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Dispute Settlement Body
13 February 1998

MINUTES OF MEETING

Held in the Centre William Rappard
13 February 1998

Chairman: Mr. Wade Armstrong (New Zealand)

Subjects discussed: Page

Prior to the adoption of the agenda the items entitled "Ireland - Measures Affecting the Grant of Copyright and Neighbouring Rights" (WT/DS82/2) and "European Communities - Measures Affecting the Grant of Copyright and Neighbouring Rights (Ireland)" (WT/DS115/2) were removed from the proposed agenda at the request of the United States. In addition, the consideration of the item concerning nominations proposed for inclusion on the indicative list of governmental and non-governmental panelists was postponed for a future meeting.

1. India - Patent protection for pharmaceutical and agricultural chemical products

- Implementation of the recommendations of the DSB

The Chairman said that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that,"... the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB." He recalled that on 16 January 1998, the DSB had adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report.

The representative of India recalled his detailed statement made at the DSB meeting on 16 January 1998, which contained India's views on the Reports of the Panel and the Appellate Body. India had recognized that the final results of the Panel's proceedings had been substantially more limited than those originally sought by the United States. His country had also recognized that the Appellate Body had rectified some of the errors contained in the Panel Report. Nevertheless, his delegation was disappointed with the conclusions of the Appellate Body Report regarding India's compliance with Article 70.8 and 70.9 of the TRIPS Agreement. He noted that India had always acknowledged its obligations under these articles. The dispute regarding Article 70.8 was only about how India should carry out its obligations. Although the Panel had concluded that India's administrative instructions for receiving mailbox applications were inconsistent with Article 70.8(a) of the TRIPS Agreement and this conclusion had been upheld by the Appellate Body, it should be borne in mind that the Panel had observed that it was up to India to decide how to implement its obligations under the respective article.

The dispute regarding Article 70.9 of the TRIPS Agreement was only about when India should carry out its obligations under this Article. India's position was that Article 70.9 established an obligation that exclusive marketing rights be granted for a product after the conditions specified in Article 70.9 had been fulfilled. However, the Panel and the Appellate Body believed that India should have had a mechanism for the granting of exclusive marketing rights as from 1 January 1995. It was therefore obvious that the conclusions of the Panel and the Appellate Body with regard to India's perceived failure to comply with its obligations under Article 70.8(a) and 70.9 of the TRIPS Agreement had been based on narrow technicalities. He mentioned this point to highlight the fact that these conclusions could not be related to any deliberate intent or unwillingness on the part of India to comply with its obligations.

Under Article 21.3 of the DSU, India was required to inform the DSB of its intentions in respect of the implementation of the DSB's recommendations. It was India's intention to meet its obligations under the WTO, but his country would require a reasonable period of time to comply with the DSB's recommendations. In light of the present situation and taking into consideration all relevant circumstances, India would require time until at least 16 June 1999. He would appreciate it if the DSB approve India's request with regard to the reasonable period of time for implementation.

The representative of the United States expressed his delegation's appreciation for the statement made by India concerning its intentions in respect of the DSB's recommendations. In order to implement the DSB's recommendations, India was obliged to amend its law in order to provide a legally sound mailbox system for filing patent applications and a system for granting exclusive marketing rights for qualifying products. These obligations formed part of the transitional arrangements under the TRIPS Agreement. Under the TRIPS Agreement, countries, such as India, that could take advantage of a ten-year transition period for providing patent protection for pharmaceuticals and agricultural chemicals were required to provide mailbox and exclusive marketing right systems during the transition period. In the statement by the representative of India he had referred to his country's intention to "meet its obligations under the WTO". The US representative assumed that this meant that India intended to implement the DSB's recommendations.

The Panel and the Appellate Body had found that India was obliged to establish mailbox exclusive marketing rights systems as of 1 January 1995. It was now 1998, and India was already three years overdue to meet these transitional obligations. After such a lengthy period of non-compliance there was no basis for any further delay and the United States looked forward to India's full and prompt implementation of the DSB's recommendations. India had requested the DSB to approve a period of time up to 16 June 1999 to implement the DSB's recommendations. The United States was unable to accept such a period of time. Timely implementation by India of these obligations were of particular importance to US right-holders. India had indicated that it intended to take advantage of the ten-year transition period in the TRIPS Agreement for providing patent protection for pharmaceutical and agricultural chemical products. However, it had also a corresponding obligation under the TRIPS Agreement -- now reaffirmed by the Panel and the Appellate Body -- to implement a mailbox system and a system of exclusive marketing rights during the transition period. Under Article 21.3 of the DSU, Members should, where practicable, comply immediately with the DSB's recommendations. This would protect the interests of all Members and the DSB system. Countries that could implement their WTO obligations immediately should do so.

He noted that, in paragraphs 62 and 80 of its report, the Appellate Body had found that India's Government had the power, pursuant to Article 123 of the Indian Constitution, to promulgate an ordinance when Parliament was not in session. This procedure had been used in 1995 when the Indian executive branch had sought to comply with India's obligations under Article 70.8 and 70.9 of the TRIPS Agreement. Therefore, there was no reason why India could not use such a procedure to comply immediately with the DSB's recommendations. The temporary legislation could subsequently be made permanent by the legislature. He reiterated that there was no basis on which to accept a period of time until 16 June 1999. The United States looked forward to India's immediate compliance with the DSB's recommendations.

The representative of India, said that first he wished to address the United States' concerns with regard to the phrase which read as follows: "In this context I would like to state that it is India's intention to meet its obligations under the WTO with respect to this matter." He understood that the United States had sought confirmation that this phrase meant that India would comply with the DSB's recommendations. He noted that the same phrase had been used by the United States in the *Gasoline Case*.[1] If this phrase meant that the United States intended to comply with the DSB's recommendations, the same was true for India.

With regard to the United States' comment that India was obliged to amend its law, at this stage he did not wish to enter into detail regarding this matter. He highlighted that the Panel, in paragraph 7.33 of its report, had cited Article 1.1 of the TRIPS Agreement. This Article provided, *inter alia*, that: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." Neither the Panel nor the Appellate Body had given India any specific instructions about the manner of implementation. While other Members were entitled to ensure that the Appellate Body's rulings would be implemented, it was up to India to determine the manner in which these obligations would be fulfilled. He reiterated that it was India's intention to meet its obligations under the WTO with respect to this matter.

With regard to the issuance of an ordinance, he did not consider it necessary to address at the present meeting India's Constitutional law as it was up to the Government of India to decide on the manner of implementation of the DSB's recommendations. He regretted that the US delegation was not in a position to accept that India be granted a period of time, at least until 16 June 1999, in order to comply with the DSB's recommendations. Therefore, India wished to enter into bilateral

[1] WT/DSB/M/19.

consultations with the United States in order to explore the possibility of finding a mutually agreed reasonable period of time pursuant to Article 21.3(b) of the DSU.

The representative of the United States said that, as indicated in India's statement, it was up to India to decide how to meet its obligations. The dispute examined by the Panel and the Appellate Body concerned transitional obligations of India before it would meet its full obligations under the TRIPS Agreement. It was not up to India to decide when to meet its transitional obligations, which should have been in place as from 1 January 1995. The Appellate Body had found, and in his understanding the representative of India had not disagreed, that it was possible for India to comply immediately with the transitional obligations. There was no reason why the Government of India should seek an extended period of time beyond the three years that had already elapsed with regard to these transitional obligations.

The representative of India said that, since the United States was not in a position to agree to the time period requested by his delegation, India wished to hold bilateral consultations in order to explore the possibility of finding a mutually satisfactory period of time. He presumed that there was no objection with regard to this. When he had stated that it was up to India to determine the manner of implementation, he had not referred to the time period. He had only cited Article 1.1 of the TRIPS Agreement which had repeatedly been highlighted by the Panel and the Appellate Body. India was aware of the DSU provisions and it had first requested that the DSB approve a period of time until 16 June 1999. Subsequently, in accordance with Article 21.3 of the DSU, it had requested bilateral consultations with the United States. He did not imply that India had an absolute freedom of choice with respect to the time period for implementation.

The Chairman noted that, since there was no agreement on the acceptable period of time, in accordance with Article 21.3(b) of the DSU, a period of time mutually agreed by the parties to the dispute should be indicated within 45 days after the date of adoption of the recommendations. In this case, the 45-day period would expire on 2 March 1998.

The DSB took note of the statements.

2. Canada - Measures affecting the importation of milk and the exportation of dairy products
   - Request for the establishment of a panel by the United States (WT/DS103/4)

The Chairman drew attention to the communication from the United States contained in document WT/DS103/4.

The representative of the United States said that his delegation requested that the DSB establish a panel to determine whether Canada's special milk class pooling system was inconsistent with its WTO obligations. Through its special milk class pricing, Canada provided subsidies on exports of dairy products without regard to the ceilings on the quantity of subsidized exports that had been agreed in the Uruguay Round. Canada subsidized such exports by making milk available at a lower price for processors who exported their finished dairy products. The pooling system was in breach of Canada's export subsidy reduction commitments under the Agreement on Agriculture. The restrictions on export subsidies were a fundamental part of the commitments undertaken under the Agreement on Agriculture and a failure to adhere to them threatened that those disciplines would be unravelled to the detriment of all Members. In addition to the determination sought by the United States with respect to Canada's export subsidies, the United States also requested that Canada's administration of its tariff-rate quota on fluid milk be examined by a panel. Canada did not permit commercial shipments within the tariff-rate quota. The exclusion of such trade was unprecedented and inconsistent with Canada's concessions undertaken during the Uruguay Round.

The representative of Canada said that her Government considered that the dairy pricing system and the tariff-rate quota for fluid milk maintained by it were in compliance with its WTO obligations. Canada was not in a position to agree to the establishment of a panel at the present meeting.

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

3. Turkey - Restrictions on imports of textile and clothing products

- Request for the establishment of a panel by India (WT/DS34/2)

The Chairman drew attention to the communication from India contained in document WT/DS34/2.

The representative of India recalled that, as contained in document WT/DS34/1, dated 21 March 1996, his country had requested consultations with Turkey pursuant to Article 4 of the DSU and Article XXIII:1 of GATT 1994, with regard to the unilateral imposition by Turkey, on 1 January 1996, of quantitative restrictions on imports of a broad range of textiles and clothing products from India. Turkey had accepted India's request for consultations on 1 April 1996. Subsequently, India had scheduled the consultations with Turkey in Geneva for 18-19 April 1996. After Turkey's acceptance of the proposed dates, India had brought a delegation from the capital to conduct these consultations. However, Turkey had not entered into these consultations within the stipulated period of time in accordance with Article 4.3 of the DSU. In the absence of any other mutually agreed period of time, India had the right to proceed directly to request the establishment of a panel. He recalled that India had specifically referred to these provisions of the DSU in its statement made at the DSB meeting on 24 April 1996[2], with regard to this unfortunate situation.

India considered that the restrictions imposed by Turkey were inconsistent with its obligations under Articles XI and XIII of GATT 1994, which did not permit any Member to impose discriminatory quantitative restrictions. It also considered that these restrictions were inconsistent with Turkey's obligations under Article 2 of the Agreement on Textiles and Clothing (ATC). India further considered that these restrictions nullified or impaired the benefits accruing directly or indirectly to it under the GATT 1994 and the ATC. His country requested the DSB to establish a panel with standard terms of reference to examine this matter in light of GATT 1994 and the ATC and to find that Turkey's measure nullified and impaired the benefits accruing to India under the WTO Agreement.

The representative of Turkey said that the quantitative restrictions on the importation of certain textile and clothing products from India had been introduced in accordance with the provisions of the Customs Union between Turkey and the European Community, effective from 1 January 1996. The representative of India had qualified these restrictions as "unilateral imposition." However, Turkey had requested consultations aimed at signing of a memorandum of understanding with India, which laid down arrangements for trade in textiles and clothing. There was no reply to this request. His delegation strongly disagreed with India's position that Turkey had not entered into consultations and consequently this dispute had not been resolved. The consultations could not have been held because India had refused to recognize the parties to the dispute. The reasons why consultations could not have been held were outlined in the same document to which the representative of India had referred in his statement (WT/DSB/M/15).

He recalled that Article XXIV:8 of GATT 1994 stated that: "A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories." Therefore, the Customs Union encompassed one legal entity and both partners were bound by its

[2] WT/DSB/M/15.

provisions. He considered that the quantitative restrictions resulted from Turkey's obligations under the Customs Union and constituted the joint responsibility of Turkey and the European Communities. Bearing this in mind, he underlined that any request for consultations with regard to a measure taken consequent to the establishment of the Customs Union should be addressed to both partners, in this case, Turkey and the Communities. He recalled that his delegation had been willing, at that time, for the purpose of reaching an amicable solution, to hold consultations with India in which the Communities would participate on the same footing as Turkey. This position had also been reiterated by both parties to the Customs Union at the DSB meeting on 24 April 1996. It was regrettable that India had not accepted this proposal and had abstained from participating in the consultations. After having rejected the consultation, India had brought this case before the DSB. India would have had a better understanding of the situation if it had participated in the consultations.

The matter brought by India before the DSB was of a systemic nature. This issue as well as other systemic issues were currently under discussion in the Committee on Regional Trade Agreements. This Committee had been mandated to review some concepts of Article XXIV of GATT 1994, including those related to customs unions. Furthermore, the Customs Union between Turkey and the European Community was currently under the examination by the Committee which held its last meeting on 1 October 1997. His delegation strongly believed that India's request for the establishment of a panel was untimely and seemed to be aimed at pre-empting discussions in the relevant WTO bodies and decisions to be reached by consensus. It was only through such negotiations that the multilateral trading system could be consolidated. Turkey was willing to reach an amicable solution with India. Bearing this in mind, Turkey was ready to enter into consultations with India together with the European Communities as its partner to the Customs Union. His delegation was not in a position to accept India's request for the establishment of a panel at the present meeting.

The representative of the European Communities said that Turkey had provided some of the background relating to this complaint and had indicated that it could not agree to the establishment of a panel. Therefore, no decision could be made at the present meeting. However, for the record, he wished to make a few points since it would be desirable to take account of the particular circumstances of this case. This was not a simple case of an alleged breach of the ATC Agreement. India's request recognized this when reference had been made to the fact that the restrictions "are not justified under Article XXIV of GATT 1994". The Communities disagreed on this point, but it was clear that this case would concern the interpretation of Article XXIV of GATT 1994, and in particular paragraph 8 thereof which laid down the obligations of a customs union. Turkey had mentioned the Customs Union context and in this case the joint responsibility of both partners. Like the representative of Turkey, he was not comfortable with the situation that the Committee on Regional Trade Agreements would examine the conformity of the Customs Union with Article XXIV of GATT 1994 and in parallel a panel might carry out the same work from a different and more legal angle. The basic policy on Turkey's future textiles regime had been agreed by the Communities and Turkish Ministers and was contained in the Decision No. 1/95 of the EC-Turkey Association Council.[3] The Turkish measures had simply been introduced in application of this policy. This raised the issue of whether the Indian complaint had addressed the right target, namely the basic regulation or the implementing measure.

In his delegation's view, the Chairman, the DSB and the delegation of India would need to carefully consider a situation where an issue of vital importance to the Communities, with the Communities directly involved in the decision-making, was to be examined without direct participation of the Communities. It would be difficult if a panel found that the measure was unjustified -- not a likely scenario, but it could be possible -- and one party to the decision would only

[3] The text of the Decision 1/95 is contained in WT/REG22/1.

be partly present as an interested bystander not as a defendant. The Communities could request to be a third party in this dispute, but this solution was inadequate. The Communities should be able, *inter alia*, to work together with Turkey, submit joint submissions and oral arguments as well as answer questions in a coordinated manner. The procedural question in this case was a clearer status of the Communities in the proceedings. The wording in the DSU was not helpful. He recalled the saying *de minimis non curat lex* and said that this could be a case where the *de minimis* stood in the way of the smooth functioning of the DSU. Therefore an innovative look might be needed to find how the Communities could become more directly involved in this case. His delegation believed that in the absence of a solution to this matter, the Communities would be deprived of their right to defend their interests and this procedure was questionable.

The representative of India said that he did not consider it necessary to reply to some of the comments made by Turkey and the European Communities. In his view, the point was simple. India had made a request for the establishment of a panel. He noted that the establishment of a panel could only be delayed but not denied and as on other occasions, delegations could raise their concerns before a panel. As far as India was concerned, the restrictions had been imposed and notified to India by Turkey. In India's view, Turkey was the only party to this dispute. This position had also been taken previously by other delegations in the DSB. He did not wish to explain India's position at the present meeting since this would be raised before the panel. Under the DSU procedures, India had the right for the establishment of a panel if not at the present meeting then at the next meeting. Turkey, as a respondent in this case would have the opportunity to explain its position before the panel. Third parties interested in this case would also have the opportunity to explain their position before the panel. He reiterated India's request for the establishment of a panel. Since Turkey did not accept this request at the present meeting, which was Turkey's right, he inquired about the dates of the next DSB meeting because he wished that this panel be established as quickly as possible. At the same time he did not wish to request a special meeting for this purpose.

The Chairman, in response to India's queries, said that in accordance with the schedule of meetings, the next regular meeting of the DSB would be held on 25 March. However, there was a particular reason for an earlier meeting of the DSB which would be held on 13 March.

The representative of India said that if he could be given confirmation that India's request for a panel be included on the agenda of the DSB meeting scheduled for 13 March, he would not request a special meeting.

The Chairman confirmed that India could request the inclusion of this item on the agenda of the next DSB meeting.

The representative of the European Communities said that his delegation did not question India's right to request the establishment of a panel, nor Turkey's refusal of this request at this stage. The Communities were only concerned about their rights and how they could defend their interests with regard to the Customs Union in which they were jointly responsible for decisions. He wished to ask this question but at the same time he recognized that this was a difficult question for the Chairman, the Secretariat and the DSB members.

The representative of Turkey wished to associate his delegation with the statement made by the European Communities. Turkey, which wished its partner to participate in defending this case, also posed the same question to the DSB.

The representative of India said that all the rights were defined in the DSU. It was not possible to accept more nor to expect less. The rights were contained in the DSU and India would proceed strictly by the terms of the DSU.

The Chairman noted India's statement that Members would be guided by the provisions of the DSU in response to the questions which had been raised.

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

4. European Communities - Measures concerning meat and meat products (hormones)
- Report of the Appellate Body (WT/DS26/AB/R - WT/DS48/AB/R)
and Reports of the Panel (WT/DS26/R/USA, WT/DS48/R/CAN)

The Chairman said that this item was on the agenda at the request of the United States and Canada. He drew attention to the communication from the Appellate Body contained in document WT/DS26/12 - WT/DS48/10 transmitting the Appellate Body Report which had been circulated in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestrictions of WTO documents contained in WT/L/160/Rev.1 the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. Under Article 17.14 of the DSU: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body Report."

The representative of the United States said that his country supported the adoption of the Appellate Body and the Panel Reports. These Reports were significant because they contained first interpretations of the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Much more importantly, however, the Appellate Body had addressed two of the most fundamental principles contained in the SPS Agreement. Foremost among those principles was that the sanitary measure that implemented a Member's chosen level of protection should be based on scientific principles and should not be maintained without sufficient scientific evidence. Such measures, moreover, had to be justified by a risk assessment and the Appellate Body had affirmed that the requirement for a risk assessment was a substantive requirement, not merely a procedural one. The Appellate Body had found that the SPS Agreement reserved for each Member the right to establish its own level of protection respecting sanitary and phytosanitary risks to life and health. Thus, the Panel and the Appellate Body had confirmed that a Member might depart from international standards where those international standards would not achieve the level of protection that a Member determined to be appropriate. However, the Reports had found that the right to depart from international standards was conditioned on compliance with the requirements of the SPS Agreement. The Appellate Body had recognized that a Member could and had to exercise its sovereign rights to protect human health in a manner that complied with the necessary disciplines on sanitary measures adopted by Members in the SPS Agreement.

Each of these principles was a cornerstone of the SPS Agreement and the Appellate Body's application of those principles in its analysis of the Communities' ban on beef from animals treated with growth-promoting hormones was a validation of the SPS Agreement. The Appellate Body's conclusions that the disciplines contained in Article 5 of the SPS Agreement, including the requirement of a risk assessment, had to be informed by the provisions of Article 2 of the SPS Agreement was also an important contribution to the WTO jurisprudence. Unless SPS measures were justified by the objective criteria of scientific evidence and scientific principles, they could easily come to reflect unwarranted prejudices and degenerate into disguised restrictions on trade. The integrity of dispute settlement could only be maintained if the DSB's recommendations were implemented by Members. His delegation encouraged the Communities to take the appropriate action at the next DSB meeting, and to state their intentions to implement the DSB's recommendations by removing the ban as soon as possible. Anything short of a clear commitment to the removal of the

unjustified ban would threaten mutually shared interests in maintaining an effective rules-based trading system. The United States was ready to work with the Communities toward achieving this objective.

The representative of Canada supported the adoption of the Appellate Body Report and the Panel Report as modified by the Appellate Body Report. Canada was pleased that both the Panel and the Appellate Body had reaffirmed the key-principle of the SPS Agreement that SPS measures should be based on a risk assessment. Her country expected the Communities to bring their measure into compliance with the Panel Reports as amended by the Appellate Body Report and remove as soon as possible their import prohibition which was restricting Canadian exports of beef for nearly 10 years. Internationally recognized risk assessments had confirmed that beef produced with growth-promoting hormones was safe. She noted that the risk assessment performed by the Communities had reached the same conclusions. Therefore, there was no reason for the Communities to delay lifting their ban. Her delegation looked forward to hearing from the Communities about their intentions with regard to implementation as well as when the Communities would be in a position to implement the recommendations of the Reports.

The representative of the European Communities said that the Communities accepted and welcomed the Appellate Body Report, which had significantly modified the Panel Reports on a number of important points. The implications of the Reports, read together, were now being carefully examined by his authorities. In accordance with Article 21.3 of the DSU, the Communities would indicate, within the next 30 days, their intentions in respect of the implementation of the recommendations to be adopted at the present meeting. At this stage, he wished to limit his comments to certain general observations regarding the Appellate Body Report, which might also be of interest to other Members. The Communities considered the Appellate Body Report to be very helpful in clarifying the general approach towards interpreting the rights and obligations of Members, in particular in areas such as human health, where, on the one hand consumers were seriously concerned about the quality and safety of products and, on the other hand governments had vital responsibilities towards their population. In this respect, the Appellate Body provided a number of important guidelines.

With regard to the issue of the burden of proof, the Appellate Body had made it clear that whether or not the EC measure was based on international standards, the burden had remained on the complaining parties to present evidence and legal arguments sufficient to demonstrate that this measure was incompatible with the WTO obligations (paragraph 102 of the Appellate Body Report). In this respect the Appellate Body had reversed the Panel's arguments. Another important guideline was contained in paragraph 124 of the Report in which the Appellate Body stated that, "... a panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g.life-terminating, damage to human health are concerned". The Appellate Body had also ruled, in this context, that the right of Members to act on the basis of prudence and precaution was not limited to situations described in Article 5.7 of the SPS Agreement. In this respect, the Appellate Body's finding in paragraph 165 was relevant which stated that: "It is clear to us that harmonization of SPS measures of Members on the basis on international standards is projected in the Agreement as a *goal*, yet to be realized *in the future*." Such international standards could not be considered as amounting to binding norms, as the Panel had done. The Appellate Body had also clarified that, contrary to the Panel's interpretation, the right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement was an autonomous right not an exception from a general obligation under Article 3.1 of the SPS Agreement. As a result of this general approach, the Communities had been found not to have violated Article 3.1 of the SPS Agreement, although the Panel had found a violation.

In examining whether the EC measure resulted in discrimination or a disguised restriction on international trade, the Appellate Body had taken into account the carcinogenic potential of hormones, the dangers of abuse of hormones, and the concerns in the Communities over the quality and drug-free character of meat. This had led the Appellate Body to conclude the following: "We are unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of hormones here in dispute for growth promotion purposes in the beef sector were not really designed to protect its population from the risk of cancer, but rather to keep out US and Canadian hormone-treated beef and thereby to protect the domestic beef producers in the European Communities." (paragraph 245 of the Appellate Body Report). The Communities were satisfied that this claim of protectionism had now been conclusively rejected. In consequence, the Communities had been found by the Appellate Body not to have violated Article 5.5 of the SPS Agreement.

The only inconsistency that had been upheld by the Appellate Body was that the EC ban on hormone-treated meat did not comply with requirements of Article 5.1 of the SPS Agreement that such a measure be based on an assessment, as appropriate to the circumstances, of the risks to human health. However, it was important to note the significant qualifications made by the Appellate Body in this respect. First, the Appellate Body had confirmed that for a measure to be "based on" a risk assessment meant that it had to be "sufficiently warranted or reasonably supported by" a risk assessment (paragraph 193 of the Appellate Body Report). This had made a big difference compared with the Panel's finding that "based on" meant "conforming to". This was especially relevant for Members who in this area acted cautiously and wished to achieve a level of sanitary protection higher than that recommended by international standards.

Second, the Appellate Body had also confirmed that it was not necessary for a Member to perform its own risk assessment. An SPS measure might well find its objective justification in a risk assessment carried out by another Member or an international organization (paragraph 190 of the Appellate Body Report). This should be reassuring to all Members, and in particular developing-country Members who might not be in a position to make their own risk assessment. In this respect, he noted that the Communities found it disconcerting that the complainants had refused to provide the EC with the scientific information in their possession on which their risk assessment regarding the hormone MGA[4] was based. It would have certainly been possible to cope with any concerns for confidentiality of data. This general issue could be considered by the DSB during the review of the DSU.

As a third qualification to the obligation to base sanitary measures on a risk assessment, the Appellate Body had rejected the notion that a risk assessment had to be quantitative in nature and had to establish a minimum magnitude of risk. As stated by the Appellate Body, "... the imposition of such a quantitative requirement finds no basis in the SPS Agreement" (paragraph 186 of the Appellate Body Report). Fourth, the Appellate Body had ruled that a risk assessment did not have to come to a monolithic conclusion reflecting the mainstream of scientific opinion. In paragraph 194, the Appellate Body stated that, "... equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion from qualified and respected sources."

The Appellate Body had held that the scientific evidence presented by the Communities had been relevant and had demonstrated that the hormones concerned had a carcinogenic potential. The only shortcoming in the scientific evidence had been that it had not appeared to be sufficiently specific to the case at hand. This meant that it had not focused enough on the carcinogenic potential of those hormones when used specifically for growth promotion purposes, in particular the potential

[4] Synthetic hormone: melengestrol acetate.

for carcinogenic effects arising from the presence in meat of residues of the hormones concerned (paragraphs 199 and 200 of the Appellate Body Report). Since this was a possible lacuna there was a need to find out how it could be filled more specifically.

In paragraph 205 of its Report, the Appellate Body had considered that the language of Article 5.2 of the SPS was "... amply sufficient to authorize the taking into account of risks arising from failure to comply with requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as the risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice." This was an important finding. The risk to be evaluated in a risk assessment was not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also, as stated by the Appellate Body "... risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die." (paragraph 187 of the Appellate Body Report).

In the above-mentioned instances, the Appellate Body had provided much needed guidelines for Members and panels to deal with future cases where trade obligations would have to be reconciled with other legitimate interests such as human, animal or plant life or health protection or environmental protection. This would help to increase Members' confidence in the ability of the dispute settlement system to deliver fair, workable and prudent rulings. It was therefore clear that the Communities supported the adoption of the Appellate Body Report and the Panel Reports.

The representative of Norway underlined that with reference to information found in the press that Norway supported the United States and Canada with regard to this matter, his country, through the EEA Agreement, was an integral member of the EC internal market even though it was not a member of the European Communities. One aspect in this dispute, although not necessarily a matter of cause and effect was the fact that Norway and the Communities had a very similar legal situation regarding regulations on imports of meat and meat products. Norway welcomed the Appellate Body Report and the fact that this Report had modified or reversed important aspects of the Panel Reports. In this regard, his delegation supported the statement made by the Communities. Norway was glad that the Appellate Body had reversed the Panel's ruling in general with regard to the question of the burden of proof and in particular with regard to a situation where a measure was not based on international standards in accordance with Article 3.1 of the SPS Agreement. He emphasized the importance of the Appellate Body's ruling that Article 3.3 of the SPS Agreement was not an exception to Article 3.1 of the SPS Agreement and, like the Communities, noted the importance of clarifying the relationship between Articles 3.1 and 3.3 of the SPS Agreement and of the concepts: "based on" and "conforming to". Norway considered that the Appellate Body had made important modifications with regard to the Panel's interpretation on the concept of risk assessment and the fact that factors which were not susceptible of quantitative analysis could not be excluded *a priori* from the scope of a risk assessment.

The representative of New Zealand said that his country had participated as a third party in the proceedings of the Panel and the Appellate Body. New Zealand welcomed the adoption of the Panel and the Appellate Body Reports. These Reports would serve to reinforce the trade facilitating objectives that underpinned the SPS Agreement. Both the Panel and the Appellate Body had confirmed that it was not permissible to maintain SPS measures that were not "sufficiently supported" or "reasonably warranted" by a risk assessment carried out in accordance with Article 5 of the SPS Agreement. As a result, they had left no doubt that the SPS Agreement included a range of substantive -- and not merely procedural -- risk assessment disciplines that had to be followed by Members in order to justify the imposition of SPS measures. In this regard, New Zealand welcomed the Appellate Body's analysis of the substantive requirements for a risk assessment.

New Zealand had the following observations with regard to the Appellate Body Report. The Appellate Body had upheld the right of Members to determine their own appropriate level of sanitary

or phytosanitary protection. However, as the Appellate Body had made it clear, this right was not "an absolute or unqualified right". It had to be exercised in conjunction with the other provisions of the Agreement, and, in particular, those relating to risk assessment as set out in Article 5 of the SPS Agreement. The Appellate Body had also stressed that an integrated approach was required when interpreting the various provisions of the SPS Agreement. The provisions of the SPS Agreement, in particular Articles 2 and 5 thereof, should be read together; one could not be interpreted in isolation from the other. With regard to the importance of a risk assessment, he quoted paragraph 177 of the Appellate Body Report which stated that: "The requirements of a risk assessment under Article 5.1 as well as of 'sufficient scientific evidence' under Article 2.2 are essential for the maintenance of the delicate and carefully negotiated balance in the SPS Agreement, between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings." In the view of New Zealand, this was a succinct and instructive determination that ought to be respected by all Members.

However, the Appellate Body seemed to leave two areas open for further consideration. First, its interpretation of Article 3.1 of the SPS Agreement had displaced the balance away from the Panel's interpretation of an obligation to harmonize SPS measures with relevant international standards, to one in which the provision was depicted as expressing a goal of harmonization. Second, the Appellate Body's discussion of Article 5.5 of the SPS Agreement -- a provision that sought to advance the principle of consistency in the application of SPS measures at the domestic level -- had demonstrated that jurisprudence in this area remained to be fully elaborated. In this regard, he noted that the SPS Committee had been mandated to develop guidelines to further the practical implementation of Article 5.5. Such guidelines could play an important role not only as guidance provided to Members in elaborating SPS measures, but also by assisting future Panels and the Appellate Body to develop a consistent approach to questions regarding Article 5.5 of the SPS Agreement.

He noted that applying the relevant requirements of the SPS Agreement, both the Panel and the Appellate Body had determined that the EC ban on imports of meat from animals treated with hormonal growth promoters was contrary to the Communities' obligations under Article 3.3 and 5.1 of the SPS Agreement. New Zealand fully agreed with these findings. The disputed EC measures were of long-standing concern, not only to countries that wished to export meat treated with hormonal growth promoters to the Communities, but also to a much broader range of agricultural exporting countries, including New Zealand, which remained seriously concerned about the systemic implications to global agricultural trade of sanitary and phytosanitary measures that were not supported by scientific evidence. The measures were in place for over a decade, generating a debate in the GATT as well as in the WTO. As the Appellate Body had now settled the issue by confirming the incompatibility of the ban with the Communities' obligations under the SPS Agreement, New Zealand believed that it was now incumbent on the Communities to take prompt action to lift the ban. New Zealand believed that this was the only course of action both compatible with Appellate Body ruling and consistent with the objective of maintaining the integrity of the dispute settlement system.

The representative of Australia said that her country had also participated as a third party in this dispute. Australia supported the adoption of the Appellate Body Report and the Panel Reports as modified by the Appellate Body Report and welcomed the findings of the Reports that the EC measure was inconsistent with the Communities' obligations under the SPS Agreement. Her country also welcomed the important contribution made by the Appellate Body Report to the WTO jurisprudence and to the quality and soundness of the legal reasoning adopted in the dispute settlement system. Her delegation looked forward to the Communities' statement, within the next thirty days, in regard of their intentions in bringing their measure into compliance with the findings of the Reports. She noted that the findings of the Appellate Body had not questioned the right of countries to take measures necessary for the protection of life and health. However, they had upheld the key role of the SPS Agreement in minimizing the scope for SPS measures to operate as unjustifiable barriers to trade.

Her delegation hoped that the Communities and the complaining parties would be able to reach mutual agreement on the time-frame and basis for the Communities to achieve full compliance with their SPS obligations while also respecting the rights of other Members. Her delegation looked forward to contributing to surveillance of the implementation of the DSB's recommendations in this case in future DSB meetings.

The representative of Argentina said that his delegation supported the adoption of the Panel Reports as modified by the Appellate Body Report and wished to make some comments on specific points in accordance with Article 16.4 of the DSU. In the view of Argentina, the finding contained in paragraph 253(j) of the Appellate Body Report could open the way for diverging interpretations of the scope of obligations set out in Article 5.1 of the SPS Agreement, which defined the elements to be taken into account in risk assessment. In modifying the finding of the Panel, the Appellate Body appeared to widen the basis for justifying SPS measures. This was because the Appellate Body had placed the scientific basis for assessing "risks to human life or health" on the same footing as other factors that could not be assessed on the basis of scientific principles and evidence.

He recalled that in the Uruguay Round, the negotiators of the SPS Agreement had explicitly decided to disregard non-scientific factors, as far as possible. The decision with regard to the level of protection was sovereign but it had to comply with the provisions of Article 2 of the SPS Agreement, the overall risk-assessment methodology derived from all the provisions of Article 5 of the SPS Agreement and the objectives and other provisions of the SPS Agreement. Therefore, this could not be a sovereign decision of a political nature. The level of protection should systematically stem from: (i) a risk analysis based on the techniques "developed by the relevant international organizations" (Article 5.1), which had to take into account the prevailing specific sanitary conditions (Article 5.2); (ii) the economic effects of the protective measure (Article 5.3); (iii) a consideration of the objective of "minimizing negative trade effects" (Article 5.4); and (iv) a search to achieve consistency "in risk management" (Article 5.5). These elements defining the level of protection under the SPS Agreement highlighted the contractual nature of the provisions and the principal idea that the sovereign decision with regard to the level of protection required the largest possible number of objective references, in particular those of a scientific nature. Any interpretation which viewed the definition of the level of protection as a "political decision" would diverge from the provisions of the SPS Agreement.

Argentina was therefore concerned with regard to the grounds for the Appellate Body's finding contained in paragraph 187 of its Report. In its reasoning, the Appellate Body had followed the interpretation that factors enumerated in Article 5.2 such as: "relevant processes and production methods" and "relevant inspection, sampling and testing methods" should, for the purposes of "risk assessment", be placed on an equal footing with the "scientifically based" grounds, which, in Argentina's view, were the primary factor justifying a measure. This reversal of the Panel's finding on the "risk assessment" concept in Article 5.1 had widened the scope of the factors to be assessed and had indirectly diminished the weight, within the risk assessment process, of the other factors that were indeed "susceptible of verification in a science laboratory". The Appellate Body stated as follows: "It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die." (paragraph 187 of the Appellate Body Report).

In the real world, properly carried out risk assessments would allow for the possibility that laboratory testing might not be foolproof, and there was generally a tendency to quantify the risk involved for human, animal and plant health, as well as the possible economic and sanitary effects that might ensue from such situations. Nobody could rely one hundred per cent on the assessments since the purpose of the SPS Agreement was to abandon the "zero risk" concept, but the aim of the multilateral disciplines was to determine the conditions in which trade could be carried on with the

least reasonable risk. The work of the scientific community was precisely to determine the conditions in which trade could be carried on within the parameters of the Agreement. Therefore, the argument of the Appellate Body to reverse the Panel's finding might open the way for the introduction of political considerations that would be difficult to assess and potentially subjective and conflictual, as they could be determined according to national interests rather than their contractual international obligations. This possibility of using factors which might alter the balance of the text of the SPS Agreement and be used as a basis for trade restrictions might distort the application of one of the most laboriously negotiated Agreements of the Uruguay Round. He reiterated that Argentina supported the adoption of the Reports.

The representative of Switzerland said that his country welcomed the strict interpretation of the SPS Agreement by the Appellate Body which had confirmed the fact that, while respecting certain conditions, a Member might choose a protection level deviating from international standards. Switzerland agreed with the findings of the Panel and the Appellate Body, in particular with the recognized necessity for a scientifically based risk assessment, which had provided evidence and sufficiently supported the need and justification of possible protection measures. Consequently, Switzerland understood the Appellate Body Report in the sense that in line with Article 2.2 of the SPS Agreement, the risk assessment had to be undertaken before any measures of protection would be applied, except when measures of an urgent nature were required.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS26/AB/R-WT/DS48/AB/R and the Panel Reports in WT/DS26/R/USA, WT/DS48/R/CAN as modified by the Appellate Body Report.

5. European Communities - Regime for the importation, sale and distribution of bananas

- Statement by Mexico

The representative of Mexico, speaking under "Other Business", also on behalf of Ecuador, Guatemala, Honduras, Panama and the United States, recalled that at the DSB meeting on 22 January 1998, they had individually expressed concerns with regard to the Commission's proposal concerning the European Communities' banana import regime. At the present meeting, he wished to inform the DSB of the following: (i) on 28 January 1998, the above-mentioned countries had received the Commission's proposal regarding the EC banana import regime as well as a brief explanation regarding its main aspects; (ii) after the examination of the Commission's proposal and the explanation provided by the Communities, the six countries believed that if this proposal was implemented it would result in a banana import regime incompatible with the WTO rules. Consequently, on 5 February 1998, a document had been sent to the Communities which summarized preliminary views regarding the Commission's proposal. He drew to Members' attention that his statement and the document to which he had referred would be made available at the end of the meeting. He stressed that the Governments of the six countries were ready to work with the Communities to ensure that, as from 1 January 1999, the banana import regime would fully comply with the Communities' obligations under the WTO. In this context, they looked forward to working with the Commission and the member States in the forthcoming months, to ensure that a banana import regime, compatible with the WTO, would be implemented in accordance with the recommendations of the Panel and the Appellate Body.

The representative of Ecuador noted the steps and procedures of the Communities to discuss the terms of the Commission's proposal aimed at amending Council Regulation 404/93 establishing the common organization of the market for bananas. Ecuador hoped that the suggestions and comments made by Members, including Ecuador, would contribute to this process, so that this proposal would specifically incorporate the recommendations of the Panel and Appellate Body that had not yet been included therein. The final outcome of this process should bring satisfactory results to all Members with interests in the banana sector, in particular to Ecuador, the world's largest banana

exporter into the European market. It should also resolve the conflict of interests among the member States regarding bananas.

Ecuador believed that the most important result would be the strengthening of confidence of all Members regarding the benefits and efficiency of the dispute settlement mechanism. All Members, but in particular developed-country Members, had a responsibility not to cause frustration, disenchantment and mistrust in the efficiency of the dispute settlement system. Undoubtedly, the consequences of disregarding the DSB's recommendations would be carefully weighed by the Commission and member States. The precedent that would be created would be unfavourable for the proper functioning of the system. The trading powers which most frequently used the dispute settlement mechanism were undoubtedly aware of the implications of non-compliance and had therefore been first to recognize the need to demonstrate their readiness and willingness to respect the WTO rules.

Ecuador had brought to the attention of the Commission certain aspects to be taken into account which would enable the banana import regime to be fully compatible with the recommendations of the Panel and Appellate Body. He recalled that in his statement made at the DSB meeting on 22 January 1998, he had stressed his concern that bananas from Ecuador would gradually be displaced from the European market. On that occasion, he had also stated that the following elements of the proposal were incompatible with the WTO: (i) the application of Article XIII of GATT 1994 with regard to different quotas proposed by the Commission. The obligation of non-discrimination was fundamental and had to be respected, since no Member had been granted a waiver enabling it not to comply with provisions of this Article. The waiver had only been granted with regard to Article I of GATT 1994, as confirmed by the Appellate Body; (ii) the volumes and levels of the tariffs that would be imposed on imports of bananas into three new member States and the imports of other countries that would join the Communities in the future. If the banana imports were subject to new rules and new terms were established, the interests of some Latin American countries would be affected, in particular the trade interests and investments made by Ecuador's nationals and firms involved in the various stages of the process, aimed at, *inter alia*, improving their competitiveness and securing a stronger position on the European market; (iii) the attempt to extend the application of the preferential regime for bananas up to the year 2005, as set out in the proposal; and (iv) the licensing system, the details of which had not yet been disclosed by the Commission and were therefore a source of concern because the functioning and administration of the system would have implications on the banana trade and might create a risk of injury with unpredictable consequences.

The representative of the European Communities acknowledged the receipt of the document. This document had been circulated to all member States of the Communities and had been transmitted to his authorities in Brussels. As he had stated at the DSB meeting on 22 January 1998, he recognized that other parties had the right under the DSU to raise the issue of implementation at any time, but the Communities, currently in the process of implementation pursuant to their internal procedures, had an equal right not to reply to such issues in detail while undertaking these procedures. He added that it was possible that the parties to this dispute would read the Panel and the Appellate Body reports differently and that they would have different interpretations on some points contained therein. He noted that this was a result of rulings which had not been clear with regard to all elements of this dispute. If this persisted and parties continued to have different views on implementation it would be difficult to conclude that a definite solution to this problem had been reached. This could be considered when judging the ultimate effectiveness of the procedures. The parties to the dispute had stated and continued to state their views regarding the requirement of implementation. The Communities maintained their view but they had decided to pursue their own course and internal procedures and interested parties were invited to remain in contact with Brussels to discuss how to resolve this issue.

The DSB took note of the statements.

6. Procedural aspects of the DSU review
- Statement by the Chairman

The Chairman, speaking under "Other Business", said that he had circulated to delegations a self-explanatory note outlining his consultations on procedural aspects of the review of the DSU. He recalled that in 1997, he had invited delegations to make their views known to him and a substantial number of delegation had done so. This note was factual and practical. He noted that Members shared the desire to clarify procedural matters to the extent possible before considering the substance of the review. He had also received some positive response to this report on his consultations and he proposed that the DSB take note of it as a basis for future discussion.

In looking forward to this discussion, which would be a matter for his successor as Chairperson of the DSB, he wished to make three brief observations: (i) this was a Member-driven Organization and it was clear that inputs for the review and the review process were exclusively a matter for Members; (ii) suggestions had been made as to how Members might benefit from hearing the ideas of others as they would develop their thinking, including the scope to draw on informed views of participants within the structure of the dispute settlement mechanism, and even the possibility of ideas from informed observers outside this house. At present this issue was unresolved, but he hoped the incoming Chairperson would quickly find a constructive way forward; (iii) the consultations had given him a sense of confidence that Members attached great value to the dispute settlement mechanism, and that they would address with care, precision and foresight the fine-tuning of this central feature of the rules-based multilateral trading system. He proposed that the DSB take note of the report as a basis for future discussion.[5]

The DSB so agreed.

7. Concluding remarks by the Chairman

The Chairman, speaking under "Other Business", said that subject to satisfactory conclusion of the consultations conducted by the Chairman of the General Council, it was expected that the DSB would formally elect its new Chairman at its meeting on 13 March 1998. Since he would complete his posting in Geneva on 2 March, he proposed that the next DSB meeting be opened either by the Chairman of the General Council or the Chairman of the Trade Policy Review Body, with the election of the DSB Chairperson as the first item on the agenda.

The representative of India said that since the Chairman would be absent at the time of the next DSB meeting, he believed that it was his duty, as well as other members of the DSB, to thank the Chairman for his excellent and outstanding work. It had been a pleasure to have Mr. W. Armstrong as Chairman of the DSB. As someone who had worked closely with the Chairman, he wished, at the present meeting, also on behalf of other DSB members, to pay tribute to him for his outstanding performance.

The Chairman said that, given the hour, and consistent with what he hoped had been the practice during the past year of discharging the business efficiently, he did not wish to detain delegations. He noted that the past year had been an active one. Like his predecessors, he had seen delegations making full use of the dispute settlement system. The number of requests for consultations initiated under the DSU had risen from 83 in 1996 to 118. To date, eight Appellate Body reports had been circulated as compared to two in 1996. This increasing use of the system was a positive sign, as

[5] Subsequently circulated in WT/DSB/W/74.

Ministers had noted in Singapore. The structure of the rules-based dispute settlement system was being progressively reinforced through use and interpretation. This evolution into an even more juridical atmosphere was perhaps inevitable. But it would be important that the system retained the flexibility which had been a feature to-date and which had allowed Members to resolve disputes in advance of final legal determination. That point was, of course, underlined in Article 3.7 of the DSU. He said that it had been an honour and a privilege to be the Chairman of the DSB. He thanked Members for their cooperation and assistance during his term

The DSB took note of the statements.