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MINUTES OF THE MEETING

Held in the Centre William Rappard
on 17 November 2000

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

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1. Surveillance of implementation of recommendations adopted by the DSB

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

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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 to which he had referred 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.13)

2. The Chairman drew attention to document WT/DS27/51/Add.13 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that at the 23 October meeting, the EC had informed the DSB of its intentions regarding the adoption and implementation of a new banana import regime, which would be fully in compliance with the DSB's recommendations. Since its previous status report, the EC had continued discussions, both internally and externally with interested parties, with a view to finalizing the adoption of this new import regime. In accordance with Article 21.6 of the DSU, the EC would keep the DSB regularly informed of any development in this regard.

4. The representative of Ecuador said that his delegation had noted the EC's status report. At the previous meeting, Ecuador had reaffirmed its preference for the application of a banana import regime based on a single tariff. Ecuador had also indicated that it could accept a transitional scheme based on tariff quotas subject to the following conditions: (i) the scheme was WTO-compatible; (ii) its duration did not exceed the time necessary for the corresponding negotiations under Article XXVIII of the GATT; (iii) the application of these tariff quotas did not discriminate according to the origin of the bananas; (iv) the quotas were not subdivided into country shares; (v) the tariff levels for the quotas were not prohibitive; (vi) the preference for ACP countries did not exceed the traditional levels both in terms of tariffs and volume; and (vii) the quotas were allocated according to licences granted in the order of receipt of requests for such licences.

5. These were not conditions imposed by Ecuador, but the elements required to ensure that the EC's banana import regime was WTO-consistent and thus complied with the DSB's recommendations. At the previous DSB meeting, Ecuador had explained in detail some of its concerns regarding the way in which the EC would apply the tariff quota system as proposed in a recent communication from the Commission to the EC Council. However, the EC had not yet responded to any of the questions raised by Ecuador. This was a matter of serious concern for two reasons: (i) it would appear that the EC did not have any valid response to demonstrate that the new proposal was consistent with WTO rules; and (ii) it would also appear that the EC was trying to delay any solution to this dispute and wished to maintain the status quo, thereby continuing to cause serious injury to Ecuador's banana industry.

6. The representative of Colombia expressed his country's concern about the statement made by the EC at the present meeting in which the EC had referred to its WTO-incompatible proposal. In December 1999, a proposal had been put forward to the EC urging that all the interested Latin America and ACP countries be included in the negotiations of interest to stakeholders in the banana trade. Consequently, Colombia reiterated that it was willing to participate constructively in transparent negotiations and discussions on this matter.

7. The representative of Honduras expressed her country's disagreement and frustration with regard to the way in which this matter had been handled. In fact, this matter appeared to be a permanent item on the DSB's agenda. It was inconceivable that arguments continued to be made in an attempt to evade responsibilities imposed by the Panels and the Appellate Body, and that the DSU rules were being disregarded which in turn was undermining the credibility of the WTO. When Honduras joined the WTO, it understood that it had to respect the rights of other Members and that its own rights would be respected. However, the reality was different. It would seem that the EC did not wish to abide by its obligations, and continued to ignore the DSB's recommendations while seeking alternatives in order to prolong its illegal banana regime.

8. The most recent proposal by the EC combined two methods: a simultaneous examination and a first come, first served system. The resulting mechanism was in breach of Articles I and II of GATT 1994 as well as Article XVII of GATS. Furthermore, this mechanism clearly discriminated between suppliers. In this connection, he noted that the EC had the duty to comply with paragraph 190 of the Appellate Body Report, since the first come, first served method was being implemented with the intent of violating Article XIII of GATT 1994.

9. The mechanism in question also provided for a tariff level of € 300 in quota C which would restrict access for Honduras and other Latin American countries, and would reserve a quota for ACP countries that vastly exceeded their actual production. The separate C quota licensing system, coupled with the discrimination resulting from the reservation of that quota, tipped the balance in favour of ACP bananas, thus directly contravening Article II of GATT 1994. For that reason, Honduras again called upon the EC to comply with the DSB's recommendations. Honduras considered that it had already paid a high price as a result of the application of the illegal banana

import regime. She questioned how much longer one had to wait to see the establishment of a WTO-consistent regime. She wondered whether the violations in question would continue until Honduras had no more bananas to export.

10. The representative of Guatemala said that, like on previous occasions, the EC's report did not achieve the required aim. She noted that the report set out the supposed advantages of the first come, first served licence administration system. The EC expected that Guatemala would accept these advantages without any challenge and would endorse its proposal. She pointed out that the EC's definition of the import licensing system as transparent, open for all operators and WTO-compatible constituted a misrepresentation of the practical implications of such a system. Guatemala disagreed with this inaccurate description, because first come, first served/simultaneous examination approaches had proved to be discriminatory and unlawful. Furthermore, it had led to complaints on the part of Caribbean and European countries. The EC not only persisted in putting forward the above-mentioned licence administration arrangement, but also envisaged introducing a system of three tariff quotas designed to reduce Latin American access to an even greater extent, while granting the ACP countries free access in the first two quotas and imposing an excessive tariff level detrimental to Guatemala. Her country remained concerned about the issue and would be vigilant with regard to developments in this case.

11. The representative of Panama said that, like previous speakers, his delegation was also disappointed with the status report provided by the EC. He noted that Panama's arguments had not been taken into account by the Commission. Therefore, at the present meeting, he wished to address his comments to member States of the EC. It was his understanding, that the main aim of the EC member States was to avoid any future dispute on this matter. Panama reiterated that the EC's proposal would not solve the dispute. He recalled that the recent statement made by Latin American countries rejected the EC's proposal as being WTO-incompatible and discriminatory. He noted that there was near consensus in the hemisphere that the EC's proposal would not meet the obligations of the member States under the WTO and would not solve the dispute. There was also a consensus as to what constituted a good basis for negotiations which could help to solve the problem. Panama was concerned that the Commission intended to maintain the status quo rather than to solve the problem and to comply with its obligations or to remove the negative effects of discrimination. With regard to an additional meeting on this matter, it would depend on the insistence of members of the EC to demonstrate in the Commission that this problem should be solved in order to settle the dispute. Panama urged the member States of the EC to bring all the arguments before the Commission in order to end this long-standing dispute.

12. The representative of Mexico said that the EC had held consultations with interested parties but pointed out that Mexico which was a complaining party in this case had not been consulted. If the EC was really trying to find a satisfactory solution, then Mexico should be included in those consultations. In Mexico's view, the EC only wished to ensure that the system was compatible with WTO rules. As already stated on previous occasions, it was Mexico's preference that the system be based on tariffs providing that the level of tariffs was adequate.

13. The representative of the United States regretted that the EC had nothing new to report since the 23 October DSB meeting. The EC was aware of the US position concerning its current proposal. The EC was also aware that it had been criticized by many other Members for it. Given that the proposal would not settle this long-standing dispute, the United States urged the Commission to reconsider its position. The United States would welcome the opportunity to continue consultations with the Commission with a view to reaching a prompt solution to this matter.

14. The representative of Nicaragua said that, like many other countries, his country had joined the WTO with legitimate expectations arising from the WTO rules. One of the legitimate expectations was that, under the auspices of the DSB its rights would be respected by all other

Members. As it had been stated on other occasions, Nicaragua could not endorse the proposed solution. The banana import regime that the EC wished to implement was not only discriminatory, but also inconsistent with WTO rules. In Nicaragua's view, the system devised by the EC in respect of the sequential receipt of applications, i.e. the first come, first served system, was incompatible with WTO rules. Nicaragua consequently reaffirmed its readiness to help find a solution to the problem through negotiations conducted in a constructive spirit between all the parties concerned.

15. The representative of Saint Lucia said that her country was well aware of the difficulties encountered by the Commission in negotiating an acceptable reform of the banana regime due to the conflicting interests of several parties. This, in fact, was the reason for the delay. The EC had no incentive to prolong the dispute as it was paying a high price. Saint Lucia was also concerned about the ongoing impasse as the uncertainty over the future was creating both a lack of confidence amongst its farmers and a wider economic uncertainty. Saint Lucia had already indicated its views on the current proposal which it hoped would be taken into account. Saint Lucia shared the general view of Members which looked forward to a speedy but lasting resolution of this dispute. What was of fundamentally even greater importance than the pace at which reforms were implemented was the adoption of an equitable arrangement in order to safeguard the legitimate trading interests of all suppliers and preserve market access on a viable basis. Saint Lucia wished to assure the EC and all the parties of its willingness to assist in the search for such a solution. Saint Lucia attached importance to a satisfactory resolution of this dispute, which would permit continued market access on a viable basis. For that reason it was willing to assist in the search for a viable compromise which preserved the legitimate trading interests of all parties.

16. The representative of the European Communities said that, as stated by Saint Lucia, the EC was trying to reconcile the conflicting interests involved in the banana dispute in order to have a WTO-compatible solution. The EC noted the statements made at the present meeting. He underlined that he was aware that Members wished that the new banana regime be put into place as soon as possible. This was also the EC concern and he assured Members that the views expressed in the DSB would be communicated to his authorities. At the same time, he stressed that his authorities in Brussels were involved in finding within the system the technical solution in order to have a final decision which could reconcile those conflicting interests. The EC was also open to different suggestions from its trading partners and hoped that the banana issue could be removed from the agenda in the near future.

17. The representative of Panama said that the EC had stated that a delay in implementation was caused by those who suffered from discrimination. As stated by Mexico, the only solution which would ensure that the banana dispute was resolved was a WTO-compatible solution. However, what prevented the EC from implementing a WTO-compatible solution was not a disagreement among Latin American countries who suffered from discrimination but a disagreement among member States of the EC. He reiterated that the Caribbean proposal which had been ignored by the EC, could be a good basis for negotiations.

18. The representative of the European Communities said that the member States were content with the way of proceeding.

19. 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.9)

20. The Chairman drew attention to document WT/DS76/11/Add.9 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.

21. The representative of Japan said that as described in the status report, his country continued to hold consultations with the United States in a constructive and friendly manner. However, in spite of these efforts, some technical issues still remained to be resolved. Both Japan and the United States were doing their best and would continue to do so in order to reach a mutually satisfactory solution in the near future. At the present meeting, he wished to provide some clarification, since at the 23 October DSB meeting some Members had raised concerns with regard to Japan's implementation in this case.

22. On 31 December 1999, Japan had abolished the varietal testing requirement with respect to eight agricultural products at issue in the case, *inter alia*, apples, cherries and peaches. In accordance with the DSB's recommendations, Japan had also abolished its "Experimental Guide" and on 10 January 2000, it had informed the DSB thereof. As the varietal testing requirement and the "Experimental Guide" with regard to these products no longer existed, exporting countries wishing to request Japan to lift the import prohibition on additional varieties of one of these eight products were not required to follow such varietal testing requirements. This applied equally to all countries, including the United States.

23. However, in order to prevent the codling moth from entering into Japan's territory, it was necessary to establish an appropriate substitute quarantine methodology, which should be consistent with Japan's WTO obligations. Thus, if an exporting country were to request Japan to lift the import prohibition, Japan would be prepared to hold consultations with that country from a scientific and technical point of view in order to establish a necessary quarantine methodology. Such a procedure for establishing an SPS measure was not uncommon. Based on this principle, Japan was carrying out consultations with the United States aimed at establishing a new methodology to substitute for the abolished varietal testing requirement. As other countries were also interested in the matter, Japan was submitting status reports on progress in implementation at every DSB meeting. For the sake of transparency, Japan would notify the DSB of the results of its consultations with the United States as soon as a satisfactory agreement was reached.

24. As soon as Japan was in a position to introduce a new quarantine methodology it would do so in accordance with Article 2.3 of the SPS Agreement, which provided that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail". Therefore, when an exporting country wished to adopt for its own products the same methodology as the one to be applied on US products, this could be done after consultations with that country as well as examination and confirmation of the applicability of that methodology. This confirmation process would be conducted from a scientific and technical perspective. He hoped that the explanation provided at the present meeting would enable Members to understand Japan's position.

25. The representative of the United States thanked Japan for its report and hoped that the parties would be able to complete the necessary work that needed to be done on a few remaining issues in the near future.

26. The representative of the European Communities thanked Japan for the additional information provided at the present meeting. However, the EC still had to verify this information and would further discuss it with Japan. The EC hoped that the parties would be able to reach a satisfactory solution from the point of view of the United States as well as other exporting countries.

27. The representative of Hungary welcomed Japan's status report and the indication by the parties that they were close to an agreement to resolve this dispute. He noted that although 20 months had passed since the adoption of the Appellate Body Report, the parties had not yet been able to reach a solution nor had sufficient details on progress in implementation been provided. It was expected that a solution reached by the parties would be implemented on an m.f.n. basis, thus affecting the entry of Hungarian fresh fruits and vegetables to the Japanese market. Therefore, once the import ban on these products was lifted, Hungary wished to receive substantive information on how Japan would implement the DSB's recommendations and wished to be consulted on this matter.

28. 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.4 – WT/DS113/12/Add.4)

29. The Chairman drew attention to document WT/DS103/12/Add.4 – WT/DS113/12/Add.4 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.

30. The representative of Canada said that his country continued to implement the DSB's recommendations and rulings consistently with the terms of the implementation agreement between Canada, the United States and New Zealand. Moreover, Canada was implementing in a fully transparent manner in close consultation with the complaining parties. The next round of consultations with the United States and New Zealand would be held in mid-December 2000. Canada would continue to keep the United States and New Zealand informed of the implementation process during the reasonable period of time, and would keep the DSB apprised of developments pursuant to Article 21.6 of the DSU. In previous meetings, the complaining parties had expressed concern that Canada would not be in compliance with its obligations at the end of the reasonable period of time; i.e. by 31 December 2000. They had stated that the proposed implementation scheme would enable Canada to maintain prohibited export subsidies under a different guise. Canada continued to maintain that this was not the case. Canada's proposed implementation fully complied with the DSB's recommendations and rulings and would bring its measures into conformity with the relevant WTO Agreements by 31 December 2000.

31. The representative of New Zealand said that his delegation had noted at previous DSB meetings that to bring itself into compliance with the rulings, Canada had to ensure that all exports of dairy products, including those from any new measures for the export of these products, were fully consistent with its WTO obligations under the Agreement on Agriculture. New Zealand continued to be seriously concerned about developments in Canada in this regard. In recent months Canada had confirmed that it had implemented new provincial-level export measures and that dairy exports were now taking place through them. Canada had also indicated that it did not consider that dairy exports through these mechanisms provided export subsidies. As a consequence, Canada would not be counting these exports against its export subsidy reduction commitments. In New Zealand's view, the new provincial-level dairy export mechanisms continued to provide export subsidies to Canadian exporters. Canada's failure to count such exports against its export subsidy reduction commitments was therefore contrary to its obligations under the Agreement on Agriculture, and constituted its failure to fully implement the DSB's recommendations and rulings in this regard. New Zealand noted

that the consultations scheduled for mid-December would provide further opportunity to discuss this matter. He hoped that Canada would reflect on the implications of its course of action.

32. The representative of the United States noted that Canada had not provided any information that would alter the US view regarding the nature of the programmes newly introduced at the provincial level. These programmes were established to replace the Special Class system, and like that system, also provided export subsidies. The substitute programmes, introduced in August 2000 in all the provinces that exported dairy products, had made milk available for export at preferential subsidized prices. As a result, exports under the new programmes had to be counted towards the total limits that Canada had accepted as part of its reduction commitment on export subsidies.

33. If its dairy exports continued at the pace previously established, Canada would again violate its reduction commitments. She emphasized that the reasonable period of time for Canada to bring its dairy exports into compliance with the DSB's recommendations would expire in about one month. Although not much time was left before the parties would meet in December, Canada could still make the decision to acknowledge that the new programmes were export subsidies and were subject to the same reduction commitments that had applied to exports under the Special Class system. This could enable Canada to achieve compliance with the DSB's recommendations as it had assured repeatedly to do so.

34. 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/Add.3)

35. The Chairman drew attention to document WT/DS90/16/Add.3 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.

36. The representative of India said that his country's status report was brief but clear. India was committed to remove restrictions maintained for balance-of-payment reasons in two instalments in a balanced fashion. On 1 April 2000 India had removed 50 per cent of the residual quantitative restrictions and the reasonable period of time for the remaining quantitative restrictions would expire by April 2001. Thus, India was on course in implementing its commitments.

37. The representative of the United States thanked India for its status report and looked forward to further reports as the implementation deadline of 1 April 2001 drew closer.

38. 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 textile and clothing products: Status report by Turkey (WT/DS34/12/Add.3)

39. The Chairman drew attention to document WT/DS34/12/Add.3 which contained the status report by Turkey on its progress in the implementation of the DSB's recommendations regarding its restrictions on imports of textile and clothing products.

40. The representative of Turkey said that the relevant Turkish authorities continued to work on this matter.

41. The representative of India recalled that a reasonable period of time in this case would expire on 19 February 2001. In past DSB meetings, Turkey had indicated its intention to discuss the issue of implementation with India, and his country had expressed its willingness to engage in such consultations. India wished to reiterate its expectation that Turkey would fully comply with its WTO obligations by the deadline of 19 February 2001.

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

2. India – Measures affecting the automotive sector

(a) Request for the establishment of a panel by the European Communities (WT/DS146/4)

43. The Chairman recalled that the DSB had considered this matter at its meeting on 23 October 2000 and had agreed to revert to it. He then drew attention to the communication from the European Communities contained in document W/DS146/4.

44. The representative of the European Communities said that as explained in the panel request, the EC believed that India's measures in the automotive sector were in breach of Articles III and XI of GATT 1994 and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs). On 2 December 1998, consultations had been held on this matter without any success. Since 1998, the issue had been constantly discussed. Substantive efforts to solve the problem had been made but unfortunately with no positive outcome. Due to the economic impact of the measures on the interests of European operators, the EC had no choice but to request, for the second time, the establishment of a panel.

45. The representative of India said that his country was disappointed that the EC had renewed its panel request. He regretted that in spite of having explained, at the 23 October DSB meeting in the context of a similar request for a panel by the United States, not only the salient features of its automotive policy but also India's systemic concerns, the EC had decided to renew its request for a panel. As he had mentioned at the 23 October DSB meeting, the measures referred to by the EC were not TRIMs. Even assuming that the measures in question were TRIMs, as alleged by the EC, the obligations of India and of other developing Members would have to be evaluated in the light of Article 4 of the TRIMs Agreement. The measures referred to by the EC did not violate India's WTO obligations. On several occasions, India had expressed its concern that in spite of the Chairman's statement of 17 December 1999 and the General Council Decision of 8 May 2000 on TRIMs transition period issues, some Members were requesting the establishment of panels alleging violations of TRIMs Agreement. The approach was not helpful in enhancing the confidence of developing countries in the system. Since he had made a detailed statement on this issue at the 23 October DSB meeting, he did not wish to dwell at length on this aspect at the present meeting.

46. The representative of the United States recalled that in July 2000, the DSB had established a panel to examine the US complaint on India's measures. The United States believed that Article 9.1 of the DSU should apply in this case, in other words, that a single panel should examine both the EC and the US complaints. The United States welcomed the fact that India and the EC agreed with it and that they had also agreed that the US request to the Director-General to compose the panel would apply to the single panel examining both complaints. As agreed, the amended terms of reference should read as follows: "To examine in the light of the relevant provisions of the covered agreement cited by the United States in document WT/DS175/4 and by the European Communities in document WT/DS146/4 the matters referred to the DSB by the United States and the European Communities in those documents and to make such findings that would assist the DSB in making recommendations and giving the rulings provided for in those agreements."

47. The representative of the European Communities said that the EC had no problem with the US proposal and it was his understanding that the EC would be fully involved in the composition of the panel.

48. The representative of India said that his country had no difficulties with regard to what had been stated by the United States and the EC. He noted that the United States had read out the terms of reference and in this context it was his understanding that the United States had referred to standard terms of reference. He wished to make sure that no additional elements were included in the terms of reference beyond what was specified in the DSU regarding the establishment of a single panel.

49. The Chairman drew attention to Article 9.1 of the DSU which provided that "where more than one member requests the establishment of a panel related to the same matter, a single panel might be established to examine these complaints taking into account the rights of all members concerned". In the light of this provision, he proposed that a panel previously established on 27 July 2000 to examine the complaint by the United States in WT/DS175/4 should also examine the complaint by the EC contained in WT/DS146/4, provided that the rights which the parties to the dispute would have enjoyed had separate panel examined the complaints were in no way impaired. Terms of reference should be standard terms of reference but making reference to both of the relevant documents. As the composition of the Panel in the parallel case between India and the United States was presently in the hands of the Director-General pursuant to Article 8.7 of the DSU, he proposed that the EC should be included in the consultations on this matter.

50. The DSB so agreed.

51. The representative of Japan indicated that his country wished to reserve its third-party rights to participate in the panel established at the present meeting.

52. The Chairman recalled that Japan and Korea reserved their third-party rights to participate in the Panel established at the request of the United States and noted that since a single panel had been established it was open for other Members to reserve their third-party rights within the next ten days.

53. The DSB took note of the statements.

3. Philippines – Measures affecting trade and investment in the motor vehicle sector

(a) Request for the establishment of a panel by the United States (WT/DS195/3)

54. The Chairman recalled that the DSB had considered this matter at its meeting on 23 October 2000 and had agreed to revert to it. He drew attention to the communication from the United States in WT/DS195/3, which contained its request for the establishment of a panel. He also drew attention to the communication from the Philippines contained in document WT/DS195/4 concerning the US request to which he had just referred.

55. The representative of the United States said that her country was requesting the establishment of a panel to examine the Philippines' trade-related investment measures (TRIMs) for firms manufacturing motor vehicles. The Philippines' TRIMs regime required manufacturing firms in the motor vehicle sector to use parts and components produced in the Philippines and to earn a percentage of the foreign exchange needed for importation by exporting finished goods. Manufacturers had to comply with these measures to import goods at preferential tariff rates. Furthermore, it appeared that import licenses for parts, components and finished vehicles were conditioned on compliance with these requirements. These measures denied the Philippines' trading partners the opportunity to supply the Philippine market. In addition, they unfairly burdened manufacturers operating within the Philippines. If anything, they retarded rather than promoted the development of the Philippines'

motor vehicle industry. The United States considered that these restrictions were inconsistent with the Philippines' obligations under Articles III:4, III:5 and XI:1 of GATT 1994 and Articles 2.1, 2.2, 5.2 and 5.5 of the TRIMs Agreement. These measures should have been removed on 1 January 2000. The Philippines requested an extension of the phase-out period in accordance with Article 5.3 of the TRIMs Agreement. Immediately thereafter, the United States had begun consulting with the Philippines and had met several times to exchange views on how to address the interests of both countries. The dialogue with the Philippines had been useful, and its delegation had been forthcoming in answering the questions concerning the TRIMs regime. The consultations were ongoing and the United States looked forward to further discussions with the Philippines and hoped that those discussions would lead to a mutually agreed solution. The United States had now been consulting for more than a year, and however optimistic it might be about reaching a solution that was satisfactory to both sides, such a solution had not yet been reached. Therefore, the United States regrettably concluded that its interests were best served by moving forward with its panel request at this time.

56. The representative of the Philippines said that his country acknowledged that as a general rule, pursuant to Article 6.1 of the DSU, a panel had to be established by the DSB on second request, unless there was a consensus not to establish a panel. However, this rule on automaticity did not exist for its own sake; rather, it was part of the elements which provided security and predictability for the multilateral trading system. Article 3.2 of the DSU specified that the dispute settlement system, of which the rule on automaticity was but a part, was a central element in providing such security and predictability. That the dispute settlement system was such a central element meant that it was not the only element. The need for transcending the legal procedural technicalities of the DSU was stipulated in Article 3.1 of the DSU, namely, that Members should adhere to the "principles for the management of disputes ... applied under XXII and XXIII of GATT 1947". The DSU was an elaboration of those principles. The central principle for the management of disputes was that of multilateralism. Procedures established and decisions promulgated by Members in other WTO bodies were also indispensable elements in providing security and predictability for the multilateral trading system. The DSB was bound to take into account the procedures and decisions made in other WTO bodies. The DSB had to ensure that its own procedures and decisions did not create conflict, whether actual or potential, with other procedures and decisions. Such a conflict would be contrary to the security and predictability of the multilateral trading system, which the DSB had the obligation to uphold.

57. This dispute between the United States and the Philippines was not a normal dispute. It was a dispute on a matter already considered by the General Council in the context of the 8 May 2000 Decision. Furthermore, it was a dispute on a matter currently being dealt with in the Council for Trade in Goods (CTG). The multilateral system had dealt with this matter and it continued to do so. In accordance with the 8 May Decision, which had been reached by consensus, the CTG was instructed to give positive consideration to individual requests submitted in accordance with Article 5.3 of the TRIMs Agreement. Indeed, the CTG was in the process of doing so. The DSB was bound by the 8 May Decision since it was not a separate body from the General Council. Pursuant to Article IV:3 of the Marrakesh Agreement, the DSB was the General Council itself discharging the responsibilities of the DSB.

58. The Philippines was aware that it could raise its objections before the panel. He noted that this had been done in prior disputes where attempts had been made to block the establishment of a panel upon a second request. However, the current dispute was different from the past disputes because in such past disputes no decisions of the General Council had been involved. Nor had there been relevant processes similar to the present process in the CTG. The Philippines considered that before a panel could be legitimately established in this case, the 8 May Decision would have to be repealed. Otherwise, such an establishment of a panel would be *ultra vires*. Furthermore, if a panel were to be established, the CTG process mandated under Article 5.3 of the TRIMs Agreement and the 8 May Decision would be rendered moot and academic. The Philippines, like any other Member, had a vested right to due process, both procedural and substantive. These included: (i) the procedural

right to present its case before the CTG, which meant the corresponding obligation of all Members, including the United States, to assess the application of the Philippines' request on its merits; and (ii) substantive rights arising from the 8 May Decision to the effect that the respective applications of the Philippines and those of other developing countries similarly situated be given positive consideration. Thus, the establishment of a panel could have serious systemic implications which could adversely affect the security and predictability of the multilateral trading system. The Philippines believed that there was no need to rush judgment on issues such as the one in question with potential systemic implications.

59. The Philippines confirmed that the parties to the dispute continued to pursue their efforts towards a mutually-acceptable solution. In this regard, the Philippines hoped that the United States would withdraw its request or, if not, that it would agree to the suspension of consideration of its panel request or the suspension of consideration of the agenda item. It was the Philippines' understanding that the United States was concerned that if it were to withdraw its request or agree to the suspension of its consideration, the Philippines might in the future raise legal technicalities that the panel could only be established by positive consensus. Therefore, the Philippines was willing to agree that should the United States decide to suspend consideration of its request, it might at any time, subject to the usual notice requirements, submit such a request for consideration by the DSB and such a request shall be deemed as one presented "at the DSB meeting following that at which the request first appears as an item on the DSB's agenda", in accordance with Article 6.1 of the DSU.

60. The representative of Thailand said that it was regrettable that despite the concerns raised by a number of Members at the 23 October DSB meeting, the United States had, for the second time, requested the establishment of a panel on this matter. In Thailand's view, the establishment of a panel would nullify the Philippines' rights as well as the rights of other developing country Members provided for in Article 5.3 of the TRIMs Agreement. Pursuant to the 8 May Decision the requests made by nine Members for extension of the transition period should be given "positive consideration". The Decision underscored the need to preserve the multilateral character of the process and that the requested extensions be examined in accordance with the rights and obligations of Members under Article 5.3 of the TRIMs Agreement. As stated by the Philippines, the establishment of a panel in this case would be contrary to the security and predictability of the multilateral trading system as the process was currently ongoing under the CTG, and in light of positive developments that had taken place in the past few days, Thailand believed that it would have been preferable first to complete the CTG process and to exhaust other multilateral options before resorting to the dispute settlement mechanism. Unfortunately, this was not possible. Thailand fully respected the US decision. The establishment of a panel in this case would undermine the confidence of the system and was in contradiction with the intent and desires of Members, as reflected in the 8 May Decision that called for positive consideration of the Philippines' request.

61. The representative of the United States said that a significant multilateral issue had been involved in this case. The United States did not agree with the statement that the Philippines were entitled to maintain their TRIMs because they had requested an extension pursuant to Article 5.3 of the TRIMs Agreement. To the contrary, as the United States had stated on many occasions, the fact that its extension was pending did not prejudice its obligations under the TRIMs Agreement and the GATT 1994 or other Members' rights with regard to its measures. At this stage, the Philippines had no justification under the WTO Agreement. The Philippines was incorrect in stating that the 8 May Decision could prevent the establishment of a panel. The DSU was a multilateral agreement and had to be respected. Article 6.1 of the DSU was clear on this question and specified that "the panel shall be established at the latest at the DSB meeting following that at which a request first appeared as an item on the DSB agenda". There was only one exception to this rule, namely, if the DSB decided by consensus not to establish a panel. Article 6.1 of the DSU did not provide any other reason for not establishing a panel. In particular, there was nothing in the DSU that would authorize it or the General Council to take a decision that prevented the establishment of a panel. The 8 May Decision

did not amend the DSU and had been presented by the Chairman of the General Council as being without prejudice to Members' rights and obligations. The mandatory character of Article 6.1 was well-recognized and automaticity in the DSU was a central element in the Uruguay Round results.

62. Furthermore, the DSB had never permitted a procedural objection such as the one in question to block the establishment of a panel upon the second request. She recalled that when the EC had sought to establish an Article 21.5 panel in the banana case, Members had raised a number of procedural objections to the panel request, including the question of the parties and third parties as well as the ability of a Member to request a panel against its own measure. At that time, the Chairman had pointed out that these issues would have to be decided by the panel because the DSB could not refuse a panel request at the second meeting. On another occasion, Australia had objected to the establishment of a panel to examine the US complaint with regard to leather subsidies and, once again, the Chairman had pointed out that, in the absence of the consensus to the contrary, the panel would have to be established. He had added that Australia was free to raise its procedural concerns before the Panel. It was clear that the DSB had to establish a panel unless there was a consensus against it. The Philippines were free to bring before the Panel its procedural objections and the United States hoped that it would not seek to delay the panel's proceedings in that way because its arguments were not well-founded. The 8 May Decision had been taken without prejudice to Members' rights and obligations, including the US right to initiate dispute settlement proceedings. As she had already stated, the United States was requesting the establishment of a panel and, at the same time, it was close to resolving its dispute with the Philippines. Therefore, it was requesting a panel with reluctance because both parties were willing to come to a negotiated solution. The United States had given very positive consideration to this matter for more than a year, and would continue to work with the Philippines to try to resolve this dispute in a way that would take into account the concerns of both parties.

63. The representative of India said that his country had already made comments on the implications of the 8 May Decision in past DSB meetings. India strongly supported the statements made by the Philippines and Thailand and shared their concerns. He noted that the United States had requested the establishment of a panel with reluctance. India continued to believe that implementation issues had to be handled in a political not a narrow legal framework because if Members always wished to ensure their legal rights, it would not be possible to deal with implementation issues in a serious manner. TRIMs transition period issues had been on the table for more than two years. The United States had stated that a positive solution to a number of cases was envisaged and that this would be done shortly. India was concerned that a legal solution was to be followed in this case in order to pursue legal rights while, at the same time, efforts were being made towards achieving a political solution. He noted that when legal and political routes were followed in parallel, a legal route was always faster. India believed that all implementation issues, including the TRIMs transition period issues had to be handled with some political sensitivity. These issues had arisen because there were problems in implementation. India believed that it would be appropriate for Members to exercise restraint. He recognized that some Members were under pressure from industrial groups and that politically there were some difficulties. However, it was India's understanding that the December 1999 statement by the Chairman and the 8 May Decision involved an undertaking that until the consultation process under the CTG was completed there would be no requests for the establishment of panels. India regretted that this understanding had not been possible in the case of one Member. It hoped that the parties involved would reconsider their position and welcomed the indications given by the United States that it was its expectation to be able to arrive at an understanding with the country concerned.

64. The representative of Pakistan said that his country wished to be associated with the views expressed by previous speakers. Pakistan was concerned that the matter presently under consideration by the General Council pursuant to the 8 May Decision as well as to the 17 December 1999 statement was being taken up to the dispute settlement system. In Pakistan's view, this questioned the validity

of the understanding reached on various issues and eroded the confidence of a large number of developing countries. The appropriate course of action would have been to await the outcome of the consultations on the TRIMs transition issue in the CTG and the General Council. Such a gesture by major trading partners could go a long way in confidence-building and the credibility of the system. He recalled that in previous DSB meetings, Pakistan had expressed its hope that the parties would soon be able to find a mutually acceptable solution to this problem. His country welcomed the indications by the parties to that effect and reiterated its hope that the parties would be able to find a mutually agreeable solution and that the CTG and the General Council would also be able to find a multilateral solution to this matter.

65. The representative of Argentina said that, like previous speakers, his country was concerned about the dispute settlement process while the process of extension of transition periods under the CTG was ongoing. In Argentina's view, under the circumstances the US panel request was premature. Therefore, until the CTG had decided on this matter it was not clear whether there was a violation of the TRIMs Agreement by a Member who had requested an extension of the transitional period. Argentina believed that for the sake of the system, the priority should be given to a conclusion of the discussion in the CTG with regard to the extension of the transition period issues.

66. The representative of Saint Lucia said that her country shared the concerns expressed by the Philippines on the importance of the need to adhere to both procedural and substantive rules of law. Due process rules were fundamental to ensuring justice and preserving the security and predictability of the multilateral trading system. She noted that there were systemic problems with the concept of automaticity which required more reflection. The concept increased the likelihood of actions being taken in the DSB which were *ultra vires*. Consultations on the extension of TRIMs under the CTG were both promising and positive and it was in that context that she wished to draw attention to Article 3.7 of the DSU that "before bringing the case a Member shall exercise its judgment as to whether action under these procedures would be fruitful" as the aim of the use of the DSU procedures was to arrive at a positive solution. Therefore, like previous speakers, Saint Lucia would continue to raise its concerns with some systemic issues which had been raised and which should be resolved through further discussions in the DSB.

67. The representative of Hong Kong, China said that his delegation wished to urge both parties to continue their efforts in good faith towards finding a mutually agreeable solution both bilaterally and multilaterally under the CTG. Hong Kong, China recognized that the United States had the right under Article 6.1 of the DSU to request the establishment of a panel. However, the case at hand was special in terms of its nature and the relevant process. In terms of the process, it was relevant to two other WTO bodies, the General Council and the CTG pursuant to the 8 May Decision which involved the element of due restraint. While Hong Kong, China recognized that due restraint was not legally binding, one might legitimately ask whether the United States had exercised due restraint and why it could not continue to do so. These two questions had not been answered. The CTG was also handling the request for extension under Article 5.3 of the TRIMs Agreement and it seemed that a solution to this matter was imminent. Therefore, one would have thought that it would have been better to find a solution in a multilateral context rather than to pursue a panel request. He questioned whether the establishment of a panel at this stage was necessary.

68. He noted that the case under consideration concerned a transitional period and a request for its extension. The Philippines had fulfilled all procedural requirements under Article 5.3 of the TRIMs Agreement in order to seek the necessary legal cover for its TRIMs measures. It would be unfair to the Philippines if it had to be confronted with the current request for a panel. As progress was being made in the CTG, and the United States had admitted that a solution was in sight, a better way out to preserve the system would be for the DSB to suspend the consideration of this agenda item in order to preserve the US rights under Article 6.1 of the DSU and, at the same time, to allow the CTG to continue its efforts in finding a satisfactory solution.

69. The representative of Brazil said that, like previous speakers, his country also regretted that the parties to the dispute had not been able to reach a solution to this matter. Brazil supported the concept of due restraint which had been discussed in December 1999 and was reflected in the 8 May Decision. He noted that the parties had expressed their hope to be able to resolve the matter. Some delegations had referred to the positive developments under the CTG. The United States had referred to some legal arguments which justified its position at this stage. He believed that there was a way which might lead to a solution that would take care of both political and procedural issues. He recalled that in one case Brazil and Argentina had agreed to suspend the panel's proceedings in accordance with Article 12.12 of the DSU before the composition of the panel. He hoped that both parties would be able to find a reasonable solution to this matter.

70. The representative of Malaysia said that the matter under consideration had already been discussed previously and, at the present meeting, his country wished to urge the United States to reconsider its request for a panel as suggested by the Philippines and Hong Kong, China. Malaysia recognized that the United States had the right to seek the establishment of a panel under Article 6.1 of the DSU. He noted that the United States had stated that a solution was very close. The CTG was also close to finding a solution on this matter. Therefore, Malaysia urged the United States to consider the request by the Philippines and Hong Kong, China that the discussions on this subject be suspended. The United States would still retain its request and the consideration of this agenda item be suspended until further consultations. He asked the Chairman to rule on some procedural issues as requested by the Philippines.

71. The representative of Japan said that his country was disappointed that the United States had requested the establishment of a panel at this stage while a positive and constructive outcome was awaited in other WTO bodies. Japan shared the views expressed by the Philippines that this issue should be resolved in the context of Article 5.3 of the TRIMs Agreement, in particular, since progress was being made in the CTG. Japan fully recognized the US rights under Article 6.1 of the DSU to request the establishment of a panel although it did not share the rigid interpretation of Article 6.1. He noted that the United States had stated that constructive bilateral consultations were being held and that it was reluctant to request the establishment of a panel. This was encouraging and, like Hong Kong, China, Japan considered that the appropriate way would be to suspend the consideration of this agenda item in order to allow time for the multilateral process as well as the bilateral process between the United States and the Philippines to move forward to find a mutually agreeable solution while preserving the US rights. If this was not possible, Japan supported the solution proposed by Brazil and hoped that the United States would suspend the panel's proceedings once such a panel was established.

72. The representative of Colombia said that his country was concerned that dispute settlement proceedings had been initiated while the process of consultations on the extension of the TRIMs transition periods under the CTG was not yet concluded. Colombia supported the legal argument of the United States. However, from the systemic point of view, such a situation was not desirable because it would undermine the credibility of the multilateral trading system. He noted the solutions proposed by Hong Kong, China and Brazil and hoped that the parties would use them to the benefit of achieving a solution outside the dispute settlement system. Colombia also hoped that the negotiating process under the CTG would be concluded in a successful manner in the very near future.

73. The representative of Venezuela said that his country was concerned about the US request for the establishment of a panel. Venezuela recognized the US right to seek compliance with WTO rules, but believed that the panel request was premature and did not contribute to the consultations being held under the CTG aimed at finding a multilateral solution to the question of the extension of TRIMs transition period issues. Venezuela hoped that the parties would be able to find a solution to this dispute, and that common sense would prevail at the time when positive signals were being sent to

build confidence. It was important that in the multilateral process a solution was found that satisfied all the parties.

74. The representative of Chile said that two overlapping procedures had given rise to questions that were difficult to resolve. Chile believed that this was a special case and there was a need to proceed in a cautious and reasonable manner. Chile had an interest to preserve the progress made thus far concerning a multilateral solution. It also recognized that the parties did not wish to see their rights being prejudiced. It would therefore be appropriate to do what had been stated by Hong Kong, China and he encouraged the parties to do so in order to resolve the matter in an amicable way without prejudice to their rights.

75. The representative of Singapore said that, as noted by previous speakers, the US request had set in place two overlapping procedural situations. The proposal by Hong Kong, China was an appropriate way out of this stalemate as it would help Members in the multilateral procedures and, at the same time, it would preserve the rights of the parties to the dispute.

76. The representative of Indonesia said that his country wished to reiterate its concern with regard to this matter which had been raised at the 23 October DSB meeting. Indonesia recognized the US right to seek the establishment of a panel, but hoped that the United States would exercise due restraint at this stage. Indonesia welcomed the statement by the United States to the effect that the parties were close to the conclusion on this matter and supported the Philippines' proposal to withdraw the US request or to suspend the consideration of the agenda item.

77. The representative of Jamaica said that, on the one hand, his country recognized the rights of the parties to seek a panel and, on the other hand, to have a request for an extension of the transition period issues and to have that process completed. Jamaica hoped that the parties would explore all avenues to resolve this matter before or without having to resort to a dispute settlement procedure.

78. The representative of Ecuador said that his country supported the concerns expressed by previous speakers. Ecuador urged the parties to continue their dialogue with a view to finding a solution in the most amicable way and without prejudice to the rights of both parties.

79. The representative of the European Communities said that the EC would prefer that an amicable solution was found to this problem and hoped that this be done in further consultations.

80. The representative of Hungary said that this was a delicate situation which involved political and legal issues. Hungary believed that it was not always necessary to follow the legal approach and considered that the proposal by Hong Kong, China provided a temporary solution to the problem at hand.

81. The representative of the United States said that, in her introductory statement, she had indicated that although the United States regretted to proceed with its panel request, it had to do so in order to protect its rights. At the same time, the United States thought it would be possible to reach some conclusions. She recalled the 17 December 1999 statement by the Chairman of the General Council on due restraint. The United States had exercised due restraint for more than a year. Furthermore, the 8 May 2000 Decision was without prejudice to the rights under the WTO Agreements and called for positive consideration in accordance with Article 5.3 of the TRIMs Agreement. The United States had given that positive consideration and in the CTG meeting on 16 November 2000 it had also given a very positive position. Just because a country fulfilled all the procedural requirements under Article 5.3 did not mean that extensions could be granted automatically or that Members could waive their rights under the DSU. Anyone could fulfil the procedural requirements and use the process to de facto obtain extensions. The United States hoped that even if the panel were established it would be possible to find a mutually satisfactory solution.

After the DSB took a decision to establish a panel, the United States would propose a solution similar to those proposed by other delegations at the present meeting.

82. The representative of the Philippines said that the United States had stated that it had the right to establish a panel in accordance with Article 6.1 of the DSU. The Philippines did not question the US right. However, this case went beyond Article 6.1 of the DSU and required a practical solution. The Philippines had hoped that the DSB did not have to resolve the issue of whether this was a case within Article 6.1 of the DSU but that a solution was found that would protect the US rights as well as the Philippines' rights. He believed that a solution proposed by Hong Kong, China which had been supported by many delegations was appropriate. Any other solution would necessarily delve into the issue of the propriety of establishing a panel which, at this stage, involved systemic implications. He urged the United States to reconsider its panel request.

83. The representative of Venezuela asked the representative of Hong Kong, China to reiterate its proposal.

84. The representative of Hong Kong, China said that it was not an uncommon practice to suspend an agenda item of a particular meeting and revert to that item at any time without the need to circulate a 10-day notice. The United States had raised its concern that if it were to withdraw its panel request then its rights under Article 6.1 of the DSU might be compromised. The idea was to suspend the agenda item and the request would remain on the agenda of the suspended meeting. Technically, if the request was made at the meeting immediately following the one at which the request had first been made, US rights would not be compromised. At the same time, it should be noted that a solution might soon be found in the CTG as well as during bilateral consultations. The suspension would allow both parties as well as the CTG to consider the case and perhaps a panel would not be necessary under such circumstances.

85. The Chairman noted the objections raised by the Philippines with regard to the establishment of a panel at the present meeting. He said that many delegations had refered to the 8 May Decision and to on-going consultations in the CTG as well as to the undesirability of this overlapping procedural situation. There had been many expressions in favour of a mutually agreed solution. Saint Lucia had referred to Article 3.7 of the DSU and had stated that both the United States and the Philippines clearly felt that they were within sight of a mutually agreed solution and would continue to work constructively towards that end. There was a general sense to urge them to do so in an effort to find such a solution. One had to bear in mind that Article 6.1 was a provision in a multilaterally agreed instrument and it was obviously a big question if one were to state at the present meeting that such a provision could be effectively overridden by the General Council decision and a direction to the CTG to work in a certain direction. He had been asked to rule on the procedural issue raised by the Philippines as to whether or not a panel would be properly established. There were many precedents that such procedural matters relating to the establishment of panels had normally been referred to panels. All delegations had emphasized the collective desire that the United States and the Philippines find a mutually agreed solution. Since there was no consensus not to establish a panel, the only course of action was to take note of the statements which had been made and of the strong sentiments that there should be a mutually agreeable solution in this matter, but a panel would have to be established in accordance with the provisions of Article 6.1 of the DSU with standard terms of reference.

86. The representative of the Philippines recalled that the United States had stated that it would propose a solution after the establishment of a panel. He asked the United States to make its proposal and then he would make his comments.

87. The representative of the United States said that a solution to be proposed by the United States was similar to that proposed by other delegations, but that solution would be proposed after the establishment of a panel.

88. The representative of the Philippines said that his country's objections were not directed at Article 6.1 of the DSU, but concerned the authority of the DSB to deal with this matter.

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

90. The representative of the United States said that without prejudice to the US position on the procedures and the merits, in an effort to move forward she wished to make the following proposal. The United States was engaged in intensive consultations with the Philippines, which were very positive, and hoped to be able to reach an early solution. Therefore, it would not go forward with the selection of panelists until it could see that it could not resolve this matter.

91. The representative of the Philippines said that his delegation noted the US statement regarding its intentions and expressed his country's appreciation for the solution proposed by the United States. It was the Philippines' understanding that the panel had been established, but that further proceedings would be suspended.

92. The Chairman said that the panel had been established but the United States had indicated that it was not going to proceed with the composition of the panel at this stage.

93. The representatives of India and Japan reserved their third-party rights to participate in the Panel's proceedings.

94. The DSB took note of the statements.

4. Argentina – Definitive anti-dumping measures on imports of ceramic floor tiles from Italy

(a) Request for the establishment of a panel by the European Communities (WT/DS189/3)

95. The Chairman recalled that the DSB had considered this matter at its meeting on 26 September together with another matter in relation to Argentina's definitive anti-dumping measures on carton-board imports from Germany. Following an agreement between the parties to the dispute, the European Communities was requesting the establishment of a panel to examine only one part of its original complaint, namely, Argentina's definitive anti-dumping measures on imports of ceramic floor tiles from Italy. He drew attention to the communication from the European Communities contained in document WT/DS189/3.

96. The representative of the European Communities said that at the 26 September DSB meeting, his delegation had expressed concern about Argentina's anti-dumping instruments. The EC's concern was general and related to the whole range of trade policy instruments by Argentina. The EC considered that the measures against imports of ceramic tiles had been imposed on the basis of an investigation conducted in violation of Argentina's WTO obligations. The violation related to fundamental rights of interested parties in anti-dumping investigations such as taking into consideration the information presented by exporters in an appropriate form and in timely fashion - which, if not respected, resulted in the failure to grant individual treatment - or the disclosure of the essential facts on which a decision to impose measures was based. The issue had been discussed with the Argentinian authorities on several occasions, but with no positive outcome. Therefore, the EC had no choice but to request, for the second time, the establishment of a panel.

97. The representative of Argentina said that his country recognized that this was the second time that the EC was requesting the establishment of a panel to examine the anti-dumping measures imposed by Argentina on imports of ceramic floor tiles from Italy and, pursuant to Article 6.1 of the DSU, the panel would have to be established at the present meeting.

98. 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.

99. The representatives of Japan, Turkey and the United States reserved their third-party rights to participate in the Panel's proceedings.

5. Chile – Measures affecting the transit and importation of swordfish

(a) Request for the establishment of a panel by the European Communities (WT/DS193/2)

100. The Chairman drew attention to the communication from the European Communities contained in document WT/DS193/2.

101. The representative of the European Communities said that the EC shared the general aim of conserving and protecting the environment and swordfish resources. However, it firmly believed that the most effective way to deal with international environmental issues, such as the conservation of migratory stocks, was to do so multilaterally in a negotiated agreement. Such a multilateral environmental agreement (MEA) should, from the beginning, be open to all countries concerned so that any trade measures specified therein could be negotiated and agreed by consensus. This was the best way to guarantee against discriminatory action and the use of trade measures for protectionist purposes. In the case in question, Chile prohibited the EC fishing vessels from unloading their swordfish catches in Chilean ports either for the purpose of landing them for warehousing and importing or for transhipment onto other vessels for sale in other markets. Recently, the Chilean restrictive measures and the prohibition on unloading in Chilean ports had been extended so as to cover catches made anywhere on the high seas. The EC considered that the measures were inconsistent with Chile's WTO obligations. It was not acceptable that Chile impeded the transit and importation of swordfish catches by EC vessels in its ports, unless such vessels complied, anywhere in the high sea, with so-called conservation rules imposed unilaterally by Chile. This was contrary to the principle of freedom of transit enshrined in Article V of GATT 1994.

102. Moreover, the Chilean measures rendered impossible the importation of the affected catches into Chile, which was contrary to Article XI of GATT 1994. Chile had adopted its legislation and had enforced the prohibition without entering into any negotiations with the EC with the objective of concluding bilateral or multilateral agreements. Recently, Chile had also concluded an agreement on the conservation of living resources in the South Pacific within the framework of the Permanent Commission of the South Pacific with Peru, Colombia and Ecuador. It was striking that the EC and, presumably, other interested Members had not been invited to the negotiating table. This indicated that Chile had not pursued the possibility of entering into cooperative arrangements with the EC as it had done with other countries. It would be preferable for Chile to lift the prohibition and to enter into negotiations with the EC and all other parties concerned with a view to achieving, in a reasonable delay, an agreement on the long-term conservation and sustainable use of swordfish resources in the South Pacific. The EC had unsuccessfully tried for ten years to achieve such a solution, but Chile had not shown any flexibility and had continued to deny the EC's WTO rights. In such circumstances, the request for the establishment of a panel was the only available option.

103. The representative of Chile said that swordfish were highly migratory marine species which travelled over 600 miles and, in the South-East Pacific, moved from the exclusive economic zone of the coastal States, including Chile, to the nearby high seas. Unfortunately, although swordfish was

steadily declining in all the world's oceans, including the South-East Pacific, it had been declared that it might be fully exploited, which meant that when the authorized quantities had been caught there was no surplus for the reproduction of the species. This had led Chile to adopt increasingly stringent conservation measures within the exclusive economic zone since 1989, and these had been extended to all Chilean-registered vessels operating beyond the 200-mile zone of national jurisdiction.

104. Chile's conservation measures were covered by Articles 61, 62, 63 and 64 of the Convention on the Law of the Sea, as far as application within the exclusive economic zone was concerned; and Articles 116-119 of the Convention with regard to the conservation and utilisation of the living resources of the high seas. Article 116 regulated the right to fish on the high seas, making it subject, *inter alia*, to rights and duties, as well as the interests of coastal States. Article 117 made it the duty of States to adopt, with respect to their nationals, measures for the conservation of the living resources of the high seas. Article 118 governed cooperation by States in the conservation and management of living resources. Finally, Article 119 listed the minimum essential measures to be adopted by States whose nationals fished on the high seas, laying emphasis on the application of scientific and environmental criteria, concerns related to associated or dependent species, and furnishing of appropriate statistical information.

105. The obligation under the Convention on the Law of the Sea to protect the marine environment and especially to conserve living marine resources would be undermined, if vessels registered in other countries fished in the high seas without being obliged to respect conservation measures that were comparable to, or consistent with, those applied in the exclusive economic zone of the coastal State concerned, and were able to unload and transfer catches without meeting any of the Convention's requirements, and without taking into account the conservation and management regime existing in the aforementioned economic zone.

106. In 1995, Chile had proposed to the EC a dialogue aimed at evaluating the resources so as to be able to harmonize or agree conservation measures for the high seas in the south-east Pacific and to facilitate access by the Community fleet to Chilean ports, respecting the conservation regime. In 1998, a Technical Commission had met for this purpose and, on that occasion, the Chilean party furnished full information and explained the scientific grounds for its conservation measures, whereas the EC had been unable to provide any information on conservation measures applied by the EC fleet catching swordfish in the Pacific nor had it agreed to supply any information regarding its catches, which was not transmitted to the United Nations Food and Agriculture Organization (FAO), as required by the international obligations incumbent upon all fishing States. The EC Commission did not only fail to respect the commitment to pursue the work of the Technical Commission, but two months later it had decided to take the matter up through a unilateral contentious procedure in the Commission, in which Chile had fully cooperated, and subsequently under the DSU.

107. Chile had repeatedly informed the EC and the Spanish authorities of its willingness to work together to reach an agreement on the conservation of swordfish, and it had repeated this once again during the recent consultations with the EC in New York. Chile had stressed the importance of bilateral cooperation in view of the urgent need to protect swordfish adequately and had stated its willingness to extend this cooperation to the multilateral level. In this connection, the Galapagos Agreement, signed by Chile, Colombia, Ecuador and Peru, provided a framework to which the EC Commission and the EC member States could accede; or a complementary agreement specifically for swordfish could be reached, independently of but compatible with the Galapagos Agreement.

108. The New York discussions were the first indication that the EC was willing to consider a conservation agreement and both delegations had agreed that there were no obstacles to moving ahead in this direction. Nevertheless, the EC Commission had called for immediate access to Chilean ports for Community-registered vessels catching swordfish in the Pacific while bilateral and multilateral negotiations had been initiated to agree on a conservation regime for swordfish in the high seas. The

EC had also offered to set a date for the Technical Commission, but at the same time it had declared its intention to request a panel to examine this matter.

109. A dispute like the one under consideration should be governed by the special rules established under the Convention on the Law of the Sea and not by trade and general rules of GATT 1994. Chile considered that the WTO dispute settlement mechanism was not the proper forum for considering and resolving this dispute, which was clearly defined, regulated and mentioned specifically as a matter for dispute settlement under the Convention. After several months of discussion on the procedure, following a request for arbitration under the Rules of Annex VII to the Convention, the parties had agreed in principle to place the dispute before a special Chamber of the International Tribunal for the Law of the Sea, in Hamburg, and had also agreed on the composition and terms of reference of the court and the only thing lacking was a final agreement on the rules of procedure. The environmental dispute on conservation and observance of principles or the precautionary approach could not be placed before any forum other than the dispute settlement mechanism under the Convention on the Law of the Sea.

110. The relationship between the multilateral trading system and the multilateral environmental agreements had been discussed in the Committee on Trade and Environment (CTE) since its inception. In its 1996 annual report, it had been referred to this question as well as to the need that Members should try to resolve disputes arising from compliance with an MEA through the dispute settlement mechanisms provided in the environmental agreement concerned. The EC has stated in the CTE that subordinating MEAs to the WTO would undermine international efforts to tackle environmental problems (WT/CTE/W/170). In this document, submitted less than a month ago, the EC had indicated that conflicts between parties to an MEA in relation to the implementation of that agreement should be resolved within the MEA. The EC had gone even further and had proposed reversing the burden of proof under Article XX of the GATT 1994. It was a matter of concern that the EC's action was contrary to its statements.

111. During the recent visit of the EC Commissioner, Pascal Lamy, to Chile and in a subsequent note, his country had pointed out these contradictions and had indicated that parallel dispute settlement procedures under the Convention on the Law of the Sea and the WTO contained the seeds of a serious potential conflict between the multilateral trading system and the multilateral environmental protection system. This unprecedented situation of a possible conflict between two multilateral regimes intended to reinforce each other mutually, and not to cause conflict thereby jeopardizing the credibility of both systems was an issue of interest to all Members.

112. Finally, he wished to refer to the notoriety of the fishing fleets of some EC member States which had weakened multilateral agreements in other oceans, repeatedly exceeding the catch limits and minimum size of swordfish in the Atlantic, the Mediterranean and the North Sea, with harmful effects on the marine environment and whose predatory methods of fishing were exacerbated by large amounts of aid and subsidies. Chile did not wish that these conditions occurred in the South-East Pacific and hoped that, with the collaboration of all Members, it could be avoided. The measures adopted by Chile had a clear environmental purpose and not any trade aims, as claimed by the EC. They had not been adopted unilaterally or arbitrarily but, on the contrary, they were solidly based on the obligations imposed and the prerogatives given by the UN Convention on the Law of the Sea, and moreover they were fully justified by Article XX of the GATT 1994. Chile reiterated its determination to ensure that fishing of a highly migratory species both within and outside the 200-mile limit had been carried out in a way that was responsible, transparent and regulated. This position was consistent with the need to conserve and prevent the plunder of living marine resources and had been shared by many States which had promoted an FAO action plan for this purpose. It should also meet with the consensus of Members which was born under the sign of sustainable development. For all the above reasons, Chile considered that this dispute should not be examined and certainly not resolved at this stage by the dispute settlement system, which was not an appropriate

forum for this purpose. Chile therefore rejected the establishment of a panel under the terms set by the EC. Chile once again affirmed its desire and interest to pursue a dialogue at any time in order to attain the objective of an agreement on the conservation of swordfish.

113. The representative of the European Communities said that the EC was not convinced by the arguments put forward by Chile. However, while it wished to safeguard its WTO rights, the EC remained open to explore alternative avenues to settle the dispute in a negotiated way. The EC considered that the issue should be settled in an agreement which would be open to all interested parties and that this was the most suitable way for achieving an appropriate conservation and management of swordfish resources in South-East Pacific. He noted that the Chilean authorities had not been sufficiently open to the EC's demands in this respect. With regard to the EC's fishing fleets in this area, there had been on average in the last ten years six vessels as compared to 15 or 16 industrial vessels and over 1000 of artisanal vessels of Chile. This did not constitute a considerable effect on the conservation policy in the region. Furthermore, when the EC had asked for a multilateral negotiated approach in parallel it had not asked for fully-fledged access to Chilean ports, but for limited and regulated access, and even then Chile was not in a position to do so. The EC regretted that it had to request the establishment of a panel but at the same time, it remained open with regard to a negotiated agreement.

114. The representative of Chile said that the EC had referred to six vessels. He did not have the exact figure but it was expected that if Chile gave access to its ports there would be many more vessels. Therefore, it was necessary to take into account the EC's expectations in this regard. Second, the EC had stated that it was willing to enter into negotiations. Chile was ready to start such negotiations immediately without any preconditions. The present situation was not desirable for Chile because outside of its 200 miles zone there was a fishing fleet that could fish without being subject to any regulation without any environmental responsibility and there was no information with regard to the size of the activities underway. Therefore, in order to open negotiations it was indispensable to ensure a minimum degree of transparency.

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

6. Guatemala – Definitive anti-dumping measures on grey Portland cement from Mexico

(a) Report of the Panel (WT/DS156/R)

116. The Chairman recalled that at its meeting on 22 September 1999, the DSB had agreed to establish a panel to examine the complaint by Mexico. The Report of the Panel contained in document WT/DS156/R had been circulated on 24 October 2000. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Panel Report had been circulated as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Mexico. In accordance with Article 16.4 of the DSU, the adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

117. The representative of Mexico expressed his country's gratitude to the members of the Panel and the Secretariat who had carried out their work in a prompt and professional manner. He expressed satisfaction that Mexico was right in bringing this case before the WTO. The Panel Report had found that Guatemala violated at least 17 different provisions of the Anti-Dumping Agreement and that these violations were of a fundamental nature and pervasive. This was due to the following reasons: (i) an unbiased and objective investigating authority could not have initiated such an investigation; (ii) during the investigation the Anti-Dumping Agreement had been violated on several occasions; and (iii) an unbiased and objective investigating authority could not have reached the determinations of dumping, injury and causal relationship made by Guatemala. Mexico also noted

that the Panel had used its authority under Article 19.1 of the DSU in determining that "In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute." In addition, the Panel Report had raised a number of systemic issues, for example, the suitability of the members of the Panel, the standard of review, rebuttal of the presumption in Article 3.8 of the DSU.

118. However, the Panel had not responded satisfactorily to several complaints put forward by Mexico. This was only expected since the panel request consisted of nine pages. He noted that the Panel had rejected Mexico's request that Guatemala should reimburse the anti-dumping duties paid. It had considered that this raised several systemic issues but had not examined them. Although Mexico would have liked the Panel to decide in favour of reimbursing the anti-dumping duties improperly paid, it recognized that the wording used by the Panel did not prevent this from being done. The Panel had simply not taken any decision on this matter. Mexico welcomed Guatemala's decision not to invoke the appeal procedure in this case and hoped that the trend towards lodging appeals of panel reports would be reversed, in particular when this was not necessary.

119. The representative of Guatemala said that his country thanked the members of the Panel and the Secretariat for their work, patience, availability and competence which fostered conditions that allowed both parties to present their arguments. He noted that the second Cement case brought before the WTO by Mexico had become unnecessary after Guatemala had decided to revoke the anti-dumping measure under examination. The present authorities, acting in compliance with the Anti-Dumping Agreement and independently of the proceedings conducted by the Panel, had reached a decision to revoke the measure at issue after establishing that the market conditions which had led to the imposition of the measure had changed. The decision reached by these authorities was consistent with Guatemala's decision not to appeal the Panel's ruling in this case. However, these two decisions should not be misinterpreted. Although Guatemala had not appealed the Panel Report, it disagreed with several elements contained therein. His country considered that the rules had been applied in the case at hand with undue rigour, imposing requirements, obligations and restrictions that were not stipulated under the Anti-Dumping Agreement. This undermined the ability of countries to initiate and conduct administrative investigations.

120. As regards the legal procedure, Guatemala believed that limits had been placed on extending the period of investigation and examining data provided. Moreover, Guatemala had doubts as to how the rules on the burden of proof had been applied. He noted that Guatemala's arguments had not been taken into account. For the benefit of other Members who might decide to initiate and conduct anti-dumping investigations, Guatemala had carefully considered the possibility of lodging an appeal. The factor that weighed more heavily in Guatemala's decision was its desire to demonstrate that its main priority was in abiding by the provisions of the Agreement so as to strengthen the dispute settlement system, and that, since the country's market conditions had evolved, it was lifting the anti-dumping duty instead of resorting to measures, which it was entitled to adopt, but which might be perceived as a delaying tactic. Guatemala hoped that other countries would in turn uphold points of systemic import affecting all Members and, for that reason, it intended to remain vigilant. Finally, Guatemala thanked Mexico for its attitude and consideration in dealing with this case.

121. The DSB took note of the statements and adopted the Panel Report contained in WT/DS156/R.

7. Adoption of the 2000 draft Annual Report of the DSB (WT/DSB/W/147 and Add.1 and Add.1/Corr.1)

122. The Chairman said that, in pursuance of the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO contained in document WT/L/105, he was submitting for adoption a draft text of the 2000 Annual Report of the DSB contained in document WT/DSB/W/147 and Add.1 and Add.1/Corr.1. This Report which covered the work of the DSB since 27 October 1999, had been prepared in accordance with the structure of previous Annual Reports. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2000, prepared by the Secretariat on its own responsibility, was included in the addendum to this Report at the request of DSB Members. He proposed that the DSB adopt the Annual Report contained in WT/DSB/W/147 and Add.1 and Add.1/Corr.1 and authorize the Secretariat to update this Report under its own responsibility in order to include the actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would be circulated at the end of November 2000 and would then be submitted for consideration by the General Council at its meeting on 7 and 8 December 2000.

123. The representative of Mexico said that, while he joined the consensus to adopt the Annual Report, a cross-reference to Mexico's communication contained in document WT/DS162/8 should be included in relation of the item concerning the adoption of the Panel and the Appellate Body Reports in the case on "United States – Anti-Dumping Act of 1916".

124. The Chairman said that a cross-reference mentioned by Mexico would be included in the Annual Report.

125. The DSB took note of the statements and adopted the draft Annual Report contained in document WT/DSB/W/147 and Add.1 and Add.1/Corr.1, on the understanding that it would be further updated by the Secretariat.

8. Special meeting of the General Council on 22 November 2000 to discuss the communication from the Appellate Body to the Chairman of the DSB on "European Communities – Measures Affecting Asbestos and Asbestos-Containing Products"

(a) Statement by the Chairman

126. The Chairman, speaking under "Other Business", recalled that an airgram had been issued announcing that a special meeting of the General Council would be held on 22 November 2000. The purpose of the meeting was to discuss the communication contained in WT/DS135/9 from the Appellate Body to him, as Chairman of the DSB, on "European Communities - Measures Affecting Asbestos and Asbestos - Containing Products". This being the case, it was not appropriate to discuss this matter in the DSB at the present meeting. However, he and the Chairman of the General Council with whom he had been in frequent contact over the past few days felt that it might be helpful to put forward a few personal reflections at the present meeting to enable delegations to prepare for the forthcoming meeting of the General Council. The issue at the heart of the meeting was quite controversial. It concerned whether persons or organizations which were not Members of the WTO should have any input into dispute settlement cases. Positions might be quite strongly held and so there were a few things that should be borne in mind.

127. The first and most important was that he was absolutely sure that no delegation wished to do any harm to the standing of the organization, or to the dispute settlement system or to the Appellate Body. All were inter-linked and anything which affected an integral part of the system affected the system as a whole. That was an obvious point perhaps, but it was nevertheless worth stating. The meeting on 22 November was a formal meeting and would attract public attention. Second, he

believed that it would also be appropriate to address this issue in the General Council as a systemic issue rather than as a specific case. He had been advised by the Legal Affairs Division that the handling of so-called *amicus curiae* briefs had arisen in eight panel cases to date. In only three of these cases had the matter become an issue at the appeal stage. The question was likely to be faced not only by the Appellate Body but also by panels in future. The principle underlying the specific case was plain enough, and in his view Members should concentrate on that. The very fact that the matter was being addressed in the General Council underlined its general and systemic nature. Third, he personally was looking at this forthcoming meeting in a very positive light. It would enhance communications between the membership and the Appellate Body. It was proof that the system was working. It was only natural that Members should discuss whether anything should be done to clarify systemic uncertainties which might arise from time to time. If Members approached the meeting on 22 November in that spirit, they should have a fruitful debate which would strengthen the system.

128. The representative of Canada said that as Members were aware the Appellate Body division hearing the appeal in the Asbestos case had adopted, on 7 November 2000, an additional procedure to deal with written briefs from persons other than the parties to the dispute or third parties. Canada, as a party to the dispute, had been invited by the Appellate Body division to give its views on the criteria to be followed when deciding whether to grant leave to a non-party to file a submission, as well as the procedures that should be followed. He noted that the communication from the Appellate Body indicated that this additional procedure was adopted "after consultations with the parties and the third parties." This might convey the impression that all of the parties and third parties had agreed to the procedure that had been adopted. For this reason, Canada wished to state its views on this matter. He emphasized that Canada's comments related solely to the additional procedure adopted by the Appellate Body with respect to *amicus* submissions. Canada did not intend to comment at the present meeting on any of the substantive issues on appeal in this dispute. Canada was sympathetic to the interests of non-Members in the outcomes of WTO disputes. However, it also believed that the issues surrounding *amicus* participation had important systemic and institutional implications for the WTO, and that they could not be characterized as exclusively procedural. In Canada's view, it was for Members as a whole, not the Appellate Body, to decide how the issue of *amicus* participation should be dealt with in the future. Members had to ensure that the government-to-government nature of the dispute settlement process was not weakened or compromised by the procedural initiatives of panels or the Appellate Body. Thus, Canada was concerned that the Appellate Body division had chosen to adopt these new procedures at this time.

129. The representative of Brazil said that his country was a third-party in the dispute in question. Brazil had been fully consulted on this matter by the Appellate Body and had expressed its opinion thereon. He would make substantive comments on this matter at the 22 November meeting, and noted with satisfaction the fact that the Chairman recognized the importance of the systemic issues involved in this matter. The DSB Chairman should convey to the Chairman of the General Council that it was necessary to preserve the confidentiality of the proceedings with regard to this matter. This was particularly important because of the sensitive systemic implications of the procedure.

130. The representative of Zimbabwe said that his country had also been consulted by the Appellate Body division regarding the request for leave procedure adopted in the Asbestos case. His country had not opposed the adoption of the procedure but had made no specific comments regarding the issues raised by the Appellate Body division. His delegation thanked the parties and third parties who had made their submissions and acknowledged that certain elements of the procedure could provide a basis for a negotiated procedure for the submission and acceptance of *amicus* briefs within the dispute settlement process. His delegation, like many other delegations, was convinced that only Members could negotiate and put in place a permanent procedure for submission and acceptance of *amicus* briefs by panels and the Appellate Body. His delegation shared the dissatisfaction of other Members with the *ad hoc* approach adopted on the issue. It was his delegation's understanding that the Appellate Body division had adopted the procedure only for the purpose of the appeal at hand.

Therefore, it was time for Members to adopt a permanent procedure. His country would go into more detail at the 22 November meeting of the General Council.

131. The representative of India said that his delegation wished to express its gratitude to the Chairman for his personal reflections. He also wished to express his country's gratitude to the entire membership and to the Chairman of the General Council for deciding to hold a special meeting on 22 November 2000 to discuss this important matter which had systemic implications. India hoped that the discussion on 22 November would be positive for the system as a whole. He highlighted the fact that the issue was sensitive and controversial and concerned whether non-Members should have any input into dispute settlement procedures. India considered the issue to be one in which Members not other dispute settlement bodies should decide on the need for input from other non-WTO Members.

132. The representative of Saint Lucia said that her delegation which was not a Geneva-based resident would not be able to attend the special meeting of the General Council. At the same time, Saint Lucia respected the rules of procedure and would not engage in any substantial debate on the issue, but wished to state that the communication from the Appellate Body raised some systemic issues. The DSB was to administer the DSU rules and the Appellate Body would seem to be creating another category under which even WTO Members might make submissions thereto. The broadness of the way in which the Appellate Body had defined the procedure merited serious debate in the DSB as well as in the General Council.

133. The representative of Australia noted that this item had been raised under "Other Business" and interventions should therefore be short, and that a meeting of the General Council would be held next week to discuss this issue. Against this background, he wanted to make the following brief points at this meeting and looked forward to making a further intervention at the General Council meeting. First, as the issue of *amicus curiae* briefs had been worked through at length during the Uruguay Round, there was an important negotiating history to this issue that delegations might wish to reflect on between now and next week. Second, at the time that the Appellate Body procedures had first been drawn up, the then Chairman of the DSB had stated "that it was important to familiarize the Appellate Body with the sensitivities of the WTO and its climate of opinion".

134. The representative of the United States said that her delegation looked forward to the discussion on 22 November 2000 to make a longer intervention. The United States supported the Appellate Body's decision to set up procedures for handling *amicus* submissions in the Asbestos dispute. The United States strongly believed that this was a pragmatic response to the likelihood that *amicus* submissions would be filed, which would protect the integrity of the process and the interest of all parties. The United States looked forward to the discussion on 22 November 2000.

135. The representative of the European Communities said that his delegation looked forward to the discussion on 22 November 2000 and considered that the General Council was a more appropriate framework for such a discussion. In the discussion on 22 November 2000 there was a need to make a distinction between the specific case at hand and the general systemic issue. The EC considered that Members should be able to develop generally applicable rules from this and related issues concerning transparency of dispute settlement procedures. The EC would be glad to make a constructive contribution to the debate thereon.

136. The Chairman of the General Council said that on 20 November 2000 he would circulate a statement on his behalf to which a factual note from the Secretariat would be attached as to what had transpired in the case under consideration.

137. The DSB took note of the statements.

9. Consultations requested by Brazil with the European Communities on its measures affecting soluble coffee

(a) Joint statement by the Andean Community and the Central American countries

138. The representative of Colombia, speaking under "Other Business" on behalf of the Andean Community and the Central American countries, said that on 12 October 2000, Brazil had requested consultations with the EC under Article XXIII of GATT 1994 and Article 4 of the DSU with regard to the measures applied under the GSP which affected Brazilian soluble coffee[1]. In those consultations, Brazil had refered to the graduation mechanism under the GSP which had been applied to it by the EC since January 1999 and to the so-called "Special Regime for Support in the Fight against Drugs".

139. It was the understanding of the countries in question that the graduation mechanism was applied to the specific needs of developing countries on the basis of a combination of criteria concerning the levels of development and the degree of agricultural specialization. In addition, the Special Regime applied to the Andean and the Central American countries undertaking programmes to combat drug production and trafficking. Consequently, the countries in question were concerned that, despite their interest and the political, economic and commercial importance of the subject of the consultations for them as beneficiaries of the Special Regime, they could not be associated with the consultations in order to defend their interests since Brazil had requested its consultations pursuant to Article XXIII of GATT 1994. He recalled that Brazil had requested consultations with the EC on the same matter at the end of 1998. Although Brazil attached importance to the GSP for developing countries, it was regrettable that the type of consultations it had requested would not allow the countries in question to defend their interests in this matter.

140. The representative of Brazil said that, as stated by Colombia, his country had held consultations with the EC on the same matter in 1998, and believed that it had exercised a great amount of restraint until now with regard to this matter. The substantive and procedural circumstance with regard to 1998 consultations had not changed and therefore Brazil had made a new request for consultations under Article XXIII of GATT 1994. The points that had been raised at that time in the DSB remained valid. Brazil's interest in this subject was simple, it did not wish to prejudice other Members' rights and wished to make sure that Brazil's rights were fully respected. The EC was aware of this aspect and of Brazil's position. This traditional export item had been discriminated against for a long period of time and Brazil was seeking to redress this situation.

141. The representative of Saint Lucia said that her country recognized that Brazil had exercised due restraint and urged Brazil to continue to do so. In order to demonstrate the hemispheric solidarity, Saint Lucia supported the special access rights of the Andean Community and the Central American countries to the EC's market and wished to endorse their continued access and supported negotiations rather than the use of the dispute settlement mechanism to resolve such disputes.

142. The DSB took note of the statements.

10. United States – Tax treatment for "Foreign Sales Corporations"

(a) Statements by the United States and the European Communities

143. The representative of the United States, speaking under "Other Business", announced that on 15 November 2000, the US President had signed into law HR. 4986, the FSC Repeal and Extraterritorial Income Exclusion Act of 2000. With the enactment of this legislation, the United States had implemented the DSB's recommendations and rulings in the case on United States - Tax

[1] WT/DS209/1

treatment for "Foreign Sales Corporations".[2] The legislation was consistent with the United States' WTO obligations. It was her understanding that the EC did not share its assessment of the new legislation. The United States would urge the EC to reconsider its position, but should that not occur, the parties to the dispute had agreed at least on procedures which would allow the disagreement to be resolved in a responsible and orderly manner. These procedures had been circulated to the DSB in October 2000 and her country would be ready to provide copies of the resolution upon request.

144. The representative of the European Communities recalled that in March 2000, the DSB had adopted the Appellate Body Report including its recommendation to comply with that ruling as from 1 October 2000. On 29 September 2000, the EC and the United States had agreed on procedures under Articles 21.5 and 22 of the DSU and Article 4 of the SCM Agreement. On 12 October 2000, the DSB had agreed to the US request to extend the period for compliance until 1 November 2000. However, by that date, the United States had not implemented the DSB's recommendations. Therefore, in order to protect its rights and be fully in line with the agreed procedures between the United States and the EC and consistent with its wish to avoid any escalation, the EC had filed, on 17 November 2000, its request for authorization by the DSB to take appropriate counter-measures and was requesting a special DSB meeting to be held on 28 November 2000 for that purpose. In the meantime the US President had signed the FSC Replacement Act which had been notified to the EC on this very day. The EC did not consider that the replacement act met the requirement of the DSB's recommendations and considered it to be WTO-incompatible. Consequently, the EC had requested consultations under Article 21.5 of the DSU. If the procedure were to result in the establishment of a compliance panel, the procedure agreed between the parties would apply. This meant in practice that the final ruling would take the time which was required for the procedure under Article 21.5 of the DSU and, in the meantime, if arbitration were to be requested, arbitration procedures by agreement would be fully suspended. He emphasized that the EC continued to work in a constructive spirit of the bilateral agreement of 29 September.

145. The DSB took note of the statements.

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[2] WT/DS108