WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/86
20 September 2000

(00-3733)

Dispute Settlement Body
27 July 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 July 2000

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

Subjects discussed — Page

1. Surveillance of implementation of recommendations adopted by the DSB

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

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

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

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

(e) Turkey - Restrictions on imports of textile and clothing products: Status report by Turkey

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

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.10)

2. The Chairman drew attention to document WT/DS27/51/Add.10 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 in order to find a mutually agreed solution, the EC had concentrated its efforts on a possible reform of its banana regime based on tariff quotas allocated according to traditional trade flows. However, repeated contacts with all the interested parties had demonstrated that the major stumbling block for reaching an agreement was the choice of a reference period. Some major banana producers and the United States continued to maintain opposing views on this matter. Even the search for an alternative solution, based on the Caribbean proposal, had not reconciled the different positions of the EC's trading partners. In the light of these conflicting views, the EC considered that consultations for a solution based on historical references had not led to any results. Discussions on this basis were at an impasse. This situation had recently been addressed by the EC Council. The EC Ministers had decided to concentrate discussions with its trading partners on the management of all tariff-rate quotas based on a "first come, first served" system. The EC would now swiftly examine this possibility in order to conclude that either such a system was feasible and could be put into place for a transitional period, until the entry into force of a tariff-only system, at the latest by 2006, or if that was not possible, to find a method of allocating licences within a tariff-rate quota system acceptable to all. On the basis of its examination, the EC would decide on the way forward which might include a tariff-only system.

4. The representative of Ecuador said that his delegation noted the status report by the EC. Although the EC had emphasized that it was making efforts to modify its banana regime, the situation had not changed and was deteriorating as the damage caused to countries like Ecuador continued to accumulate. Losses involved several hundreds of thousands of dollars but the EC continued to disregard this situation. He recalled that the EC had lost three panels, two panel proceedings under Article 21.5 of the DSU, the Appellate Body proceedings and two arbitration proceedings. It seemed however, that the losers were the winners since no compliance had yet taken place. For the past two years, the EC continued to present its status report but the first report would have been more than enough because no changes had taken place.

5. The EC maintained that it was not in a position to comply with its WTO obligations because the Latin American banana exporting countries and the United States had not been able to agree amongst themselves. The EC had stated that it had met with the countries concerned on many occasions. However, in those meetings the EC had only confirmed its initial position while recalling its difficulties in meeting its obligations. The EC was not prepared to negotiate and had disregarded new proposals. He pointed out that the responsibility for the failure to comply with the WTO rulings was on the EC member States who were not in agreement.

6. He pointed out that the time that had passed and the events of the past few days had proved that Ecuador was right. The EC had indicated to the EC Council that it would initiate new consultations on the distribution of licences on a "first come, first served" basis. On the one hand, the EC stated that it was consulting with all the interested parties and, on the other hand, it was proposing a solution from which no party could benefit: neither EC operators nor the ACP countries. It could be that the EC had sought to further delay its compliance or it needed a new mandate from its member States in order to solve this dispute. However, the final responsibility was on the EC member States to reach an agreement. The EC member States should also realize that this unsolved dispute represented a significant cost for them. The difference was that they could afford such an economic cost, while Ecuador was not in a position to do so.

7. The representative of Honduras said that his delegation noted the EC's status report. However, that report did not comply with the provisions of Article 21.6 of the DSU as it provided no reference to progress in implementation. On the contrary, as stated in that report, the EC would not comply with the DSB's recommendations and would continue its discussions in an effort to find a solution. Once such consultations were exhausted, the EC would decide, at its discretion, how to proceed further. In the view of Honduras, the EC's interpretation of Article 21.6 was not in line with the drafters' intentions.

8. The EC's proposal with regard to the system of quota allocations on a "first come, first served" basis was not new. That proposal had been examined in an exhaustive manner over the past few months and had been rejected because it was not suitable for perishable products. Honduras was also concerned that such a system would lead to discrimination on the basis of the origin of the product. This approach was neither acceptable to the complaining parties nor to other interested parties. Furthermore, some members of the European Parliament and some member States of the EC had expressed objections to that system. The EC's report was yet another way of delaying its implementation, with consequent injury to Honduras' economy and to the credibility of the dispute settlement system. He questioned whether this was in line with the objective of the DSU regarding surveillance of implementation. Honduras hoped that the EC member States would bring the banana import regime into conformity with their WTO obligations. He added that the EC had not held any consultations with Honduras.

9. The representative of Guatemala said that the EC's status report did not show any progress. The report referred to negotiations on a "first come, first served" approach which had already been rejected in the past. She recalled that on 1 December 1999, during the Third Ministerial Conference at Seattle, the Ministers of Foreign Trade from several Latin American countries, including Guatemala, had issued a joint communiqué rejecting the system proposed by the EC. It was therefore clear that the new consultations announced by the EC would fail.

10. With regard to a tariff-only system, Guatemala could not accept a tariff which would be higher than the bound rate because such a tariff would prevent access for Latin American countries and would lead to a further complaint. The responsibility for implementation in this case should not be shifted onto the complainants. Guatemala continued to believe that the Caribbean proposal could settle the dispute and was in a position to support that proposal, although it did not meet all its expectations. This showed its willingness to help to find a solution. However, it had not been possible to engage in a constructive dialogue. After several years and a number of proposals, Guatemala realized that the EC could only accept a regime which replicated the effects of the previous regime and was contrary to the objective of the dispute settlement system and to the expectations of the complainants. This was an historic case and its results might affect other cases. Guatemala therefore hoped that no other Member would be forced to wait so long to be able to restore its rights.

11. The representative of Jamaica said that her delegation noted the EC's status report. The EC had stated that it would now be examining the possibility of managing the proposed tariff-rate quotas

on a "first come, first served basis". It had also stated that on the basis of the examination of this approach and other possible solutions, it would decide how to proceed further. This matter was of great importance to Jamaica as well as to other ACP countries. The Caribbean countries had conveyed their views on the current proposal to the EC and its member States. Discussions on a new banana regime had been long and difficult. Similarly, those on a related issue in another WTO body were proving to be difficult and protracted. Progress in both cases would require a commitment among the interested parties to bring these matters to a satisfactory conclusion. Most of all, it would require a willingness to reach a compromise that would take into account the needs of the developing countries involved to have access to the EC market, in particular those who were small and had less resources.

12. The representative of Mexico said that his country, like other banana producers, had an interest in seeking access to the EC market and was glad that the EC had made specific references to the possibility of establishing a tariff-only system, which was Mexico's preferred option. He wished to emphasize that a new tariff should be set at an adequate level to enable Mexico to have access to the EC's market.

13. The representative of Panama said that his delegation noted that the EC's status report did not provide any new information. The EC once again blamed the complaining parties in this process. In fact, those countries that were affected by the situation were considered to be responsible for the lack of compliance. He reiterated that in order to reach a solution it was not necessary to have the agreement of all the complaining parties. However, it was important that any such solution was consistent with the WTO rules. It seemed that there were some new elements in the report regarding negotiations on historical reference periods. As stated by Ecuador, the contacts held thus far could not be called negotiations since they had been limited to the provision of information by the EC of its intentions while new proposals had been rejected. The EC had stated that it was not possible to agree on a reference period due to the lack of agreement among the interested parties. However, the problem was that the EC had insisted that licences be distributed on the basis of rights acquired after 1993: i.e. under its WTO-incompatible regime. This was unacceptable to those countries who had spent so much time trying to resolve this dispute and had been affected by the situation. It seemed that a base period prior to 1993 would be illegal under EC law. However, no legal justification had been provided by the EC with regard to this argument. It was Panama's understanding that EC traders could bring legal suits against the Commission.

14. The EC had stated that it would now proceed swiftly to consider a solution on a "first come, first served" basis. This proposal, as indicated by other delegations, was not new and had already been discussed. On the basis of its contacts with the EC, Panama believed that the EC, once again, wished to reproduce its previous system. Even if a solution was reached on a "first come, first served" basis, this would not solve the dispute. There were many other illegal aspects in the EC's proposal which would not be solved on the basis of such a distribution of licences. As stated by Ecuador, the EC simply wished to preserve the situation to the disadvantage of several countries that were being affected by the EC's banana regime and had to pay a high price.

15. The representative of Saint Lucia said that the lack of progress in negotiations on modifications of the EC's banana regime was not due to a lack of considerable effort. The measure of one's efforts was not told only in results where positive results required a consensus among a number of Members. Since the 19 June DSB meeting, the EC had made a new proposal. The EC representative was right when he had stated at that meeting that countries would not like that proposal. The latest proposal to provide access to the EC market on a "first come, first served" basis would greatly disadvantage all but the largest operators with major shipping fleets and diverse markets. Saint Lucia therefore strongly opposed the proposal. Her country was aware of the difficulties encountered by the EC in negotiating an acceptable modification of the banana regime. Saint Lucia was concerned over the ongoing impasse since the nature of the new system would have considerable impact on its trading interests. The EC had no incentive to allow this dispute to drag on as it was

paying a high price. As a result of this, the EC was under considerable pressure to solve the dispute on whatever terms in order to end the sanctions. The repeated accusations and use or abuse of trade sanctions were not helpful. The negotiations required a constructive and flexible approach on all sides if one were to define a compromise solution which would safeguard the legitimate trading interests of all suppliers.

16. The representative of the United States said that her country was concerned about the EC's report because it again represented a delay in complying with the WTO rulings. The EC's report portrayed problems with the historically based licensing system as new and as a result of differences over the reference period. In fact, the main problem the EC had to face with the historically based licensing system was its intention to retain for EC companies a vastly larger share of the market than those companies had before the banana regime had come into effect. Thus, the EC wanted to maintain the status quo, either by simply delaying compliance or by insisting on a new regime that would essentially duplicate the current one. In short, the EC wanted to keep a WTO-inconsistent system in place. It was difficult to see why the EC had not already analysed a "first come, first served" system. Indeed, the United States had provided the EC with criteria for such a system in 1999. Also in 1999, the United States had provided the EC with a detailed analysis of a tariff-only system. However, until the EC member States granted the Commission the authority to negotiate such a system, it was difficult to take that option seriously. She reiterated that the EC's report did not provide any new information. The bottom line was that there had been no compliance.

17. The representative of Colombia said that his delegation regretted that there had been no progress with regard to the dispute at hand, and shared the concerns of Ecuador, Guatemala, Honduras and Panama. At the same time, Colombia wished to be associated with the calls for flexibility expressed by Jamaica and Saint Lucia. His country supported a transitional system of tariff quotas over a long period of time. Likewise, any tariff to be applied should not be at such a level as to create barriers to trade in bananas from Latin American countries. He drew attention to the fact that European consumers were not defended in this dispute and yet they were the ones who had to pay unnecessarily high prices as a result of high tariffs. It would therefore be a mistake to further increase such prices since the negative effects on the long-term development of the market would ultimately be paid for by the producer. This was precisely what had happened with other agricultural commodities such as tropical products.

18. 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.6)

19. The Chairman drew attention to document WT/DS76/11/Add.6 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.

20. The representative of Japan said that, as indicated in the status report, his country was consulting with the United States in a constructive and friendly manner. Although some technical issues still remained to be resolved, Japan expected that a mutually satisfactory solution would be found in the near future. Once an agreement was reached with the United States, it would be notified to the DSB.

21. The representative of the United States said that her country was working and would continue to work with Japan on a few technical issues and hoped to conclude this work in the near future.

22. 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 (WT/DS103/12/Add.1 - WT/DS113/12/Add.1)

23. The Chairman drew attention to document WT/DS103/12/Add.1 - WT/DS113/12/Add.1 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.

24. The representative of Canada said that his country was presenting its second status report on progress in implementation. From the beginning of this implementation process, Canada had repeatedly stated its intention to fully implement the DSB's recommendation and rulings, and wished to reiterate that commitment. Canada had also gone to considerable effort to ensure that the process of implementation was conducted in the most open and transparent manner. To this end, on 22 December 1999, Canada had entered into an agreement with the United States and New Zealand, the other parties in this matter, under Article 21.3(b) of the DSU on the reasonable period of time for implementation. This agreement had been circulated to all Members. The terms of the agreement called for a staged implementation process, concluding on 31 December 2000. Canada had filed its first written status report in this matter on 8 June 2000 and had made a further oral statement at the 19 June DSB meeting. Since that time, at Canada's suggestion, a further meeting had been held in Geneva on 22-23 June 2000 between Canada, the United States and New Zealand. This was an additional meeting to the consultations scheduled under the implementation agreement. Its purpose was to provide an opportunity to provide the United States and New Zealand with detailed information on the status of proposals for the development of possible new dairy product export mechanisms in a number of the Canadian provinces and to address any questions concerning those proposals. At the conclusion of these meetings, Canada had reiterated its continuing commitment to keep both parties fully informed of additional developments in the implementation process. The next set of consultations under the implementation agreement had been scheduled for 15 September 2000. Canada would also continue to provide status reports to the DSB in the months ahead, pursuant to Article 21.6 of the DSU. Canada was pleased that it could continue to report to the DSB that it was meeting all of the terms of the implementation agreement. Canada had complied with each element of the staged implementation process to date, and would continue to be on course to fully implementing all of its terms by the conclusion of the implementation period at the end of 2000.

25. The representative of New Zealand said that it was now past mid-point in the period provided for implementation in the agreement between Canada, the United States and New Zealand of 22 December 1999. New Zealand wished to thank Canada for what it had done on some aspects of the implementation process as well as to reiterate the concerns that had been made known to Canada in respect to other action that it would take. New Zealand was pleased to note that Canada continued to be in compliance with its scheduled 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. Similarly, it was pleased to note 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 implementation agreement. However, in order to bring itself into full compliance, Canada had to ensure that its subsidized exports of dairy products remained within its scheduled reduction commitment levels in the coming dairy season commencing 1 August 2000, and thereafter. At consultations with New Zealand and the United States on 22 and 23 June 2000, Canada had provided details of a number of new provincial export schemes that it intended to have in place by 1 August 2000. In New Zealand's view, these new schemes would continue to provide export subsidies to Canadian exporters outside Canada's reduction commitment levels. Accordingly, the introduction of such schemes could not constitute compliance by Canada with the DSB's recommendations and rulings. New Zealand urged Canada to think carefully about the path it appeared to be set on taking.

26. The representative of the United States said that when Canada had provided its first status report on implementation at the 19 June DSB meeting, the United States had voiced its concern

regarding the direction taken by several of Canada's milk producing provinces. Information then available indicated that a number of provinces soon would be instituting new export programmes to supplement the special class system that the DSB found to be an export subsidy. The US reservations regarding the various provincial proposals had been confirmed during the consultations with Canada in June. Canada had provided the United States and New Zealand with information pertaining to the programmes being considered in eight of its provinces. Each of the provincial proposals would make milk available to processors for export at prices that were below those otherwise available for the sale of milk into Canada's domestic market. Furthermore, each province would require that all milk made available to processors at such reduced prices be exported. The reduced milk prices were, thus, contingent on the export of the processed dairy products. The unstated objective of such programmes was to allow Canada to maintain exports of dairy products at the same volume levels achieved under the export subsidy measures that the DSB had found to be inconsistent with Canada's export subsidy reduction commitments. New provincial programmes that were the same in substance, both legally and economically, as the export subsidies that they were designed to replace would not accomplish the full compliance that Canada had assured would be achieved by the conclusion of the implementation period. The United States would continue its efforts to persuade Canada to abandon the pursuit of new export subsidies which appeared likely only to aggravate Canada's breach of its export subsidy commitments.

27. The representative of Canada said that he wished to respond to the comment made at the present meeting that the new replacement measures were in some instances essentially the same as the old ones, and that they might be inconsistent with Canada's WTO-obligations. Canada was surprised at this suggestion. Having had the considerable opportunity to examine the proposal for new export mechanisms, the United States and New Zealand had to recognize that the new mechanism would represent a dramatic change in the manner in which export trade in dairy products was conducted in Canada. These new mechanisms reflected basic deregulation of the dairy exports sector and were based on the primacy of private contracts between producers and exporters. Canada's measures would be highly responsive to the DSB's rulings and recommendations and would represent a fundamental change for the Canadian dairy industry and Canada's measures would fully comply with the WTO obligations.

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

(d) India - Quantitative restrictions on imports of agricultural, textile and industrial products: Status report by India (WT/DS90/16)

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

30. The representative of India said that his country's commitment was to remove the residual quantitative restrictions maintained for balance-of-payments reasons in two tranches in a balanced fashion. To this effect, 50 per cent of the residual quantitative restrictions had been removed on 1 April 2000. The reasonable period of time for the remaining 50 per cent of the residual quantitative restrictions would expire by April 2001. Thus, India was on course with regard to its implementation commitments.

31. The representative of the United States said that, in December 1999, the United States and India had concluded an agreement with respect to the reasonable period of time in this dispute. The United States wished to express appreciation for the cooperation and flexibility shown by India in those discussions. The agreement which was a result of the negotiations had been hailed in both countries. The United States was also extremely pleased to be able to confirm that India had implemented the first stage of that agreement. The United States congratulated India for taking the

important step of eliminating the quantitative restrictions in accordance with the agreed schedule. The United States looked forward to India's removal of the remaining restrictions by 1 April 2001.

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

(e) Turkey - Restrictions on imports of textiles and clothing products: Status report by Turkey (WT/DS34/12)

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

34. The representative of Turkey said that her authorities had held preliminary discussions with the Indian authorities in an effort to find a mutually satisfactory solution to this complex and controversial dispute. During those discussions, both sides had put forward ideas which could serve as a basis for a possible settlement of the dispute. Turkey had also indicated its readiness to meet with India to take up the substance of the ideas suggested during the preliminary discussions. Turkey hoped that that meeting would enable the parties to find a solution. As her country had previously stated in DSB meetings, due to its legal obligations and commitments under the Customs Union with the EC, the process of implementation would be difficult and would require decisions to be taken together with the EC and India. To this end, Turkey had already held consultations with the EC regarding some related issues, including alternative solutions to the application of quantitative restrictions in accordance with the DSB's recommendations.

35. The representative of India wished to reiterate the importance his country attached to enhancing its ties with Turkey in all spheres of economic and commercial relations, including through the Indo-Turkish Joint Committee for Economic and Technical Cooperation. India appreciated Turkey's indications of its positive attitude in dealing with this matter. Thus, it was India's expectation that Turkey would fully comply with its WTO obligations within the time-period agreed on 7 January 2000. He also wished to make three specific comments on the status report submitted by Turkey. First, during the Panel proceedings, Turkey had suggested that it could not remove the restrictions without the consent of the EC because it was treaty-bound to pursue the same import policies as the EC. The Panel and the Appellate Body had rightly rejected this argument. There were thus no legal reasons to prevent Turkey from implementing the rulings in this dispute without the consent of the EC nor any practical considerations. India continued to hold this position. His second comment related to Turkey's description of the dispute as "highly intricate and controversial". He reiterated that the underlying issue in this dispute was relatively straightforward, namely, that the purpose of a customs union was to facilitate trade between the members forming that union, but not to raise barriers to imports from third countries. The Panel and the Appellate Body had ruled that Article XXIV did not provide Turkey with a justification for imposing new restrictions on imports of textiles and clothing inconsistent with Articles XI and XIII of GATT 1994 and Article 2.4 of the ATC. India did not believe that there could be any controversy and was surprised by Turkey's description of the dispute as controversial. Third, it was India's understanding that the bilateral contacts between India and Turkey referred to in its status report had taken place in the context of the Indo-Turkish Joint Committee for Economic and Technical Cooperation, which had held its meeting in February 2000. It was also India's understanding that the discussions in that meeting had centred around the Inward Access Regime or Import Control Regime followed by Turkey to the extent it related to India's export quota for textiles and clothing rather than the question of the implementation of the DSB's recommendations. India welcomed the indication that Turkey was willing to discuss the subject of implementation of the DSB's recommendations with it and hoped that this would be commenced at the earliest.

36. The representative of Australia said that this was a very important case which should be of interest to all Members. Australia maintained a strong systemic interest in ensuring that customs unions and regional trading arrangements were implemented in compliance with Article XXIV of GATT 1994. Accordingly, Australia looked forward to further advice of progress in this case.

37. The representative of Turkey said that her delegation had noted the statements which would be taken into account by her authorities in the process.

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

2. Canada - Certain measures affecting the automotive industry

(a) Implementation of the recommendations of the DSB

39. 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 adoption of the Panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He also recalled that at its meeting on 19 June 2000, the DSB had adopted the Appellate Body Report on "Canada - Certain Measures Affecting the Automotive Industry" and the Panel Report on the same matter as modified by the Appellate Body Report. The 30 day-period in this case had expired on 19 July and on that date, pursuant to the agreement by the parties to the dispute, Canada had informed the DSB in writing of its intentions in respect of implementation. The relevant communication was contained in document WT/DS139/9-WT/DS142/9.

40. The representative of Canada recalled that on 19 June 2000, the DSB had adopted the Panel and Appellate Body Reports on "Canada - Certain Measures Affecting the Automotive Industry". Canada had confirmed, within 30 days of adoption, that it intended to comply with the DSB recommendations and rulings in this case. A written statement to this effect had been circulated to Members on 19 July 2000. He said that compliance would require legal changes to the measures implementing the Auto Pact. Canada was moving forward quickly to complete the domestic processes required to comply with the decision on Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures within 90 days of adoption: i.e. by 17 September 2000. With respect to the other findings, Canada would require a reasonable period of time to comply. His country had launched the domestic legal process required to comply and was in the process of consulting interested parties. On 26 July 2000, Canada had held discussions with the EC and Japan on a reasonable period of time. Canada remained open to concluding a mutual agreement with Japan and the EC on a reasonable period of time.

41. The representative of the European Communities asked whether Canada would withdraw the tax exemption as well as the Canadian value added (CVA) requirement within 90 days.

42. The representative of Japan said that Canada could immediately repeal the measure found to be inconsistent with the WTO Agreement, because that measure was based on the administrative orders of the Canadian Government, namely the Motor Vehicles Tariff Order and Special Remission Orders. Therefore, the repeal of the measure did not require any action on the part of the legislative branch of the Canadian Government. Article 21.3 of the DSU stipulated that: "If it is impracticable to comply immediately with the recommendations and rulings of the DSB, the Member concerned shall have a reasonable period of time". It was clear that Canada was not entitled to any reasonable period of time unless it demonstrated sufficient grounds to claim that it was impracticable to implement the DSB's recommendations immediately. In any event, it was imperative that Canada

promptly inform the parties to this dispute of its intentions, in detail, in respect of implementation of the DSB's recommendations and rulings.

43. The representative of Canada said that Article 21.3 of the DSU stated that "If it is impracticable to comply immediately with the recommendations and rulings the Member concerned shall have a reasonable period of time in which to do so". Canada's immediate compliance was impracticable. On 26 July 2000, Canada had met with Japan and the EC with a view to negotiating a reasonable period of time for implementation. However, no agreement had yet been reached. Canada was willing to continue its discussions with Japan and the EC with a view to reaching an agreement on this reasonable period of time.

44. The representative of the European Communities said that the EC considered that Canada should cease granting the exemption so as to provide an advantage to certain Members and remove the production to sale ratio and the CVA requirements within 90 days. Pursuant to Article 21.3 of the DSU Members could have a reasonable period to comply with rulings only "if it is impracticable to comply immediately with the recommendations and rulings". Like the production to sale ratio requirements, the duty exemption and the CVA were contained in administrative orders and could be amended or revoked by the executive branch without legislative action. Canada could not claim that it needed more time to end the discriminatory granting of the duty exemption and withdrawing the CVA than it needed for the removing of the production to sales ratio. Pursuant to Article 21.3(c) of the DSU, the EC would refer the matter to arbitration.

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

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)

46. The Chairman recalled that the DSB had considered this matter at its meeting on 19 June 2000 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS175/4.

47. The representative of the United States said that her country was renewing its request for a panel to examine India's trade-related investment measures for firms manufacturing motor vehicles. As the United States had explained at the 19 June DSB meeting, motor vehicle manufacturers could not obtain import licences for automobiles or automobile kits and components unless they agreed to a series of local content, trade balancing and foreign exchange balancing requirements. As a result, India's auto regime denied India's trading partners the opportunity to supply India's market and unfairly burdened manufacturers operating within India. The measures were inconsistent with India's obligations under Articles III:4 and XI:1 of GATT 1994 and Articles 2.1 and 2.2 of the Agreement on Trade-Related Investment Measures (TRIMs).

48. At the 19 June DSB meeting, the United States had noted that India had not replied to several questions that had been asked during the consultations in July 1999. In the meantime, India had provided the United States with its answers. Unfortunately, those answers had not given the United States any comfort on the major difficulty regarding the measures. India's answers had confirmed that manufacturers would continue to be legally bound by the TRIMs even after India's removal of its import licensing requirements for automobiles and auto parts in April 2001. Under item 1(d) of the agenda, the United States had thanked India for its flexibility and cooperation in reaching an agreement in another dispute. However, with regard to the case at hand, the United States had not yet been able to reach a mutually satisfactory solution with India. The United States hoped that that would change, and that the matter would be resolved on a mutually agreeable basis. Her country remained open to further discussions with India towards that end. However, since the matter

remained unresolved, the United States was renewing its request for a panel. She added that India had put its measures in place in December 1997: i.e. almost three years after the entry into force of the WTO Agreement. Therefore, India's measures had never qualified for cover under Article 5.1 of the TRIMs Agreement.

49. The representative of India expressed his country's disappointment that the United States had renewed its request for a panel on this matter. At the 19 June DSB meeting, India had suggested that further consultations should be held with a view to finding a solution which would take into account the interests of both India and the United States. At that meeting the United States had indicated its willingness to further consult with India with a view to finding a mutually agreed solution. Subsequently, India had provided the United States with written replies to some of its questions and expected that, on the basis of those replies, the United States would wish to further consult. It was therefore regrettable that the United States had renewed its request for a panel without further discussions with India. As India had stated at the 19 June DSB meeting, the measures referred to by the United States were not trade-related investment measures. Even assuming that the measures in question were trade-related investment measures, as alleged by United States, India's obligations had to be viewed in the light of Article 4 of the TRIMs Agreement. He stressed that the measures referred to by the United States did not violate India's WTO obligations. On previous occasions, India had pointed out that the WTO should not create an impression, even inadvertently, that its disciplines impeded developmental interests of developing countries. India had also indicated that the efforts of many developing countries aimed at achieving even a minimum degree of industrialization were being challenged on the basis of the provisions of the TRIMs Agreement. This was a broader issue and had to be addressed meaningfully in the course of the review of the TRIMs Agreement, already initiated under the Council for Trade in Goods.

50. The representative of India wondered whether the United States had carefully examined the implications of its request. He recalled that on 8 May 2000, the General Council had taken a decision regarding transition period issues under the TRIMs Agreement. That decision, *inter alia*, envisaged that consultations on the means to address TRIMs which had not been notified or those for which a request for an extension had yet to be made, should be pursued as a matter of priority under the aegis of the General Council by the Chairman of the Council for Trade in Goods. That decision had been taken against the backdrop of the Chairman's statement on 17 December 1999 made in the General Council urging countries to exercise restraint on deadline issues. The US action to request the establishment of a panel on a measure, which it alleged was a trade-related investment measure, disregarded the Chairman's statement of 17 December 1999 and the 8 May 2000 decision of the General Council on TRIMs transition period issues. India was not daunted about the prospect of a panel on this matter. However, it was concerned about the implications of the US action regarding the value attached by Members to the Chairman's statement and the General Council decision. India urged the United States to reconsider its action for the sake of the larger interests of the Organization.

51. The representative of Malaysia said that it was unfortunate that the United States was seeking a panel to examine this matter, given that under the 8 May 2000 decision of the General Council, consultations had to be undertaken even for those Members who had not notified TRIMs and had yet to seek an extension. It was Malaysia's understanding that the Chairman of the Council for Trade in Goods was currently undertaking such consultations. Malaysia regretted that the United States had chosen to proceed with its request and believed that the US action was not in line with the confidence-building measures.

52. The representative of Cuba said that his delegation shared the concerns expressed by India and Malaysia to the effect that consultations were now carried out and that it would not be appropriate to pursue a DSU procedure prior to any multilateral solution to be found on this matter.

53. The representative of the United States said that the last time that consultations had been held on this matter was in July 1999. This was an old issue and the United States had demonstrated a great

amount of flexibility in this case. The United States had asked for answers to its questions in July 1999 in the hope that it could find a resolution to this problem in order to avoid a panel. The United States had hoped that even before a panel was established it would be possible to resolve this issue. As with all its trading partners, her country continued to work on this matter. The 8 May decision had been taken without prejudice to Members' rights and obligations under the WTO Agreement. The United States had tried to build confidence with India since 1999. She noted that India had put its measures in place in December 1997, three years after the WTO Agreement had come into force. Therefore, India's measures were not covered by Article 5.1 of the TRIMs Agreement. The United States had tried to work out with some of its trading partners how to move forward on those TRIMs issues, but India's situation was different. Nevertheless, the United States would try to work with India on this matter and hoped to do so sooner rather than later.

54. The representative of India noted that the United States had indicated that it would continue to have contacts with India even after the establishment of the panel to explore the possibility of arriving at a mutually satisfactory solution. The United States had indicated that although it had received India's replies, it considered that they were not satisfactory and had renewed its request for a panel. At the 19 June DSB meeting, the United States had expressed the desire to have replies to its questions. While India had recognized that originally there was some delay in replying to the US questions, after the 19 June meeting, his delegation had worked hard and had furnished the replies to the US questions. The United States had stated that it was not satisfied with the replies. India believed that further consultations should have been held on this matter in case the US had some difficulty in appreciating those replies. The United States had sought the establishment of a panel without giving India an opportunity to explain its replies.

55. The second point related to the US assertion that the 17 December Chairman's statement and 8 May decision of the General Council were without prejudice to the rights and obligations of Members. By stating that the "due restraint" decision was without prejudice to the rights and obligations of Members implied that that decision amounted to a nullity. Moreover, when certain decisions were taken in the context of confidence-building measures that raised Members' expectations. There was, therefore, a certain amount of frustration when in spite of such decisions some Members argued that they retained their rights to invoke dispute settlement procedures against other Members. He reiterated that India was concerned about systemic implications of the US request. He thanked the United States for its willingness to try to work out a solution even at the late stage and said that India, for its part, would do its best.

56. The representative of the Philippines said that the phrase "without prejudice to Members' rights and obligations" should be read in context. When the General Council took a decision, which to some extent affected Members' rights and obligations, that prejudiced the WTO rights and obligations. Otherwise the General Council would never be able to make any binding decision. He recalled that on 17 December 1999, the United States had reserved its rights, but not on 8 May 2000.

57. The representative of the United States said that her country had exercised due restraint even a year before the 8 May 2000 decision and it continued to do so. As India had stated, both countries would try to work in order to resolve this issue. India's answers, which were thorough, had only been recently provided and the United States had some additional questions. She hoped that this could be resolved in the near future. The 8 May decision was without prejudice to Members' rights and obligations, as stated by the Chairman in his statement. Therefore, it had not been necessary for the United States to indicate its position during the meeting. The 8 May decision was without prejudice to the rights of all Members, not just the United States, and did not change the existing rights.

58. 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.

59. The representatives of the EC and Korea reserved their third-party rights to participate in the Panel's proceedings.

4. United States - Section 211 Omnibus Appropriations Act of 1998

(a) Request for the establishment of a panel by the European Communities and their member States (WT/DS176/2)

60. The Chairman drew attention to the communication from the European Communities and their member States contained in document WT/DS176/2.

61. The representative of the European Communities said that the EC was requesting a panel to examine this matter because it believed that Section 211 violated certain fundamental principles contained in the TRIPS Agreement. Section 211 introduced conditions concerning the protection of trademarks or trade-names which clearly violated the trademark, trade-name and enforcement provisions of the TRIPS Agreement. In addition, because of its discriminatory character, Section 211 violated the m.f.n. treatment and national treatment provisions of the TRIPS Agreement. On 7 July 1999, the EC had requested consultations which had been subsequently held on 13 September and 13 December 1999. During the consultations, the United States had maintained its view that Section 211 was in compliance with its obligations under the TRIPS Agreement. Under these circumstances, the EC was requesting the establishment of a panel.

62. The representative of the United States said that it should come as no surprise that her country was not prepared to accept the establishment of a panel at the present meeting. The EC in its request claimed that Section 211 was inconsistent with several provisions of the TRIPS Agreement and found these inconsistencies notably with respect to several Articles of the TRIPS Agreement and the Paris Convention. Article 6 of the DSU required that a panel request should provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Accordingly, the EC's panel request failed to meet the requirement of that Article. The United States regretted that the EC had chosen to request the establishment of a panel and had hoped that the consultations would have addressed the EC's concerns.

63. The very issues raised by the EC in its panel request were the subject of ongoing private litigation in the US courts. She noted that, indeed, this ongoing private litigation appeared to have prompted the EC's panel request. Therefore, the United States believed it would be prudent for the EC to await the outcome of this litigation in order to determine its actual effect on the EC's view of Section 211. That Section reflected a long-standing policy against giving effect in other countries to decrees of a country confiscating property in that country that claimed to affect property located in the United States. This policy was not unique to the United States. It addressed the fundamental question of who was and who was not the owner of confiscated trademarks, trade-names and commercial names, an issue not directly addressed by either the TRIPS Agreement or the Paris Convention. Consequently, an inquiry into the identity of the true owner of the right and an inquiry into whether he or she had expressly consented to the use of that right by a third party were legitimate under the TRIPS Agreement. As this was a policy that did not depend on the nationality of the claimant, no national treatment or m.f.n. issues were involved.

64. The representative of Cuba said that his delegation supported the EC's request for a panel to examine Section 211 of the US Omnibus Appropriations Act of 1998, which had been signed into law on 21 October 1998. The proposed terms of reference seemed very relevant for determining that the United States did not observe the TRIPS obligations and that the benefits accruing under this Agreement to certain Members were being nullified or impaired. In December 1998, at the meeting of the Council for TRIPS, Cuba had requested the United States, pursuant to Article 63.3 of the TRIPS Agreement, to explain how that legislation was compatible with the provisions of the Agreement. Thus far, Cuba had not received any information from the United States who had

confined itself to merely reproducing and distributing a collection of legal texts. Cuba was convinced that Section 211 of the US Omnibus Appropriations Act violated various provisions of the TRIPS Agreement as well as the Paris Convention. In addition to the substantive issues raised by his delegation before the Council for TRIPS, he wished to point out that Section 211 violated fundamental rules such as the rule intended to protect consumers from the risk of confusion concerning the origin of products or services. Furthermore, it was also against the legal security and certainty which should govern relations among Members and, in turn, their relations with the consumer community. For all these reasons, Cuba considered it appropriate that Section 211 be examined by a panel and hoped that the rights abolished by that measure would be restored.

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

5. United States - Section 110(5) of the US Copyright Act

(a) Report of the Panel (WT/DS160/R)

66. The Chairman recalled that at its meeting on 26 May 1999, the DSB had agreed to establish a panel to examine the EC complaint on this matter. The Report of the Panel contained in document WT/DS160/R had been circulated on 15 June 2000, and it was now before the DSB for adoption at the request of the EC. 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.

67. The representative of the European Communities said that with regard to the Panel's conclusion on subparagraph (B) of Section 110(5) of the US Copyright Act, the EC was satisfied that the exorbitant exemption on the right holders exclusive rights had been found to be inconsistent with the US obligations under the TRIPS Agreement. However, the EC had systemic concerns with regard to the Panel's conclusion on subparagraph (A) of the statute.

68. The representative of the United States was pleased that the Panel had agreed with her country that Article 13 of the TRIPS Agreement was the correct standard to evaluate a Member's exception or limitation to a right under that Agreement, unless provided otherwise. The United States was also pleased that the Panel had clarified that the legitimacy of exceptions or limitations might not be subjectively judged. Most importantly, the United States was pleased that the Panel had agreed with the US position that Section 110(5)(A), the homestyle exemption, was consistent with Article 13 of the TRIPS Agreement, and therefore consistent with the US obligations under that Agreement. However, the United States was disappointed that, applying the same standard, the Panel had concluded that Section 110(5)(B), the 1998 amendment, was inconsistent with the TRIPS Agreement. Therefore, the United States did not join in a consensus to adopt this Panel Report, but recognized that, in the absence of a consensus to reject it, the Report would be adopted at the present meeting.

69. The representative of the Philippines said that his country welcomed the Panel Report and, in particular, its finding that exemptions under subparagraph (A) of Section 110(5) were consistent with the TRIPS Agreement. However, the Philippines considered that the Panel had erred in maintaining that subparagraph (B) of Section 110(5) was not consistent with the TRIPS Agreement. He underlined that even if one were to assume that the Panel was correct on this point, it was not appropriate to assert a right which was difficult to enforce, or could not be enforced, in particular in developing countries.

70. The representative of Australia said that his country considered this to be an important case for the WTO system, as one of the first disputes addressing the fundamental balance of interests in the TRIPS Agreement. In particular, the Panel had been required to make an assessment, in the circumstances of this case, on the appropriate balance between the interests of right holders and the dual public policy objectives of promoting due reward for creative endeavour and ensuring reasonable non-commercial public policy exceptions. Australia welcomed the balanced outcome of the Panel

Report, which was essentially in accord with Australia's concern that the fundamental balance of interests inherent in the TRIPS Agreement should be maintained.

71. The representative of Hong Kong, China said that his delegation did not have difficulties with the substance of the Panel's conclusions. However, he wished to comment on the Panel's preliminary ruling with regard to its treatment of a letter from a law firm addressed to the USTR and then copied to the Panel. In making the decision not to rely on the letter for its reasoning and finding, the Panel had made reference to the Appellate Body's interpretation of Article 13 of the DSU in the Shrimp case[1]. The Panel had not rejected the letter but had merely stated that it would not rely on it because it duplicated the information submitted by the parties. His delegation's position on the acceptance of unsolicited submissions to panels was known. Accordingly, Hong Kong, China was concerned that the Panel's ruling might open the floodgate to non-requested submissions. This could, in turn, create serious implications for future panels in terms of workload and efficiency. More importantly, Hong Kong, China considered that non-WTO Members should not be treated in a more favourable way than WTO Members who had no right to make submissions to panels and the Appellate Body if they were not parties or third parties to the dispute. His delegation hoped that it would not be necessary to intervene again on the same issue in the future.

72. The representative of Switzerland said that her country had a great interest in this case not only in order to safeguard the claims of Swiss right-holders of musical works to obtain equitable remuneration for the communication of their works to the public in the US market, but also to ensure that the TRIPS provisions, and by reference and incorporation also the relevant provisions of the Berne Convention, were implemented in national laws consistently with the WTO obligations. Switzerland supported the Panel's conclusion that Article 13 of the TRIPS Agreement permitted exceptions only if the following three requirements were met: (i) limitations and exceptions to exclusive rights had to be confined to certain special cases; (ii) they should not conflict with a normal exploitation of the work; and (iii) they should not unreasonably prejudice the legitimate interests of the right holder. While Switzerland agreed with the Panel that exceptions to exclusive rights had to meet these three requirements, it would have concluded that both exemptions under subparagraphs (A) and (B) of Section 110(5), namely the business and the homestyle exemption, did not meet these requirements. Switzerland therefore especially welcomed the Panel's conclusion that subparagraph (B) of Section 110(5) did not meet the requirements of Article 13 of the TRIPS Agreement.

73. The representative of India said that his country was not a party to this dispute. However, India had a systemic interest in the issue of *amicus curiae* briefs considered by the Panel, which had based its ruling on the Appellate Body's ruling in the Shrimp case. His country was concerned about the implications of the jurisprudence that was evolving on the issue of *amicus curiae* briefs. In the Shrimp case, the non-profit organisations had sought to intervene in the panel proceedings. In the UK Lead Bar case[2], a powerful business association had sought to intervene as well. Now a legal firm representing a business establishment directly interested in the outcome of the Panel's proceeding had submitted its brief. India recognized that the Panel's ruling in this case had been based on the Appellate Body's ruling in the Shrimp case. The Panel had asserted that it would not reject the brief, but that it would not consider it because that brief had not been addressed to it directly and the information contained therein was already available. However, had the brief been addressed directly to the Panel and had it contained certain legal arguments contrary to those of governments, or raised a new argument not addressed by the parties, would the Panel have considered those arguments and made determinations based upon them. This question had been raised by the EC but had not been dealt with by the Panel.

[1] WT/DS58.
[2] WT/DS138.

74. At the 6 November 1998 DSB meeting, India and several Members had questioned the Appellate Body's interpretation of Article 13 of the DSU, in particular the meaning of the word "seek". At the DSB meeting on 7 June 2000, in the context of the adoption of the Panel and the Appellate Body Reports on the UK Lead Bar case, with the exception of one Member, strong views had been expressed with regard to the Appellate Body treatment and acceptance of *amicus curiae* briefs. His delegation shared the concern expressed by Hong Kong, China with regard to the implications for the jurisprudence that was developing on this issue. It appeared that before panels and the Appellate Body, Members were treated less favourably than NGOs. For example, if a Member wished to participate as a third party in a panel proceeding, it had to reserve its third-party rights within 10 days of the date of establishment of a panel, otherwise it would lose its right. It was his understanding that one Member who had made a request to participate as a third-party in a certain dispute after the lapse of the 10 day-period, had been informed that since its request had not been made within the stipulated 10 day-period it had lost its right. However, there was no time-frame with regard to submissions of *amicus curiae* briefs to panels by NGOs. It seemed that NGOs could send their briefs to panels any time during the proceeding and that panels had the discretion to take such briefs into consideration. A Member could become a third party in the Appellate Body proceedings only if it had participated as a third party in the relevant panel. Some delegations had expressed concern about this situation in the past. It could be that a Member who had not participated as a third-party in a panel's proceeding had concerns about the report of a panel, but, for the reason mentioned above, was not allowed to become a third party before the Appellate Body. Even if a Member was a third party in an appeal because it had participated as a third party before the relevant panel, that Member had an obligation to make written submissions within a time-frame prescribed by the Appellate Body.

75. The disciplines which applied to Members in respect of the Appellate Body proceedings did not apply to NGOs who could submit *amicus curiae* briefs directly to the Appellate Body even though they did not make any submission to the panel. Moreover, under the current situation, NGOs could submit *amicus curiae* briefs to the Appellate Body at any time, at least before an oral hearing. In view of the jurisprudence developed by panels and Appellate Body with regard to *amicus curiae* briefs, a situation was developing in which Members had to request treatment no less favourable to the treatment being accorded to NGOs. Notwithstanding reservations about the Appellate Body's ruling in the Shrimp case, the question raised by India at the present meeting was not whether that decision was appropriate. India was concerned that the rights of Members in dispute settlement proceedings were more restricted as compared to the rights enjoyed by NGOs. This was a serious systemic issue for which no ready solution could be proposed. However, he believed that Members should work collectively under the Chairman's leadership in an effort to find a solution to this unfortunate situation.

76. The representative of Mexico said that his country, like India and Hong Kong, China, was concerned about the Panel's preliminary ruling. Mexico noted that briefs and letters from non-WTO entities were not useful in resolving disputes and were counter-productive.

77. The representative of Australia said that his country wished to be associated with the comments made by India. This was a very serious problem and, as stated by India, one for which there was no immediate or obvious solution. From Australia's point of view, putting aside its views on the legality of submitting *amicus curiae* briefs, the fact was that the jurisprudence in this area seemed to be developing. Without prejudice to other Members' position on this issue, Australia believed that there was a need to reflect on appropriate rules and to try to provide some guidelines in this area rather than to leave this issue entirely in the hands of panels and the Appellate Body. There was a need to address this issue because a serious imbalance was emerging between the rights of Members and the rights of NGOs.

78. The representative of Malaysia wished to associate his delegation's views with the statements made by India, Australia and Hong Kong, China. Malaysia believed that this issue should be

discussed by Members rather than be left to the Appellate Body to continue to develop its own jurisprudence.

79. The DSB took note of the statements and adopted the Panel Report contained in WT/DS160/R.

6. Third-party participation in GATT Article XXII consultations in relation to the case on "United States - Section 306 of the Trade Act of 1974 and Amendments Thereto"

(a) Statement by Japan

80. The representative of Japan, speaking under "Other Business", wished to raise some systemic concerns regarding his country's request to be joined in the GATT Article XXII consultations requested by the EC on US Section 306 of the Trade Act of 1974 and amendments thereto (WT/DS200/1). On 5 June 2000, the EC had requested consultations with the United States on this matter. On 19 June 2000, Japan had requested the United States, pursuant to Article 4.11 of the DSU, to be joined in those consultations (WT/DS200/4). Japan believed that it had a substantial trade interest in those consultations. On 3 July 2000, Japan had received the US response declining its request which stated that: "It is the view of the United States that Japan does not have a substantial trade interest in these consultations. The United States also does not understand Japan to have a direct interest in the question of the exercise of DSU Article 22 rights in this dispute." Article 4.11 of the DSU stipulated that Members "shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded". It was Japan's understanding that the "substantial interest" meant "substantial trade interest". However, it was unclear why such a reason as, "direct interest in the question of the exercise of DSU Article 22 rights", had been put forward by the United States in its response. It was obvious that "substantial trade interest" was the only criterion to be taken into account in this context, as stipulated in Article 4.11 of the DSU.

81. On the basis of the documents circulated by the Secretariat, Japan noted that nine other Members had requested to be joined in the consultations. His country believed that not all the requests had been rejected by the United States. He asked whether the United States had accepted some Members because they had a "substantial trade interest" in those consultations, or because they had a "direct interest in the question of the exercise of DSU Article 22 rights" or both. Japan was concerned that the United States had introduced a new criterion for the acceptance of the request to be joined in consultations other than that stipulated in Article 4.11 of the DSU. Japan therefore wished to know whether all the Members that had been accepted by the United States had a "substantial trade interest". Due to the systemic importance of Section 306 of the Trade Act of 1974, Japan wished to reserve its right to take any necessary steps in future, including its initiative to request its own consultations against the United States on this matter.

82. He noted that under current practice, requests for consultations as well as requests to be joined in consultations under Article 4.11 of the DSU were circulated as WTO documents, but not the responses thereto. In the past, the Secretariat had circulated a document containing the names of Members which had been accepted to join consultations. He believed that due consideration should be given to the fact that a requesting Member should be informed of the outcome regarding similar requests made by other Members. This was a matter of internal transparency, which, he believed, was important for a fair and effective functioning of the dispute settlement system.

83. The representative of Saint Lucia said that her delegation supported the statement made by Japan. She noted that the US letter to Saint Lucia stated that "pursuant to Article 4.11 of the DSU, the United States was declining your request to join the consultations. It is the view of the United States that Saint Lucia does not have a substantial trade interest in the consultations as defined by the EC request. The United States also does not understand Saint Lucia to have a direct interest in the

question of the exercise of DSU Article 22 rights in this dispute." In the view of Saint Lucia, when Article 4.11 of the DSU was read in accordance with customary rules of interpretation of public international law and the basic principle of good faith, and taking into account the fundamental GATT/WTO principles of non-discrimination, the discretion and trust of the respondent to reject the claim of a substantial trade interest should not be exercised in a discriminatory or arbitrary manner. The WTO record showed that a number of Members had indicated a desire to be joined in the consultations on this matter. In the view of her delegation the US responses should have been circulated because all Members had the right to know how the DSU rights were being exercised. She hoped that the Chairman would take a pro-active approach in the future towards greater transparency in the exercise of the DSU procedures.

84. All Members had a real interest in ensuring respect for the WTO rules, including the DSU rules, which were an essential element in providing security and predictability to the multilateral trading system. Saint Lucia had repeatedly made the point that the DSU was admittedly not designed to deal efficiently with multiparty disputes. The DSU appeared to weigh the interest of complainants over other Members. Her delegation recognized that Members which were not complainants in the Banana and Beef disputes had an interest in the application of the "carousel" measures and noted that there was one such Member who had been included in the consultation. Saint Lucia did not seek to deny any Member access to the consultations but simply challenged the basis on which it had been rejected. Her delegation noted with interest the statement made by India under item 5 of the agenda that Members should demand equal treatment with that of international organizations and other entities. The position of non-parties *vis-à-vis* the parties directly involved in the dispute and their marginalization through this process was a matter of increasing concern. Saint Lucia hoped that this matter of immediate and urgent interest would be pursued by the Chairman so as to ensure confidence in the DSU procedures.

85. The representative of Australia said that his country recognized that Article 4.11 of the DSU conferred on the responding Member the discretion to determine claims of substantial interest. However, the exercise of this discretion selectively to accept some requests for participation while rejecting others could give rise to perceptions of bias. It was therefore important for the responding Member to act in a fully transparent manner. Australia had systemic as well as direct commercial interests in "carousel" retaliation by the United States. His country was aware of its rights to initiate its own complaint against the United States, if necessary. However, setting aside requests in what would seem to be an arbitrary way did not contribute to the efficient operation of the WTO, not least as it would lead to proliferation of complaints initiated by others whose interest might otherwise have been accommodated under Article 4.11 of the DSU.

86. The representative of Jamaica said that her country had also requested to participate as a third party in the consultations on this matter (WT/DS200/3). Like Japan, Jamaica had received a letter from the United States declining its participation in those consultations. The letter was along the same lines as that received by Japan and, it was now known that the three other Members had been refused. Jamaica fully recognized the right of a defending party to decline a request if it did not consider that the requesting Member had a substantial trade interest in the subject. This was the essence of Article 4.11 of the DSU. However, Jamaica did not understand that the defending party could decline a request for participation on the grounds that the requesting party did not have a direct interest in the exercise of DSU Article 22 rights. Nor that an interest in Article 22 could qualify participation as to whether or not the Article 4.11 basis was fulfilled. In Jamaica's view, Members had the right to have a systemic interest in the implementation and operation of DSU provisions, in this case Article 22 of the DSU. Jamaica was therefore concerned with what appeared to have been the use of Article 22 as the basis for accepting some Members but not others in consultations. Jamaica thanked the Chairman for his support and immediate action in promoting improved transparency of the work of the DSB. This would enhance Members' efforts to address this important issue.

87. The representative of Hong Kong, China said that his delegation had not requested to be joined in the consultations referred to by Japan. However, it maintained a strong systemic interest in the case and was monitoring its development closely. At the present meeting, he wished to make some observations. First, both the terms “substantial trade interests” and “substantial interests” were referred to in Article 4.11 of the DSU. He recalled that his delegation had made a proposal to modify the terms of that Article in the DSU review. However, since the deadline for completion of the DSU review had expired there might be no immediate avenue to address this matter. In his delegation's view "substantial interest" should not only refer to trade interest but to systemic interest as well. Some requests in the case under discussion were of systemic interest. There was a question of nature and scope of these terms. In his delegation's view, systemic interests should be covered by Article 4.11 of the DSU.

88. Second, further reflection on the quality of reasons given in accepting or declining a particular request was required. If a Member claimed that it had a substantial trade interest in the matter, and the response was merely that the requesting Member did not have a substantial trade interest, then the quality of reasons given was in question. Third, under Article 4.11 of the DSU, only requests to be joined in consultations were circulated but not responses. His delegation supported the proposal that, for transparency purposes, responses under Article 4.11 should also be circulated by the Secretariat. That implied that some improvements were required to Article 4.11 either through amendments or other means. Hong Kong, China was ready to contribute to any process to be undertaken by the Chairman in relation to this matter.

89. The representative of the European Communities said that, as other delegations had stated, the United States had based its refusals on a different criterion, which it described as a "direct interest in the exercise of rights under Article 22 of the DSU". By this the United States meant those who shared the US views on unilateral application of Article 22 of the DSU. The United States had used this criterion as a substitute for that contained in Article 4.11 of the DSU in relation to a substantial trade interest. If a country took the liberty of abusing the rights under Article 4.11 of the DSU whereby it could recognize or not substantial interest and replaced it with a different subjective criterion, this would have negative implications for the system. The complainant had the possibility to make its request under Article XXII or XXIII of GATT 1994. If a defendant could abuse the rights under Article 4.11 of the DSU and accept only those who shared its view then the complainant would never make its request under Article XXII, which allowed for the participation of third parties. The rights of Members would therefore be seriously affected. In the EC's view, Article 4.11 of the DSU allowed refusal of third-party status only on the basis of the substantial trade interest criterion. The defendant did not have a discretion to use a different criterion. The EC supported Japan's proposal that, for transparency purposes, responses under Article 4.11 of the DSU should also be circulated.

90. The Chairman drew attention to Rule 25 of the Rules of Procedure which stated that Members should avoid unduly long debates under "Other Business" and discussions on substantive issues. He would not prevent other delegations who wished to speak on this matter but they should avoid getting into an unduly long debate.

91. The representative of Ecuador said that from the statement made by the EC it could be understood that those who had been accepted in the consultations on the matter under discussion shared the US view that Article 22 of the DSU could be applied unilaterally. Although accepted in those consultations, Ecuador maintained its position on the application of Article 22 of the DSU, namely, that that Article could only be applied after completion of a multilateral determination on non-compliance.

92. The representative of the United States recalled that under Article 4.11 of the DSU, a Member might be joined in consultations only if "the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded." In the consultations requested by the EC concerning Section 407 of the Trade and Development Act of 2000, the United States had

examined the issue of substantial interest on a case-by-case basis. In the case of Japan and certain other delegations, the United States could not agree that the claim of substantial trade interest was well-founded. The United States was therefore fully within its rights under Article 4.11 of the DSU not to include certain delegations in the consultations. Some delegations had stated that there was no transparency. The United States, even though it was not required to provide to the DSB copies of all its responses, had made such responses available to Japan and other delegations. Some delegations had not even met the 10-day deadline. The United States believed that it had followed the rules and would continue to do so. Her delegation noted the statements made at the present meeting and, in particular, the comments made by Hong Kong, China. This issue could be examined in the DSU review in future.

93. The representative of Saint Lucia wished to provide some clarification, namely that her delegation in Brussels had received the EC's request for consultations with the United States after the 10-day deadline and had responded thereto immediately. She noted that this was not the basis on which Saint Lucia's request had been rejected. Her delegation sought transparency for all Members. Saint Lucia wished to know GATT/WTO practice on the application of Article 4.11 of the DSU. Her delegation was concerned that it was not possible to know the rights if one did not know how Article 4.11 of the DSU had been applied in practice. In order to benefit from that provision there was a need to have access to the responses on a general basis.

94. The Chairman said that this issue had been raised with him as the Chairman of the DSB by Japan in a letter dated 10 July 2000. He had considered carefully the points put to him by Japan and he had responded in a letter to Japan dated 17 July 2000, which had also been copied to the parties most closely involved in this particular dispute. He had indicated in his reply to Japan that among other things a practice seemed to have developed of responding Members notifying the Secretariat of their responses to the requests to be joined in consultations and that the United States was one of the delegations who had followed this practice. However, he wished to point out, and he had made that point in his letter to Japan, that there was no obligation on the part of the responding Member under the DSU to notify either the Chairman or the Secretariat of their response to the requests to be joined in consultations as far as such responses were negative. However, he had suggested in his letter that it might be a practical solution to return to a previous practice of the Secretariat circulating a note identifying the Members which had been accepted to participate in such consultations under Article 4.11 of the DSU where such information had been made available to the Secretariat. He had suggested this because circulating complete letters would be very time-consuming and there was a problem of translation. Therefore, the suggestion was simply to circulate the names of the Members which had been accepted to participate in consultations under Article 4.11 of the DSU. That would introduce some additional element of transparency. It was also his intention, unless Japan disagreed, to circulate Japan's letter as well as his reply. Members could give further consideration and reflect on this matter and, if necessary, revert to it as an item on the agenda of a regular DSB meeting in future.

95. The representative of the Philippines said that it was his understanding that the Secretariat would circulate a list of Members who had been accepted to join consultations under Article 4.11 of the DSU, only if the responding Member decided to notify the Secretariat thereof.

96. The Chairman then drew attention to Article 4.11 of the DSU which stipulated that "when there is a request to be joined in consultations such Member shall be joined in the consultations provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they so shall inform the DSB." Therefore when a claim for joining in consultations was accepted, the DSB was informed. His proposal was to circulate the names of Members that had been accepted to join consultations under Article 4.11 of the DSU, but there was no obligation to notify the names of Members that had not been accepted.

97. The DSB took note of the statements.

7. Chairmanship of a possible DSB meeting in the second half of August.

(a) Statement by the Chairman

98. The Chairman, speaking under "Other Business" said that a special DSB meeting would be held on 4 August 2000 and that the next regular DSB meeting was scheduled for 26 September 2000. That meant that there would be a long time lapse between the present regular meeting and the meeting in September. He would not be available in the period between 14 August and early September. The Chairmen of the General Council and the TPRB were also, to the best of his knowledge, not available during that period of time. However, the Chairman of the Council for Trade in Goods, Amb. Pérez del Castillo (Uruguay) had informed him that he would be available if necessary during the last days of August. Accordingly, he proposed that the DSB appoint the Chairman of the Council for Trade in Goods, Amb. Pérez del Castillo, to chair any DSB meeting that might be required, for reasons of urgency, during that period of time.

99. The DSB so agreed.

100. The representative of Panama said that he was not sure whether a decision on this matter could be taken under "Other Business" and did not wish that a precedent be set in this regard. He sought clarification from the Secretariat regarding the correct procedure in such situations.

101. The Chairman said that Rule 26 of the Rules of Procedures for meetings of the General Council which also applied to the DSB stated that "while the General Council is not expected to take action in respect of an item introduced as Other Business nothing shall prevent the General Council, if it so decides, to take action in respect of any such item at a particular meeting." Therefore, there was clearly nothing to prevent action being taken. In this particular case, the action that he had proposed was of a routine nature.

102. The representative of Panama said that his delegation had no objections to the Chairman's proposal, but was concerned about the procedure. Panama, as a small delegation, often decided whether to attend a meeting on the basis of the agenda circulated in advance. However, if an item was placed under "Other Business" which required a decision and his country was not informed in advance thereof, this could have an impact on its rights. He proposed that the decision on the Chairmanship be taken at a future DSB meeting as the first item on the agenda. If not, Panama would reserve its rights to challenge decisions taken under "Other Business".

103. The Chairman said that he was not entirely clear on the point made by Panama. If there was a meeting in the second half of August, due notice would be given and the airgram as well as the proposed agenda would be circulated in the usual way so that delegations would know the agenda of that meeting. As to whether delegations might be taken by surprise if certain items were raised under "Other Business", Rule 25 of the Rules of procedure stated that substantive issues under "Other Business" should be avoided. For that reason, delegations wishing to discuss substantive issues at DSB meetings had to request that an item be placed on the agenda so that other delegations would be duly forewarned and could prepare themselves for the debate. The discussion under the previous agenda item under "Other Business" concerned a substantive issue. However, only a series of statements had been made which would be included in the minutes of the meeting. If necessary, delegations might revert to that matter for substantive debate in future. At the present meeting, he was only proposing that, if due notice was given regarding a meeting in August with certain specified items on the agenda, then that meeting could be chaired by the Chairman of the Council on Trade in Goods.

104. The representative of Panama said that he was not concerned about the Chairman's proposal but rather about the procedure. He wished to reserve his country's right to question decisions taken under "Other Business" because the rights of Members could be seriously prejudiced.

105. The Chairman asked whether this implied that Panama was objecting to appoint Ambassador Pérez del Castillo to chair a DSB meeting if duly notified and if necessary on grounds of urgency in the second half of August.

106. The representative of Panama said that he was not objecting to the Chairman's proposal as long as no precedent was established as to the way in which decisions were taken.

107. The Chairman said that, on the basis that no precedent was established as to the way decisions were taken, the DSB had agreed to appoint Ambassador Pérez del Castillo to chair a meeting of the DSB, if duly notified, and if necessary in the second half of August. He would be back in Geneva in the first days of September so if it was necessary to have another meeting then he would be available to chair that meeting on grounds of urgency as required.

108. The DSB took note of the statements.