zealand's concerns about the full and effective implementation of the DSB's rulings on Canada's agricultural export subsidy commitments. In this regard, New Zealand was pleased to note that to date, Canada had remained in compliance with its scheduled export subsidy commitment levels for the current marketing year for exports under Special Classes 5(d) and 5(e) for butter, skim milk powder and other milk products. New Zealand also noted that Canada had taken steps to limit its Special Class 5(d) and 5(e) cheese exports in the current marketing year, in accordance with the terms of the 22 December 1999 Agreement. New Zealand looked forward to Canada's full compliance with the DSB's recommendations and rulings by the end of the implementation period. In order to comply, Canada would need to ensure that its subsidized exports of dairy products were within its scheduled reduction commitments. This meant that for the next marketing year, as from 1 August 2000 and thereafter, Canada had to ensure that Special Class 5(d) and 5(e) volumes were within these commitment levels. Canada would also need to ensure that no new measures were introduced, which would provide export subsidies in excess of Canada's commitment levels. In this connection, New Zealand noted with concern reports on efforts made by Canada at the sub-federal level to develop new dairy export mechanisms and schemes, which would allow export volumes over and above Canada's subsidized export commitment levels. Like the United States, New Zealand also wished to emphasise that no new dairy export schemes were necessary for Canada to implement fully the DSB's recommendations and rulings. All Canada needed to do was to ensure that its subsidized exports, under the existing Special Classes 5(d) and 5(e), were maintained within its commitment levels. New Zealand looked forward to further consultations later in the week. New Zealand expected that such consultations would provide the opportunity to obtain additional information on how Canada intended to ensure that it remained within its reduction commitment levels for subsidized exports of dairy products.

41. The representative of Canada said that his country would comply fully with its WTO obligations. Any new measures would require a fundamental change in the manner in which export trade was conducted by Canada's dairy industry. Canada was working with its dairy industry to ensure that any new measures would be consistent with the DSB's rulings and recommendations. Canada would be pleased to discuss these questions with the United States and New Zealand at a meeting to be held later in the week.

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

2. United States - Transitional safeguard measure on combed cotton yarn from Pakistan

(a) Request for the establishment of a panel by Pakistan (WT/DS192/1)

43. The Chairman recalled that the DSB had considered this matter at its meeting on 18 May 2000, and had agreed to revert to it. He drew attention to the communication from Pakistan contained in document WT/DS192/1.

44. The representative of Pakistan said that his country's request for a panel had been examined for the first time by the DSB at its meeting on 18 May 2000. At that time, however, the United States had opposed the establishment of such a panel. He did not wish to repeat the details of the case which were contained in document WT/DS192/1. At the present meeting, Pakistan's request was before the DSB for the second time and, therefore, pursuant to Article 6.1 of the DSU a panel would have to be established.

45. The representative of the United States said that her delegation accepted the establishment of the panel at the present meeting, but still hoped that the on-going consultations with Pakistan would lead to a mutually satisfactory solution.

46. 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.

47. The representatives of the EC and India reserved their third-party rights to participate in the Panel's proceeding.

3. India - Measures affecting trade and investment in the motor vehicle sector

(a) Request for the establishment of a panel by the United States (WT/DS175/4)

48. The Chairman drew attention to the communication from the United States contained in document WT/DS175/4.

49. The representative of the United States said that her country was requesting the establishment of a panel to examine India's trade-related investment measures (TRIMs) in the motor vehicle sector. Under India's TRIMs regime, manufacturers could not obtain import licenses for automobile components unless they agreed to a series of local content, trade and foreign-exchange balancing requirements. India intended to continue enforcing those TRIMs for several years, even after its removal of import licensing requirements for automobile components in April 2001. These measures denied India's trading partners the opportunity to supply India's markets and unfairly burdened manufacturers operating in India. The United States considered that India's restrictions were inconsistent with its obligations under Articles III:4 and XI:1 of GATT 1994 as well as Articles 2.1 and 2.2 of the TRIMs Agreement. The United States had held consultations with India on this matter in the beginning of 1999. Immediately thereafter the United States had requested clarification from

India with regard to a few points. The United States hoped to receive India's response shortly. The United States remained open to further discussions with India and hoped that consultations would lead to a mutually satisfactory solution. Recently, the United States had held useful discussions with India in Geneva and hoped that the parties would make some progress in this respect. However, since the matter remained unresolved, the United States was requesting that a panel be established to examine this matter.

50. The representative of India expressed his country's regret that the United States was seeking a panel on this matter. He pointed out that the measures referred to by the United States were not trade-related investment measures. He also emphasized that even the title given by the United States used the phrase: "measures affecting trade and investment". India believed that its measures were not inconsistent with its obligations under Article III:4 and XI:1 of GATT 1994 as well as Articles 2.1 and 2.2 of the TRIMs Agreement. Even if India accepted that the measures in question were TRIMs, as claimed by the United States, its obligations would have to be examined in light of Article 4 of the TRIMs Agreement. He also pointed out that one of the transition period issues, recently considered by Members, related to the extension of the transition period under the TRIMs Agreement. He recalled that the Chairman of the General Council, in his statement on 17 December 1999, had urged Members to exercise the necessary restraint on these matters.[1] At its resumed meeting on 8 May 2000[2], the General Council had taken a decision on the transition period issues in the TRIMs Agreement in light of the Chairman's statement of 17 December. That decision envisaged, *inter alia*, consultations as a matter of priority to be carried out by the Chairman of the Council for Trade in Goods, under the aegis of the General Council, on the means to address those TRIMs cases that had not yet been notified or those for which no extension had yet been requested. The United States should carefully reflect on the question of what impression its request for a panel would create on developing-country Members with regard to the 8 May 2000 decision, which was meant to be a confidence-building measure. A solution could be found through consultations. India was, therefore, glad to note that the United States was willing to hold further consultations on this matter. At the present meeting, India was not in a position to accept the establishment of a panel.

51. The representative of the Philippines said that his delegation was encouraged by the statements made by the United States and India. It seemed that the parties would consult further and that a mutually satisfactory solution might be possible. However, the Philippines wished to express its views on the US request for a panel. Although Members had the right to request a panel, the dispute under consideration was *sui generis*. India had pointed out that at its resumed meeting on 8 May 2000, the General Council had taken a decision that consultations to address the transition period issues under the TRIMs Agreement should be held, under the aegis of the General Council, by the Chairman of the Council for Trade in Goods. Therefore, the US request for a panel at this stage was premature, pending such consultations. The decision of the General Council was binding and was not inconsistent with procedural due process. Moreover, a dispute on TRIMs transition periods might raise other concerns with regard to implementation issues. Many developing countries, including the Philippines, had raised concerns about certain imbalances in some agreements. Therefore, if the dispute at hand were to be pursued, it might raise broader concerns with regard to the imbalance in the TRIMs Agreement in relation to GATT provisions concerning special and differential treatment.

52. The representative of the United States said that her country had always respected and had given positive consideration to the 8 May 2000 decision. The United States, together with other countries, had tried to work out problems related to the transition period issues, and in particular those under the TRIMs Agreement. She noted that both the Chairman's statement of 17 December 1999 and the 8 May 2000 General Council decision were without prejudice to Members' rights under the WTO

[1] WT/GC/M/52
[2] WT/GC/M/55

Agreement. The United States was willing to work with other countries to see whether an understanding on how to move forward could be reached. In this regard, her country had made considerable efforts in the past six months. However, the United States would not give up its WTO rights. She was surprised about the Philippines' reference that if the dispute at hand was to be pursued, that would create problems in other areas. This was not the right way to move forward. The United States and India had been working closely in an effort to find a mutually satisfactory solution. The issues raised by India at the present meeting as well as those discussed in the consultations had been taken into account by the United States. But India's measures had been put in place in December 1997, three years after the WTO Agreement had come into force, and had never been covered under Article 5.1 of the TRIMs Agreement. The United States had tried to solve this matter and was never keen on invoking dispute settlement procedure or requesting a panel. However, the matter had to be moved forward.

53. The representative of the Philippines said that the Chairman's statement of 17 December 1999 was without prejudice to the rights of Members under the WTO Agreement. But that statement, subject to the rights and obligations, was part of the context of the 8 May 2000 decision to exercise due restraint. The 8 May 2000 decision referred to consultations to be held in open sessions by the Chairman of the Council for Trade in Goods under the aegis of the General Council. As far as he was aware, such consultations had not yet been held. The Philippines' intention was only to ensure that the 8 May 2000 decision of the General Council be given due respect.

54. The representative of Cuba said that his delegation shared the views expressed by the Philippines. The transition period issues under the TRIMs Agreement were still on the table. As stated by other delegations, there was certain imbalance in some agreements, which had to be redressed. Therefore, a panel to examine TRIMs-related issues, without prior consultations on a new transition period, should not be established.

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

4. Korea - Measures affecting government procurement

(a) Report of the Panel (WT/DS163/R)

56. The Chairman recalled that at its meeting on 16 June 1999, the DSB had agreed to establish a panel to examine the complaint by the United States. The Report of the Panel had been circulated on 1 May 2000 in document WT/DS163/R, and it was now before the DSB for adoption at the request of Korea. In accordance with Article 16.4 of the DSU, this adoption procedure was without prejudice to the right of Members to express their views on the Panel report.

57. The representative of Korea thanked the members of the Panel and the Secretariat for their efforts to prepare the Report. The Panel had found that the entities responsible for procurement for Korea's Inchon International Airport were not subject to the Agreement on Government Procurement (GPA), and therefore Korea had not violated that Agreement. Korea supported the adoption of this important Panel Report. This was the first time that a panel had to interpret the terms of the GPA. The Panel had correctly recognized that before reviewing the US allegations that Korea's procurement practices violated the GPA under Article 1 of the GPA, one was required first to determine whether the entities undertaking that procurement were covered by Korea's commitments. The Panel had correctly held that the specific entities responsible for procurement at the Inchon International Airport were not included in Korea's commitments. The Panel had, therefore, concluded that the GPA did not even apply to procurements by those entities and had thus rejected the US claims. More importantly, the Panel had also rejected the US non-violation claim. Although Korea agreed with the Panel's conclusion, it had systemic concerns about its analysis.

58. In the Panel proceedings, the United States had argued that it had reasonably expected that it had received Korea's commitment to extend GPA-consistent treatment to US suppliers for procurement for the Inchon International Airport. The Panel had correctly noted that the first step in analysing any non-violation case was to determine whether there had been an agreed concession. In this particular case, there was no such a concession since the entities responsible for procurement at the Inchon International Airport were not included in Korea's commitments. The Panel had correctly noted that a non-violation case could not be sustained. In Korea's view, the Panel should have stopped its analysis at that point. Instead, the Panel had stated that an alternative, non-traditional type of non-violation claim could be sustained, under customary international law rather than under the DSU or the GPA, on the basis of reasonable expectations accrued pursuant to negotiations rather than concessions.

59. Korea was not persuaded by the Panel's development of this alternative non-violation claim. In Korea's view, the duty of a panel was to interpret and apply the covered agreements, and, in doing so, to uphold and enforce the rights and obligations of Members under those agreements. Even under its non-traditional analysis, the Panel had concluded that the US expectations of the GPA's coverage for the entities responsible for Inchon Airport procurement were not reasonable. The Panel's analysis and conclusions with regard to the US violations claims as well as its final conclusion with respect to the US non-violation claim were both correct. Korea welcomed the Panel's conclusions which had fully rejected all the US claims that Korea violated the GPA. Korea would continue to vigilantly observe the terms of the GPA.

60. The representative of the United States said that her country had initiated this dispute because Korea's practices in the procurement for its Inchon airport project had favoured Korean firms over foreign firms. The United States had argued that Korea's practices, including the use of domestic partnering, short deadlines and certain licensing requirements were inconsistent with the GPA. Korea had not contested these claims but instead had argued that the entities procuring for the airport project were simply not covered under its GPA obligations. It was unfortunate that the Panel had accepted Korea's claims. While the United States did not wish to engage in a detailed critique of the Panel's reasoning, it wished to highlight certain aspects of the Panel's decision which raised broader concerns.

61. The GPA coverage was defined by entity-based schedules as negotiated by individual parties to the Agreement. A GPA schedule typically consisted of a "positive" listing of entities that were covered, with explicit provisions - when necessary - to exempt from coverage subdivisions of a listed entity, which in essence constituted a "negative" listing for subdivisions: i.e. only subdivisions that were not covered were listed. Alternatively, if a party intended to limit the coverage of subdivisions, it would provide a "positive" listing of subdivisions, so that only the listed subdivisions would be covered. Korea's GPA schedule consisted of a "negative" listing of subdivisions, yet the Panel had treated it as a "positive" listing. The Panel had effectively narrowed Korea's GPA coverage contrary to the expectations of the United States and the EC who had participated as a third party to this dispute. It also called into question the balance of concessions achieved during the GPA negotiations.

62. Additionally, in creating its own criteria to determine whether an unlisted entity was covered by the GPA on the basis of it being controlled by a GPA-covered entity, the Panel had not taken into account the possibility of a de facto control of the entities in question by other GPA-covered Korean entities. The United States had initiated this case to ensure that foreign companies were able to compete on an equal basis with Korea's firms for procurement opportunities in the construction of the Inchon Airport. This would benefit not only the United States and other GPA suppliers but Korea as well. Korea would benefit because competition with world class companies from all around the world could only ensure that the Inchon airport was built using the highest quality products and services with the lowest possible cost. This would help the Inchon Airport to become the successful transportation hub of East Asia, as intended by Korea.

63. Despite its disagreement with the Panel's findings, the United States had decided not to appeal this case. In taking its decision, the United States had considered the following factors: (i) The Inchon project was moving forward. The first phase of construction was reported to be 90 per cent complete, with the overall start-up and commissioning expected to commence as early as beginning of July 2000, to prepare for the opening of the Airport in 2001; (ii) Korea had informed the United States that the entities procuring for the Airport would conduct tenders in line with principles of free competition and openness, allowing the participation of all qualified suppliers, and that these entities had been advised to open all remaining procurements to foreign bidders. In light of these assurances, and of the expertise of the US companies in this area, the United States expected that its companies would be able to fully participate in the remaining Inchon procurements; (iii) Korea had also indicated that the current entity procuring for the Inchon airport, the Inchon International Airport Corporation, would soon be privatized so procurement for the project should be conducted openly and free from government influence, in a manner that would ensure opportunities for competitive suppliers from any country. Finally, notwithstanding its disappointment with the outcome in this case, the United States expected that the Panel Report would have no impact on the application of the GPA beyond the specific facts of the case at hand since the Panel's findings were limited to one specific procurement project.

64. The representative of the Philippines drew attention to paragraph 7.93 of the Panel Report which read as follows: "the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law". The Philippines were concerned about this statement because panels should interpret the rights and obligations of Members in a manner consistent with the covered agreements and in accordance with the general rules of interpretation of customary international law. There was a distinction between the rules of interpretation and the rights and obligations under customary international law. Members agreed to be subject to dispute settlement proceedings to deal with disputes which involved their rights and obligations under the covered agreements. Members did not intend the WTO to be the arbiter of their rights and obligations under customary international law.

65. The representative of India said that his delegation wished to know whether it could comment upon the Panel Report. India was not a party to the GPA, which was a plurilateral agreement. He understood that under Article 2.1 of the DSU, non-parties to the plurilateral agreements could not participate in any decision or action taken in respect of disputes involving those agreements.

66. The Chairman said that India had raised a valid point. He believed that, at the outset of this item, he should have drawn to Members' attention that this matter was for the parties to the GPA. In this regard, Article 2.1 of the DSU provided that: "Where the DSB administers the dispute settlement of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute". He did not know whether India could make a comment, but it was clear that it could not participate in any DSB's decision or action in this regard.

67. The representative of the Philippines said that his delegation did not intend to participate in any decision or action, but to make comments on the Panel Report.

68. The Chairman said that there seemed to be no objection to non-parties to the Plurilateral Trade Agreement expressing views, but it was clear that they could not participate in any decision or action by the DSB in this context.

69. The representative of India said that his country had a serious systemic concern about the Panel Report, especially with respect to its examination of non-violation claims raised by the United States. He drew attention to the last part of the Panel Report with regard to errors in treaty formation. Although the Panel had concluded that the complainant had failed to demonstrate an error in the GPA,

it seemed to have assumed that it had a right to correct errors in the WTO Agreement. This should be of serious concern to all Members. India considered that panels or Appellate Body were not competent to assume or arrive at a finding of error in the WTO Agreement. They were even less competent to correct errors, if any. It was for the Membership alone to arrive at any conclusion regarding treaty errors and means to correct them.

70. The representative of Hong Kong, China said that his delegation wished to reserve its position on the fact that two Members, non-parties to the GPA, had made comments on the Panel Report under this agenda item. Hong Kong was concerned whether such comments would have any effect on the operation of the GPA, and therefore wished to reserve its position on the interpretation of Article 2.1 of the DSU.

71. The Chairman proposed that the DSB take note of the statements and adopt the Panel Report contained in WT/DS163/R; it being noted that the adoption was being agreed only by the parties to the Plurilateral Trade Agreement at issue in this case.

72. The DSB so agreed.

5. Canada - Certain measures affecting the automotive industry

(a) Report of the Appellate Body (WT/DS138/AB/R - WT/DS142/AB/R) and Report of the Panel (WT/DS139/R - WT/DS142/R)

73. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS139/7 - WT/DS142/7 transmitting the Appellate Body Report on "Canada - Certain Measures Affecting the Automotive Industry", which had been circulated in document WT/DS139/AB/R-WT/DS142/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 the WTO Documents contained in WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He recalled that Article 17.4 of the DSU required that "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

74. The representative of the European Communities said that the EC welcomed the Reports of the Panel and the Appellate Body. The issues examined in this case were both various and complex. The EC was satisfied that Canada's discriminatory regime with respect to imported automotive components and finished vehicles had been condemned by the Panel and by the Appellate Body on several grounds. The quick removal by Canada of the WTO-incompatible measures would re-establish a level playing field in this sector, which was of considerable economic importance for the EC. He recalled that Canada's regime had been found to be a prohibited export subsidy with respect to the production-to-sales ratio. Canada was, therefore, under the obligation to remove the measure without delay as provided for under Article 4.7 of the SCM Agreement. At the present meeting, he wished to refer to certain important claims made by the EC, which had successfully been upheld by the Panel and the Appellate Body. He would then make additional comments on the Appellate Body's findings on the claims made under Article 3.1(b) of the SCM Agreement and Article II of GATS.

75. With regard to a violation of Article I:1 of GATT 1994, the Appellate Body had confirmed that although on its face the regime did not establish a discrimination based on the origin of the products, it necessarily implied that imports of particular sources would be favoured thereby entailing a *de facto* violation of the MFN clause of GATT 1994. The Panel had rightly found that the measure "granted the advantage of the import duty exemption only if it [i.e. the product] originates in one of

the small number of countries in which an exporter of motor vehicles is affiliated with a manufacturer". The Appellate Body had concluded from this observation that Canada had granted an advantage to some products from some Members that it had not "accorded immediately and unconditionally" to like products originating in or destined for the territories of all other Members. The regime was accordingly found in violation of Article I:1 GATT 1994. The EC considered that the Appellate Body had correctly interpreted the unconditionality clause of Article I:1 of GATT 1994 by making it clear that the MFN principle should apply to any products from any origin.

76. The EC noted with satisfaction the Appellate Body's correct interpretation of Article 3.1(a) of the SCM Agreement. The EC had argued that while the manufacturers could increase their duty exemption simply by increasing production, the amount of subsidy available absent exportation was less than that of the subsidy available upon exportation. Accordingly, there were bonuses or additional payments if exports had taken place. The Appellate Body had fully endorsed this reasoning and had confirmed that the duty exemption constituted a subsidy contingent in law upon export performance. The EC also contended that the standard for *de jure* inconsistency encompassed implicit export contingency: i.e. where the requirement to export was a necessary consequence arising from the operation of conditions stated in the law. The Appellate Body had also supported the EC views. It had stated that a subsidy was *de jure* export contingent where the condition to export was clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument did not always have to provide *expressis verbis* that the subsidy was available only upon fulfilment of the condition of export performance (paragraph 100). The Appellate Body had also underlined that these legal standards apply to "contingency" under Article 3.1(b) of the SCM Agreement (paragraph 123). The EC considered this as a very useful clarification by the Appellate Body.

77. With regard to the interpretation of Article 3.1(b) SCM Agreement, the Appellate Body had also supported the EC and Japan's claims that Article 3.1(b) applied to measures that were contingent "in fact" upon the use of domestic over imported good. It had properly found that there was nothing in the language of Article 3.1(b) which specifically excluded subsidies contingent in fact from the scope of the provision. The EC welcomed this finding which would restrict the scope for circumvention of Article 3.1(b). The EC wished to point out that on two very important issues, the application of the MFN clause of GATS to the duty exemption and the qualification of the Canadian Value Added requirement as an export subsidy under Article 3.1(b) of the SCM Agreement, the Appellate Body had dismissed the Panel's findings, but had been unable to come to a conclusion. He recalled that in the Salmon case (WT/DS18), the Appellate Body had properly ruled that: "where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis to the extent possible on the basis of the factual findings of the Panel and/or undisputed facts in the Panel record." He regretted that, in the case at hand, the substantial and undisputed evidence before the Appellate Body had been considered insufficient for it to adjudicate the claims brought by the parties to the dispute. The EC wished to express its disappointment with regard to the concluding remarks of the Appellate Body under Article II of GATS. In paragraph 184, the Appellate Body had stated that given the complexity of the subject-matter of trade in services, it believed that claims made under the GATS deserved close attention and serious analysis. It had finally concluded that it had left "interpretation of Article II of GATS to another case and another day". The EC regretted that these findings did not help the parties on the question of WTO consistency of the measure at issue. The EC would have preferred a ruling that would have brought further clarifications as to the applicability of Article 3.1(b) of the SCM Agreement and Article II of GATS to the Canadian measures.

78. The representative of Japan thanked the Panel, the Appellate Body and the Secretariat for their work. Japan welcomed the Appellate Body's conclusions, which had generally endorsed the Panel's conclusions that Canada's tariff measures under the Auto Pact were in violation of the WTO Agreement. Japan expected that Canada would implement the recommendations of the Panel and the Appellate Body in good faith. Prompt compliance with the DSB's recommendations and rulings was

essential in order to ensure effective resolution of disputes to the benefit of all Members. In this regard, he recalled that the Panel had recommended that Canada withdraw its prohibited subsidies, the production-to-sales ratio requirements, within 90 days.

79. The representative of Canada thanked the members of the Panel, the Appellate Body and the Secretariat for their work in this case. Canada was pleased with some aspects of these Reports, but quite disappointed with others. It was pleased with the Appellate Body's conclusions on the GATS. In particular, that the Appellate Body had agreed that the Panel had erred by finding Canada's measure to be inconsistent with Article II:1 of GATS without first examining whether the measure - a duty exemption for imported goods - fell within the scope of GATS as a measure "affecting trade in services" under Article I:1. It was now clear that a goods measure such as a duty or duty exemption did not affect trade in services merely because service suppliers, such as importers or wholesalers, might deal in the dutiable or exempt goods. In order for a measure to be one "affecting trade in services" it had to affect service suppliers in their capacity as service suppliers.

80. Canada was similarly pleased that the Appellate Body had reversed both the Panel's conclusion that the measure was inconsistent with Article II:1 of GATS and the findings leading to that conclusion. The Appellate Body had confirmed that one could not simply extrapolate from how a measure affected goods or their manufacturers to how it affected service suppliers who dealt in those goods and their services. Although Canada would have preferred the Appellate Body to be more forthcoming in interpreting the outer limits of the scope of GATS, its findings were an important step toward that end. At the same time, Canada had to express its disappointment with the analyses of the Panel and Appellate Body with respect to the MFN obligation under Article I:1 of GATT 1994. The Appellate Body had acknowledged its "daunting task of interpreting certain aspects of MFN principle that had long been a cornerstone of GATT and was one of the pillars of the WTO trading system". Nevertheless, the Appellate Body had failed to address important arguments regarding the proper interpretation of Article I:1 of GATT 1994, and had failed to provide guidance regarding Members' obligations not to discriminate "in fact" in according advantages to like products based on their origin. In particular, Canada regretted that the Appellate Body had failed to address the fact, acknowledged by the Panel, that the Government of Canada had no role in the sourcing decisions made by private companies. Moreover, it was important to note that the Appellate Body had attributed to Canada a position that Canada did not espouse. In paragraph 78 of its Report, the Appellate Body had stated that "we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'." Canada had not taken that position before the Panel or the Appellate Body. Canada was also disappointed with the analyses in the Reports with respect to the SCM Agreement. It was important that the Panel and Appellate Body reports contributed to Members' understanding of the proper interpretation of "export contingency" under Article 3 of the SCM Agreement. Both the Panel and Appellate Body decisions in this case had failed to do so. Export contingency had been found to exist even in those instances where the Panel and the Appellate Body acknowledged that there was no obligation to export in order to receive the subsidy found to exist under Canada's measures. Despite its reservations, Canada accepted the Panel and Appellate Body decisions, and joined the consensus to adopt these Reports. Pursuant to Article 21.3 of the DSU, Canada would inform the DSB of its intentions with respect to implementation within the next 30 days.

81. The representative of Hong Kong, China said that the part of the Appellate Body Report on services had given some pause for thought and his delegation wished to set out some misgivings relating to the approach taken by the Appellate Body. This could have serious consequences for future cases. He wished to comment on three aspects of the Appellate Body's decision. The first related to its decision in paragraph 151 that "… the fundamental structure and logic of Article I:1, in relation to the rest of GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of GATS can be assessed". In paragraph 152, it had further stated that "This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure 'affecting trade

in services' within the meaning of Article I:1, and thus covered by the GATS, before any further examination of consistency with Article II can logically be made." However, in the Bananas case, the Appellate Body had found that "the term 'affecting' in Article I of GATS has a broad scope of application and that accordingly no measures are a priori excluded from the scope of application of the GATS". But it was hard to see how there could be no a priori exclusion if it was first necessary to establish that a measure fell within the GATS. Whether a measure fell within the GATS would require an assessment as to whether it affected aspects of GATS - in this case the conditions of competition.

82. Second, in paragraph 155 of its Report, the Appellate Body had stated that "at least two key legal issues must be examined to determine whether a measure is one 'affecting trade in services': first, whether there is 'trade in services' in the sense of Article I:2; and second, whether the measure in issue 'affects' such trade in services within the meaning of Article I:1." The approach to see first whether "there was trade in services" could have serious implications. If for example, one were to assume that a Member had decided not to allow any commercial presence of a foreign services provider in Sector "A" and had placed a valid limitation in the market access (MA) column as a result, there was no trade in services in that sector. If one were to assume that the Member forgot to place a valid restriction in the MA column (i.e. entered "none") but still prohibited commercial presence, again no trade in services would take place. The latter case would be a clear violation of the GATS. But according to the Appellate Body since no trade in services was taking place, it would seem that the measure was not one affecting trade in services under the GATS. This was clearly not a viable proposition.

83. Third, with regard to the issue of "affects", the Appellate Body had decided that it was necessary to examine the conditions on the ground. In paragraph 165, it had stated: "Having interpreted Article I:1, the Panel should then have examined all the relevant facts, including who supplies wholesale trade services of motor vehicles through commercial presence in Canada, and how such services are supplied". But it was quite possible that the conditions on the ground had already been distorted by the measure in place and thus examining them might well lead to the wrong conclusion. It should be the "conditions of competition" that should be examined. Hong Kong, China believed that these decisions could have far-reaching and detrimental results to the intended scope and application of GATS. One could only take comfort from paragraph 184 where the Appellate Body stated that "Given the complexity of the subject-matter of trade in services, as well as the newness of the obligations under GATS, we believe that claims made under GATS deserve close attention and serious analysis. We leave interpretation of Article II of GATS to another case and another day" Hong Kong, China hoped that the Appellate Body would also leave interpretation of Article I:1 to another case and another day.

84. The representative of the Philippines said that he only wished to refer to the GATS aspect. The Appellate Body had not made any findings on whether Canada was in violation with Article II:1 of GATS because there were not enough findings of facts and analysis conducted at the Panel stage. In this regard, it was important to note that this particular aspect could be taken up in to a future DSU review. With regard to the analysis as to which should come first; a determination on trade in services or a determination on whether any measure affected trade in services, the Philippines believed that there was nothing wrong that before one tested whether or not a measure was consistent with GATS it was necessary to first determine whether, as a matter of fact, there was trade in services. Only then one could determine whether the measure affected trade in services. There was nothing wrong with this approach. In any event, the Appellate Body had not made any finding on Article II:1. The Philippines hoped that one day that Article would be interpreted properly but, at this stage, it wished to endorse the approach of the Appellate Body.

85. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS139/AB/R-WT/DS142/AB/R and the Panel Report in WT/DS139/R-WT/DS142/R, as modified by the Appellate Body Report.

6. Questions addressed by delegations to the Chairman of the DSB upon the adoption of the Reports of the Appellate Body and the Panel on "United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom" at the DSB meeting on 7 June 2000.

(a) Statement by the Chairman

86. The Chairman, speaking under "Other Business", made the following statement[3]:

"In the DSB meeting on 7 June 2000 during the discussion under the agenda item concerning the adoption of the Panel and Appellate Body Reports on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, several delegations put the question to me whether the Appellate Body during the time it was drawing up its report in this case consulted with me, as Chairman of the DSB, and with the Director-General under the provisions of Article 17.9 of the DSU. As you will recall this provision prescribes that the Appellate Body consult with me and with the Director-General, when drawing up its Working Procedures.

"The answer to this question is in the negative. The Appellate Body did not consult with me or with the Director-General. This was because the Appellate Body was not drawing up new Working Procedures for Appellate Review. The Appellate Body had merely been asked in this specific case by the European Communities as appellee in the case to rule on whether it could accept and consider two unsolicited briefs which had been presented by two US steel industry associations to the division hearing this appeal.

"I would like to point out that paragraph 39 of the Appellate Body report merely notes that nothing in the DSU or in the Working Procedures for Appellate Review provides for acceptance of *amicus curiae* briefs or for prohibition thereof. It then goes on to say that "the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements." This statement is underpinned by a quotation from Article 17.9 of the DSU and further completed by an important footnote reference to Rule 16(1) of the Working Procedures, which allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the Working Procedures. Rule 16(1) of the Working Procedures also makes it clear that any such ruling is for the purposes of that appeal only. This reasoning of the Appellate Body finally leads to the concluding sentence of paragraph 39, which I will quote in full:

> "Therefore we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."

"To recapitulate, the Appellate Body was merely ruling on a specific procedural objection made by one of the parties to the dispute concerning these two unsolicited briefs. It was not and I emphasize that it was not drawing up new Working Procedures and therefore was not under an obligation to consult me, as Chairman of the DSB, or the Director-General. Indeed, I have to say that in the context of deciding issues raised in a particular appeal, in fact, it would seem to me to be highly

[3] The Chairman's statement was subsequently circulated in document WT/DSB/W/137.

inappropriate for the Appellate Body to consult either with the Chairman of the DSB or with the Director-General in that specific context".

87. The DSB took note of the statement.