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Dispute Settlement Body
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MINUTES OF MEETING

Held in the Centre William Rappard
on 21 October 1998

Chairman: Mr. Kamel Morjane (Tunisia)

Subjects discussed: Page

Prior to the adoption of the agenda the item concerning the adoption of the Panel Report on "Korea – Taxes on Alcoholic Beverages" (WT/DS75/R - WT/DS84/R) was removed from the proposed agenda since Korea had appealed this report on 20 October 1998.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) Canada - Certain measures concerning periodicals: Status report by Canada (WT/DS31/9/Add.5)

(b) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/17/Add.2)

The Chairman recalled that Article 21.6 of the DSU required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the two sub-items be considered separately. First, he drew attention to document WT/DS31/9/Add.5 which contained Canada's sixth status report regarding its progress in the implementation of the DSB's recommendations.

The representative of Canada said that his Government was pleased to present its sixth status report on this matter. As noted in its report, Canada would comply with the DSB's recommendations by 30 October 1998. The required parliamentary proceedings to enact the changes respecting the Customs Tariff and Part V.1 of the *Excise Tax Act* had been initiated and were scheduled to be completed before 30 October 1998. With respect to the postal implementation, Canada Post had sent a letter to all its publications' mail clients, domestic and foreign, informing them that, with effect from 30 October 1998, all publications' mail customers would pay the domestic price, which represented significant savings for foreign magazines. In addition, publishers that received the postal subsidy had been informed by the Department of Canadian Heritage of the administrative changes that would take place on 30 October. Canada, as one of the original architects of the dispute settlement mechanism took the DSB's recommendations very seriously and would fully implement them on 30 October.

He also wished to address one issue raised by the United States at the DSB meeting on 22 September 1998. At that meeting, the United States had referred to a new legislation being introduced in the Canadian Parliament which it had characterized as replacing the measures recommended for removal by the Panel and the Appellate Body in the *Periodicals* case. Canada could not agree with statements linking this bill to the implementation of the DSB's recommendations in the *Periodicals* case. His country wished to state clearly that the proposed legislation which would give Canadian magazine publishers access to advertising revenues in Canada was a new, separate legislative measure taken to achieve its cultural policy objectives. The new measure related to advertising services, an area in which Canada had not taken commitments under the GATS. This measure was therefore fully consistent with its WTO obligations. He noted that in Canada's first report on this matter at the DSB meeting on 25 March 1998, his delegation had recalled that the panelists in their concluding remarks had stressed that the ability of any Member to take measures to promote its cultural identity was not at issue in this case. For its part, Canada was committed to policies and measures aimed at maintaining the viability of its cultural industries, which it believed would be consistent with its WTO rights and obligations.

The representative of the United States said that on 8 October 1998, Canada had introduced a bill in Parliament that would ban foreign-owned publishers from carrying advertisements in their magazines if such advertisements were aimed at Canadian consumers. The bill was Canada’s answer to the Panel and the Appellate Body reports condemning a discriminatory tax - and import ban - on magazines carrying the same advertisements. It perpetuated Canada’s long-standing policy of

sheltering its magazine industry from competition by funnelling its advertising revenues exclusively to Canadian publishing companies. It was openly protectionist and discriminatory. Foreign produced split-run periodicals would continue to be shut out of the Canadian market as they had been for the past 30 years.

One of Canada's leading newspapers, the *Financial Post* stated that, "the measures [are] crafted to get around a 1997 WTO ruling that Canada discriminated against US magazines". A bill of this nature apparently represented Canada's idea of compliance with the Panel and the Appellate Body reports. Canadian officials had suggested that the bill, despite its discriminatory nature, would bring Canada into conformity with its WTO obligations. This was because it would forbid foreign-owned magazine publishers from accepting advertisements aimed at Canadian consumers rather than taxing the magazines that contained such advertisements. If the bill was enacted, Canada would have reproduced the precise exclusionary effect of the measures condemned by the Panel and Appellate Body. In particular, imported magazines, unlike most of their Canadian-produced counterparts, would be prevented from carrying advertisements aimed at Canadian consumers. This new form of protectionism had been justified on the ground that it was inconsistent with the anti-discrimination provisions of the GATS rather than the GATT; conveniently, Canada had not made commitments regarding advertising under the GATS, as pointed out by Canadian representatives. It was perplexing that Canada believed that its GATT/GATS argument, which the panel and the Appellate Body had soundly rejected in 1997, had taken on credibility with the passage of time.

The introduction of bill C-55 should not obscure a second aspect of Canada's purported compliance with the Panel and Appellate Body reports. Canada had made clear that it intended to continue its practice of providing postal subsidies exclusively to Canadian-owned publishers. It had announced that it would begin using the subsidy to credit the accounts maintained by Canadian publishers with Canada Post, Canada's government postal service. This practice would replace the present system under which Canada Post reduced the rates for magazines produced by Canadian-owned firms.

Canada had opted to make a purely cosmetic change that would leave the discrimination condemned by the Appellate Body in place. Under the new system, as under the old, the cost of mailing imported magazines would be higher than the cost of mailing Canadian magazines. It was difficult to discern how this new discriminatory postal subsidy differed from the one which the Appellate Body considered that it violated GATT's national treatment principle.

Both the bill introduced on October 8 and the new postal subsidy scheme had sent a troubling signal regarding Canada's seriousness in abiding by its international obligations, and in particular, in observing both the letter and spirit of the dispute settlement system. Canada's willingness to comply with a WTO panel decision had been put to the test for the first time. Canada had requested, and insisted on 15 months to consider how to respond to the Panel and Appellate Body reports. That period should have been used to provide a GATT-consistent response and to prepare Canada's domestic industry for the introduction of the type of competition envisaged under the GATT. Instead, for over a year, Canada had refused to disclose any of the alternatives it was considering or to consult with interested governments regarding its compliance. After virtually the entire 15-month period, Canada had suddenly announced replacement measures that were both discriminatory and protectionist.

If Canada could not or would not live up to its international commitments, it should state this openly. The DSU and the GATT contained procedures for accommodating such a decision. However, the replacement bill that Canada had introduced, and the continuation of its postal subsidy, threatened to make a mockery of the dispute settlement process. This was because both suggested that the answer to an unfavourable panel and Appellate Body report was to stall for time and then trade one form of protection for another. Canada could not expect other Members to follow internationally agreed dispute settlement rules if it did not abide by those rules. The United States

strongly urged Canada to reconsider its course and to withdraw the C-55 bill as well as the proposed subsidy. If not, her country was prepared to take action in this regard.

The representative of Canada wished to reiterate that his Government was in the process of finalizing all the necessary legislative and administrative measures to bring its measures into conformity with the DSB's recommendations. He noted that the United States was concerned about the fact that Canada would continue to subsidize its magazine industry. It was his understanding that in most cases of domestic subsidies, Members favoured their domestic industries over foreign ones with regard to the provision of subsidies. With respect to Canada's new measures, which had recently been introduced, he emphasized that these measures related to advertising, an area in which Canada had not accepted any obligations under the GATS. His country believed that in response to the *Periodicals* case it had fully dealt with all the findings raised therein.

The DSB took note of the statements.

The Chairman drew attention to document WT/DS27/17/Add.2 which contained the third status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

The representative of the European Communities said that as noted in the report, the Community had entered into negotiations with all parties having a substantial interest in supplying bananas to the EC market, in order to seek agreement with respect to the allocation of shares pursuant to Article XIII:2(d) of GATT 1994. These negotiations, however, had not resulted in any agreement. At the present meeting, he wished to draw attention to a development which should be of serious concern to the DSB members. Some members of the US Congress had proposed a WTO-incompatible legislation providing for retaliatory action based on a US unilateral evaluation of the EC's non-compliance with the DSB's recommendations on bananas and other products. The Community welcomed an intervention by the US administration which had been instrumental in the withdrawal of this draft legislation. However, the Community was surprised and disappointed by a White House letter to Congress on the same issue. This letter appeared to represent a threat of retaliation based on a US unilateral determination of non-compliance. This retaliation was not to be conditional upon the result of the dispute settlement procedures under Article 21.5 of the DSU, which was the only way under the WTO rules to determine if the EC's modified regime was WTO-consistent. He underlined that any action based on a unilateral determination would be illegal and the EC would be obliged to challenge it.

In this letter, dated 10 October 1998, signed by the White House Chief of Staff [1], reference had been made to retaliation, if the EC's regime was found to be WTO-inconsistent and not acceptable to the United States. It was clear that the EC's regime needed only to be WTO-consistent. It was not for the United States or any other delegation to attach further conditions. If the United States were to take retaliatory action based on a unilateral assessment of unacceptability, this would be against its WTO obligations. Article 23 of the DSU clearly prohibited the making of unilateral determinations of violations or nullification and impairment of benefits. Since there was disagreement between the parties on the consistency of measures taken, the procedures under Article 21.5 of the DSU had to follow its course and be completed before any compensation or withdrawal of concessions could be requested pursuant to Article 22 of the DSU. Compliance with the WTO recommendations was a matter not for unilateral consideration and decision by the United States but for the WTO to determine. The Community was in the process of implementing the DSB's recommendations in conformity with its WTO obligations. When such implementation was completed, the United States would have the right to continue to pursue the appropriate and internationally agreed dispute settlement procedures. However, as a major trading party, with a shared interest in a strong and respected DSU, the Community invited the United States to refrain from taking any unilateral action,

[1] "Inside US Trade", Vol. 16, No. 41, 16 October 1998.

in clear contravention of its international obligations, which would require the EC to bring the matter to the WTO.

The representative of Ecuador, speaking also on behalf of Guatemala, Honduras, Mexico Panama and the United States, said that the complaining parties had reviewed the status report by the Community. The report had provided an assurance that the reasonable period of time "will be duly respected". However, as stated previously, the measures on market sharing and licence allocation proposed by the EC to be implemented on 1 January 1999, would be inconsistent with the GATT and/or the GATS. The complaining parties had waited over five years for this dispute to be settled. The EC still had about two months before the expiry of the reasonable period of time. The complaining parties therefore wished to request that the EC modify its proposal and hold urgent consultations with them before 1 January 1999 regarding the implementation of a regime that would be WTO-compatible. The complaining parties were confident that it was possible to discuss this issue in good faith, and that in such favourable circumstances this dispute could be promptly settled. He reiterated that the EC should comply with its undertakings in order to uphold the credibility of the DSU.

The representative of Ecuador, speaking on behalf of his delegation only, further said that it was only two months before the expiry of the reasonable period of time. Although the EC had stated that it would implement the DSB's recommendations within that period of time, Ecuador continued to have doubts about this matter. The measures taken thus far by the EC had demonstrated that the discrimination would continue since this new EC regulation, scheduled to be effective on 1 January 1998, would not comply with the DSB's recommendations. As a result, the EC would imperil the foundations of the dispute settlement system and bring Members into uncharted territory. The manner of resolving this dispute could become a guideline for ensuring the future credibility and efficiency of the system. It was therefore necessary that this matter be discussed and resolved before 1 January 1999. For Ecuador, a country with an economy based on the production, marketing and distribution of bananas, this expensive and excessively protracted matter could lead to injustice. It could also demonstrate that developing countries might be deprived of benefits under a system of rules as a result of disguised illegal actions and discriminatory treatment by one Member.

Ecuador awaited the EC's final amendment to its banana import regime since it would affect the main market for its most important agricultural export product. It wished to be informed of the new conditions of competition in the EC market which should, at least in principle, be free of discrimination. Ecuador had a right to demand that this should not entail delaying tactics to postpone compliance. Together with other complainants, Ecuador had repeatedly stated in the DSB that the EC Commission had ignored their views on the modification of its banana import regime and had adopted new measures which had been challenged both in the DSB and in bilateral consultations. This had led to disagreement with regard to the WTO consistency of the EC measures shortly before 1 January 1999. This dispute could be further prolonged as a result of the initiation of procedures to challenge, once again, the EC import banana regime. The time involved in any such procedures favoured the EC's trade interests and harmed Ecuador. The EC had also disregarded the letter and spirit of the DSU, and in particular Article 21.8 thereof. In this dispute, no account had been taken of the trade impact on Ecuador's economy pursuant to Article 21.8 of the DSU. He therefore appealed to the DSB and the EC member States to urge the Commission to deal with this matter shortly. At the meeting of the General Council in October 1998, the Director-General had raised the question of transparency. He had stated that there was a mistaken perception of the WTO's work because civil society or the general public did not have access to information. He had also stated that it was therefore necessary to improve the WTO's communication policy, on the basis of the principle of transparency. However, he had added that while this negative image of the WTO might be remedied by a better policy of communication, a feeling of concern and uneasiness was being spread among developing countries at the absence of equity and special and differential treatment. The only strength of developing countries was to support multilateral rules which upheld their rights. The settlement of this dispute could not be imposed unilaterally. For example, the imposition of a new regime that,

apart from making a mockery of the dispute settlement system, would lead to its erosion and prolong the dispute without a speedy action such as immediate recourse to the original panel. In the context of this search for a balance, he could not fail to mention that the sole strength of developing countries with relatively small economies, was the law enshrined in panels and the multilateral order. Ecuador would therefore continue its search towards ensuring that the market for its primary export product was governed by fair and non-discriminatory rules. His country wished to reserve its right under Article 21.5 of the DSU to counter any inconsistencies of the EC's new measures with the GATT and GATS.

The representative of Honduras said that her Government attached great importance to the dispute settlement system, because it considered it a legitimate option for ensuring that its rights were fully respected. After participating in lengthy proceedings before the Panel and the Appellate Body and after the adoption of the DSB's recommendations, Honduras had serious doubts and was concerned about the effectiveness of the system. Although the reasonable period of 15 months set by the arbitrator was extremely burdensome due to the negative impact on its economy, her country had been confident that on 1 January 1999 the EC would bring its regime into conformity with its WTO obligations. She regretted that several months had elapsed and it appeared that the 15-month period might be prolonged arbitrarily. In order to preserve the discriminatory and illegal measures which had already been condemned, the EC had made its own interpretations of the reports, and had used every means to prevent the original panel from ruling promptly on the incompatibilities of the new system it wished to introduce. Honduras believed that it had received an unfair treatment. It considered that if this case - which many had viewed as the trade dispute of the century - could be reduced to a mere academic exercise, which in practice would replace one illegal system by another equally incompatible one, any future trade dispute might have similar results. She therefore wished to invite the developing-country Members to consider the difficult situation of her country, which after two years had realized that all its efforts had been wasted and that the proceedings had prolonged indefinitely the implementation phase of the DSB's recommendations. This experience did not contribute to the strengthening of the credibility of the system, and, like Honduras, other developing countries would harbour serious doubts about the effectiveness of resorting to the WTO. Efforts were underway in the DSB to review and revise the procedures. However, the solutions that could be proposed in this context would not remedy the denial of justice to Honduras. Although one might try to design the perfect system any change could be circumvented. The only effective solution was a change of attitude. Honduras still hoped that the EC would change its attitude and would take the necessary decisions to bring its banana import regime into conformity with the WTO without further complicated manoeuvring and within the time-limit set by the arbitrator.

The representative of Guatemala said that this dispute aimed at putting an end to the EC's banana import regime was not new. This matter had twice been examined in the GATT but the panel reports had not been adopted. The matter had once again been brought to the WTO with the hope that its dispute settlement system was reliable, foreseeable and effective. In the past several years, Guatemala had invested both time and effort in this case because it was confident that the dispute settlement system was a suitable means for ensuring that its rights would be restored. However, its expectations had been frustrated. The new regime which the EC wished to impose would not comply with the Panel and Appellate Body findings. It would no longer be possible for the original panel to conduct the review provided for in Article 21.5 of the DSU within the reasonable period set by the arbitrator. This situation raised serious systemic implications which affected the credibility of the dispute settlement system. Prompt and full compliance with DSB's recommendations as a means of ensuring the efficient settlement of all trade disputes was of interest to all Members. The history of the WTO was being written with each case brought by Members. The EC could still make a positive contribution, that would display its willingness to take the necessary decisions in order to bring its banana import regime into conformity with the WTO within the reasonable period of time.

The representative of Mexico said that his delegation supported Ecuador's statement on behalf of Guatemala, Honduras, Mexico, Panama and the United States. Like other complaining parties,

Mexico had repeatedly explained its view that the EC measures to modify its banana import regime were not sufficient to comply with the DSB's recommendations and were WTO inconsistent. Since the EC did not share this view, the complaining parties had proposed recourse to the original panel to decide on this matter. Unfortunately, it had not yet been possible to establish this panel to clarify the situation with the promptness that this case required. If both the respondent and the complainants were certain of their assertions, this matter could be referred immediately to the panel. Therefore, Mexico wished to take this opportunity once again to urge the EC to examine, with the complainants, the best way of ensuring that its new banana import regime was compatible with the WTO, and that it effectively complied with the DSB's recommendations.

The representative of the United States said that her delegation noted the EC's statement. The United States was not surprised that the EC had preferred to draw the DSB's attention to another matter rather than its long-standing pattern of total disregard of its GATT and WTO obligations regarding this dispute. The real issue before the DSB was the EC's intention towards its response to the panel and the Appellate Body reports. The issue was not what the US intended to do if the EC continued its current path toward non-compliance. The United States had been very transparent in announcing its domestic procedures to be followed in order to respond to the EC's anticipated failure to implement the DSB's recommendations. Under its domestic process, the United States could exercise its rights pursuant to Article 22 of the DSU. Under its law her country was required to seek public comment prior to taking such action, and therefore it was only complying with its domestic law. Her country was acting fully within its WTO rights and had scheduled future action accordingly.

For the past five years, the EC had reserved for itself the determination of whether its measures were consistent with its multilateral obligations by acting unilaterally and by ignoring the GATT and WTO decisions in this regard. It appeared that respecting its international commitments did not mean acting consistently with them. The United States was exercising its WTO rights to withdraw concessions if the EC would not comply with its obligations, which at the present it was not. In the first half of 1998, following the Commission's proposal, the United Stated had provided the EC with numerous opportunities to address its concerns. It had provided an opportunity for the EC to test its claim that its new measures were WTO-consistent. On 7 July, US officials had suggested to the EC that their staff work together to ensure a prompt reconvening of the original panel to examine the WTO-consistency of the EC measures and render a decision before the end of the reasonable period of time. The United States had stated that the risk was that if the EC did not see fit to change its course shortly the United States would have to suspend concessions under WTO procedures. Thus, the EC had no grounds to complain about US demands for compliance because it was taking a unilateral approach to compliance, developing a WTO-inconsistent solution without discussing the case with the United States. The EC's practices had been found to violate its international obligations three times in the last five years. The United States continued to hope that a WTO-consistent solution would be found through negotiation before it had to request authorization from the DSB to suspend concessions. The United States considered the suspension of concessions as a last resort, given the history of EC's unwillingness to negotiate on the basis of a WTO-consistent solution.

The representative of Panama said that his delegation supported the statements made by the complaining parties. Panama had repeatedly expressed, both individually and together with the complaining parties, its concerns and doubts about the lack of compatibility of Regulation 1637/98 to be implemented by the EC on 1 January 1999. From the outset all the six countries had indicated to the EC that this regime had failed to comply with the Panel and the Appellate Body recommendations. The EC had disregarded these views and had continued to do so with the recent regulation on the granting of import licences that would increase the WTO-inconsistency of its banana regime. He drew attention to the fact that almost two and a half months were left before the expiry of the reasonable period of time, yet the proposed regime did not represent any significant change from the previous one. He therefore reiterated his country's position that the proposed Regulation would not enable the EC to bring its banana regime into line with the WTO rules and principles. Panama was concerned about the EC's failure to comply with these obligations because its economy suffered great

losses under the current regime. He was concerned about further economic losses as a result of the implementation of a similar regime. Panama had been a Member of the WTO for more than a year and was concerned that one of the greatest achievements of the multilateral trading system, namely the prompt and effective dispute settlement system, was called into question by the intransigent stance of one important Member. He called on the EC to heed the concerns voiced by Panama together with the complaining countries and to recognize the need to engage without further delay in a dialogue aimed at implementation of a banana regime genuinely compatible with the WTO which would help to strengthen rather than weaken the WTO and hence free trade among nations.

The representative of Japan said that if a complaining party considered that a respondent had failed to implement the DSB's recommendations, the dispute settlement mechanism did not permit the former to take a unilateral action with regard to retaliation. At the present meeting, the United States had indicated that it would consider a WTO-consistent solution to this problem. Japan wished to encourage the United States to do so. In his country's view, Article 21.5 of the DSU provided Members with the necessary guidelines in this case.

The representative of Australia said that this case raised some important systemic and procedural issues. He recalled that that all Members were committed to multilateral dispute settlement. The DSU had thus far been one of the success stories of the Uruguay Round but there was a need to ensure that it would not stumble in the process of implementation. Australia urged Members to continue their commitment to Article 23 of the DSU, including adherence to the provisions of Article 23(a), (b) and (c) which in its heading referred to "Strengthening of the Multilateral System". The DSU provided the framework for resolving differences between Members on implementation although it was evident that there were differences in interpretation on the precise procedures. Due to the fact that there were significant points of procedure that had an impact on the functioning of the DSU, he proposed that it would be useful to have a structural debate in the DSB to clarify reasoning on these matters, which should be considered in the context of the DSU review.

The representative of Jamaica said that the DSB had before it the third report by the EC and prior to 1 January 1999, Members had to ensure that the Community had complied with the DSB's recommendations. As indicated in the status report, the second regulation concerning the rules for the management of the import regime would be adopted by the EC Commission. The negotiations undertaken by the Community on the allocation of shares had unfortunately not resulted in any agreement. As part of its international commitments, the Community was also obliged to consult with the banana-exporting countries which were members of the Lomé Convention. Therefore, the EC's compliance with its international commitments should not only be considered within the context of its WTO commitments. In modifying the trade provisions of the Regulation 404/93, the Community and the ACP countries were required to ensure that these measures were WTO-consistent. Jamaica wished that the EC be given the opportunity to consult and complete these modifications in accordance with the DSU provisions. Like the EC, his country was surprised by the draft legislation prepared by the members of Congress, which contained an error of fact. Jamaica was also concerned about the content of the letter from the US Administration which had referred to retaliation as determined by one party. Jamaica was therefore satisfied that this draft legislation had been withdrawn. In accordance with this statement, the United States was pursuing its domestic procedures, but any withdrawal of concessions by a Member had to be authorized by the DSB. Therefore, if after 1 January 1999 some dissatisfaction still remained, the nature and scope of any concessions could then be examined, taking into account that the party in question had no position with respect to banana exports but had only a systemic interest in this matter. The issue of the reconvening of the original panel was not simple and could not be determined exclusively either by the EC or the complaining parties. Any interpretation of the meaning and intent of Article 21.5 of the DSU had to be undertaken by the DSB. Jamaica therefore expressed satisfaction that the avenue previously sought had not been pursued. In November, the EC would submit its fourth report to the DSB and he hoped that, in the meantime, the consultations carried out in Brussels, Geneva and Washington would enable the parties to make progress towards meeting the legitimate interest of

these developing countries that exported bananas to the EC market as well as the interest of the banana exporting countries under the Lomé Convention with respect to which the Community had international commitments and obligations.

The representative of Cuba said that his delegation was concerned about the scope of any decision to be taken with regard to this case. Cuba was concerned about the economic conditions of the small and fragile Caribbean countries which were dependent on exports of bananas to the EC market. In order to preserve their subsistence and minimum standards of living, the ACP preferences and export quotas should be maintained. His country hoped that any subsequent negotiations or decisions on this matter would permit to maintain special and differential treatment in favour of the Caribbean countries and that this issue would be resolved on the basis of equity.

The representative of the European Communities said that his delegation had noted the statement made by Jamaica in relation to the Lomé Convention. However, he believed that at the present meeting it was not appropriate to further pursue this discussion. A considerable amount of time had already been devoted to this issue in an attempt to find a solution. The Community had worked and continued to work with its trading partners. He expressed doubt whether in any dispute so much time had been involved to discuss a proposal by a Member to comply with its WTO obligations. This was the case from the very early stages of this dispute after the adoption of the Panel and the Appellate Body Reports. The Community would continue this process and hoped that it would still be possible to reach a mutually satisfactory understanding and agreement on the way in which it had proposed to meet its WTO obligations. He also wished to place on record that his delegation could not accept that another delegation should refer to "the EC's total disregard of its WTO obligations". He considered that this statement should be withdrawn.

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

2. United States – Measure affecting government procurement

(a) Request for the establishment of a panel by the European Communities (WT/DS88/3)

(b) Request for the establishment of a panel by Japan (WT/DS95/3)

The Chairman proposed that the two sub-items be taken up together. He recalled that the DSB had considered this matter at its meeting on 22 September and had agreed to revert to it. First, he wished to draw attention to the communication from the European Communities contained in document WT/DS88/3.

The representative of the European Communities said that no new development had taken place since the previous meeting of the DSB. Therefore, his delegation requested, for the second time, the establishment of a panel in accordance with the provisions of the DSU and the Agreement on Government Procurement (GPA) to examine the compatibility of the Massachusetts law of June 1996 with the GPA.

The Chairman drew attention to the communication from Japan contained in document WT/DS95/3.

The representative of Japan said that he did not wish to reiterate the points made by his delegation at the previous meeting of the DSB. He only wished to point out that Japan considered that the measure at issue was inconsistent with the US obligations under the GPA. On 22 July, 2 October and 17 December 1997, Japan and the United States had held consultations on this matter. These

consultations, however, had failed to settle the dispute. Therefore, his country requested, for the second time, the establishment of a panel.

The representative of the United States expressed her country's regret and disappointment that the EC and Japan had reiterated their request for a panel, given the strong interest of all three parties towards improving the human rights situation in Myanmar. The United States remained concerned about the extensive abuses of human rights by the SLORC regime in Myanmar, which has been internationally condemned. Her delegation disagreed with the EC statement that no new development had taken place. She noted that on 17 September 1998, the European Parliament had approved a resolution which called on the EC to impose economic sanctions that would end all trade, tourism and investment in Myanmar, and to exert additional pressures on the regime. The resolution had also criticised "the Commission decision to insist on a conflict resolution panel within WTO over the law of the US State of Massachusetts".

Furthermore, recently, the International Federation of Chemical, Energy, Mines and General Workers' Unions representing more than 20 million EC workers had called on Sir Leon Brittan to "sever all trading links with Burma until democracy is restored." The Union had also noted that, "global public opinion will see the EC's pursuance of the Commission's case in the WTO as implying EU support for one of the world's most brutal and corrupt military dictatorships." It was unfortunate that the EC had chosen to ignore the requests of the European Parliament, and one of the largest EC worker's unions, and had continued to pursue this dispute. Her Government, with the assistance of, and in consultation with the Massachusetts officials would continue its efforts to reach a mutually satisfactory resolution with the EC and Japan without prejudice of the US rights under the WTO Agreement. The United States was prepared to defend this measure before a panel, if established.

The DSB took note of the statements and agreed to establish a single panel in accordance with Article 9 of the DSU with terms of reference pursuant to Article XXII:4 of GPA.

The representative of Japan said that it was his delegation's understanding that although a single panel had been established Japan wished to reserve its third-party rights with regard to the complaint raised by the Community.

The representative of the Philippines said that he sought clarification whether Members which were not parties to the GPA could, if they so wished, participate as third parties in the Panel proceedings.

The representative of the European Communities said that since this dispute concerned a Plurilateral Agreement, additional dispute settlement rules and procedures of that Agreement would also be applied in this case. This meant that only the GPA members could intervene and participate in decision-making on this matter. He then enumerated the GPA members: EC, US, Japan, Canada, Switzerland, Norway, Israel, South Korea, Singapore, the Netherlands on behalf of Aruba and Hong Kong, China.

The representative of Cuba requested that the Legal Affairs Division provide an opinion with regard to the participation of third parties in this dispute. This was a systemic issue which had an impact for the Organization. His delegation believed that this dispute should not only be limited to the GPA members.

The representative of Colombia said that her delegation did not wish to reserve its third-party rights with regard to this matter. However, the question raised by the Philippines was important. She was not certain whether all claims contained in the EC's request for the establishment of a panel related only to the GPA but concerned the GATT as well. This should be taken into account in providing the response to the Philippines.

The Chairman drew attention to Article 2.1 of the DSU which read as follows: "With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term 'Member' as used therein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to the Agreement may participate in decisions or actions taken by the DSB with respect to that dispute".

The representative of the Philippines said that her delegation had some reservations with regard to this interpretation since any decision concerning this matter would have an effect on the DSB members which were not parties to the GPA.

The representative of Cuba said that he also had reservations concerning the interpretation provided by the Chairman. His country had a systemic interest in this matter and wished that this issue be examined in detail.

The Chairman pointed out that his statement did not contain any interpretation of the DSU but only recalled the relevant provisions of Article 2.1 of the DSU.

The representative of Mexico said that his delegation had initially intended to reserve its position on this matter but after the clarification provided by the Chairman this was no longer necessary.

The representative of Hong Kong, China said that the provisions of Article 2.1 of the DSU had been clear and therefore no disagreement should arise with regard to their correct interpretation. He added that Article II:3 of the WTO Agreement was also clear with regard to the rights and obligations under the GPA.

The representative of Argentina said that this matter had been sufficiently clarified and therefore it was not necessary to further discuss this.

The DSB took note of the statements.

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

(a) Request for the establishment of a panel by the United States (WT/DS132/2)

The Chairman drew attention to the communication from the United States contained in document WT/DS132/2.

The representative of the United States said that for several months her country had been engaged with Mexico in an effort to resolve its outstanding concerns about Mexico's anti-dumping measures pertaining to high-fructose corn syrup (HFCS). However, no satisfactory solution had been reached. As a result, US exporters of this product continued to face unjustified barriers in Mexico. The United States believed that Mexico's antidumping measures with respect to HFCS were inconsistent in important respects with its obligations under the Anti-Dumping Agreement and Article VI of GATT 1994. The notice of initiation of an anti-dumping investigation had not provided adequate information, and the evidence in the application for an anti-dumping investigation had been insufficient to justify initiation of the investigation. Mexico’s provisional anti-dumping measures and its final determination had not met the standards of the Agreement. US exporters had also been denied a full opportunity to defend their interests. Since Mexico had not taken any action to address US concerns in this area, her delegation requested the establishment of a panel. The United States

remained interested in resolving this issue through bilateral negotiations with Mexico and its panel request would not preclude that result.

The representative of Mexico said that his delegation had noted the US statement. This matter, raised in the DSB for the first time, concerned the question of whether Mexico's measures were compatible with the relevant WTO provisions. Mexico had previously discussed this matter with the United States, and did not share the views contained in the US request for a panel or its statement made at the present meeting. He did not wish to enter into a debate on the matter but wished to limit his statement to the following points: (i) Mexico was convinced that the anti-dumping investigation was carried out in accordance with its WTO rights and obligations, and in particular the Anti-Dumping Agreement; (ii) Mexico was considering the US request for the establishment of a panel contained in document WT/DS132/2; and (iii) since the consideration of the matter had not yet been completed his delegation could not 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.

4. European Communities – Measures affecting asbestos and products containing asbestos

(a) Request for the establishment of a panel by Canada (WT/DS135/3)

The Chairman drew attention to the communication from Canada contained in document WT/DS135/3.

The representative of Canada said that on 28 May 1998, his country had requested consultations with the EC regarding the measures taken by France prohibiting asbestos and products containing asbestos. This request had been circulated to Members on 3 June 1998. In the consultations held on 8 July, Canada had inquired about the reasons to ban asbestos and products containing asbestos and had attempted to convince the EC that the French ban was unjustifiable. Canada and the EC had agreed to hold a second round of consultations. However, it had not been possible to reach an agreement regarding a possible date. Canada noted with regret that it had not been possible to arrive at a solution which would take into account its interests. Furthermore, there was no indication that further consultations would enable the parties to arrive at a satisfactory solution. Therefore, in accordance with the DSU provisions, Canada requested the establishment of a panel with standard terms of reference in order to examine the French measures.

The representative of the European Communities said that at the end of 1996, France had banned production, sale, use or import of asbestos and products containing asbestos, with certain limited exceptions. It had been scientifically proved that asbestos fibres caused cancer. In France some 2,000 people died each year as a result of asbestos-derived cancer. Available scientific data had demonstrated that there were safer products that could be substituted for asbestos. In addition to France, seven other EC member States had banned or prohibited asbestos, with certain exceptions. The French measures were not discriminatory. In the EC's view the measures were fully justified for public health reasons and were in full conformity with the WTO provisions. In the consultations, the Community had attempted to convince Canada that the measures were perfectly justified. Unfortunately, Canada had prematurely broken off consultations at a time when the EC was in the process of making information available in particular with regard to the latest scientific data which could justify the measures. This was the first time that the DSB considered this request and, at this stage, the Community was not in a position to agree to the establishment of a panel.

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

5. Slovak Republic – Measure affecting import duty on wheat from Hungary

(a) Request for the establishment of a panel by Hungary (WT/DS143/2)

The Chairman drew attention to the communication from Hungary contained in document WT/DS143/2.

The representative of Hungary said that as of 10 September 1998, wheat originating in Hungary - HS 1001.1000, 1001.90 - exported to the Slovak Republic was subject to an increased duty of 2540 Sk/t which had amounted to approx. US$ 70 or 70 per cent *ad valorem.* The bound rates for the above tariff lines had been between 4,4 and 27 per cent. The increased tariff rates, which had exceeded the bound rates, had been applied only on Hungarian wheat and were inconsistent with the Slovak Republic's obligations under Articles I and II of GATT 1994 and Article 4 of the Agreement on Agriculture. The measure had amounted to a *de facto* import prohibition and had resulted in severe losses in the most important agricultural sub-sectors of Hungary, which relied heavily on exports.

On 18 September 1998, Hungary had requested urgent consultations with the Slovak Republic pursuant to Article 4.8 of the DSU. These consultations had been held on 28 September 1998 in Budapest. In the consultations, the Slovak Republic had undertaken to adjust its measure within a short period of time in order to bring it into compliance with its WTO obligations. This had been confirmed by the Slovak representative at the meeting of the Committee on Agriculture. Subsequently, Hungary had been informed that, in spite of the official assurances, the Slovak Government had changed its position and had chosen to maintain its measure.

In its letter of 20 October, the Slovak Republic had informed Hungary that as of 2 November 1998, the measure would be withdrawn. While Hungary welcomed this decision, it wished to be certain of this understanding. Therefore, he asked the Slovak delegation to confirm that, as of 2 November 1998, the import duties on Hungarian wheat exports would be only tariff rates at a level not exceeding the relevant bound rates. If so, Hungary was ready to withdraw its request for a panel.

The representative of the Slovak Republic said that her delegation noted the statement made by Hungary. She said that in 1998, her authorities had registered a substantial increase of imports of wheat to the Slovak Republic, in particular from Hungary as a result of its very good harvest of wheat. Imports had been in such large quantities and under such conditions that they had constituted a threat of serious injury for domestic producers. Therefore her authorities had decided to resolve this issue bilaterally pursuant to the provisions of the Central European Free Trade Agreement (CEFTA). On 10 September, the Minister of Economy, in his decision No. 9049/1998, had decided to impose safeguard measures on imports of wheat from Hungary in accordance with Article 14 of the CEFTA. On 14 September 1998, Hungary had challenged the consistency of these measures with the provisions of Article 14 of the CEFTA and had requested that these measures be immediately withdrawn. In spite of the willingness of the Slovak authorities to discuss this issue, on September 18, Hungary had decided to bring this matter to the WTO and had requested urgent consultations in accordance with Article 4.8 of the DSU. These consultations had been held on 28 September in Budapest. The Slovak Republic had promised to modify the measure. However, the result of these consultations had been subject to approval by the Slovak Government and subsequently the matter had been discussed at a meeting on 13 October. The Minister of Economy had been instructed to withdraw the measure as of 2 November 1998, in accordance with the domestic legal procedures.

At the present meeting, she wished to confirm that the measure would be withdrawn on 2 November in accordance with the decision of the Minister of Economy, No. 1/S/1998 of 15 October 1998. Consequently as of 2 November, the reasons for Hungary's request to establish a panel would

cease to exist. For the sake of transparency, she drew attention to the fact that the problems which had led to the adoption of the measure still existed and threatened to cause a serious injury to domestic producers. Therefore, the Slovak Republic was carefully considering possible remedies concerning this situation in accordance with the WTO provisions.

The representative of Hungary said that his delegation noted that the statement made by the Slovak Republic had not excluded the possibility of maintaining the measure by modifying its legal basis. He drew attention to the fact that after the meeting of the Slovak Government on 13 October, references had been made to a decision to reintroduce the same measure as an *erga omnes* safeguard action for a period of 200 days. If such an action was taken, Hungary would be concerned about a retroactive attempt to create the legal justification of the measure in order to avoid or delay its examination by a panel. His country was also concerned that the Safeguard Agreement would be used as a means of providing *ex post* legitimacy to the arbitrary increase of tariff rates above bound rates. In addition, the envisaged measure would, *inter alia*, be inconsistent with Article 2 of the Safeguard Agreement. This Article provided that safeguard measures might be applied only if import quantities increased in absolute or relative terms to domestic production. According to available statistics, neither condition could be met in this case. Although its legal basis and scope would be altered, the measure, as outlined in Hungary's request, remained essentially the same. Hungary was confident that a panel would be in a position to adequately address the systemic issues involved in this case. In the light of the above, Hungary requested that a panel be established pursuant to Article 4.9 and 6 of the DSU and Article XXIII:2 of GATT 1994, with standard terms of reference as set out in Article 7 of the DSU, to examine the compatibility of the measure with the WTO provisions. Taking into account that this measure was inconsistent with the most fundamental WTO-obligations and as a result farmers and exporters suffered severe economic and trade losses, the seasonal character of the measure and the serious threat of its recurrence and proliferation, Hungary wished to invoke Article 4.9 of the DSU, and expected the panel to accelerate its proceedings to the greatest extent possible, in accordance with the provisions of that Article.

The representative of the Slovak Republic said that her delegation 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.

6. India – Patent protection for pharmaceutical and agricultural chemical products: complaint by the European Communities and their member States

(a) 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 should inform the DSB, within 30 days from the date of the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that on 22 September, the DSB had adopted the Panel Report on this matter.

The representative of India recalled that at the DSB meeting on 22 September, he had made a detailed statement concerning his country's views on the Panel Report. At that meeting, he had stated that with respect to both Articles 70.8 (a) and 70.9 of the TRIPS Agreement, the difference of opinion between the EC and India had been based on certain legal niceties. He had highlighted the fact that the dispute had not arisen due to any disinclination on the part of India to accept its obligations but due to the difference of opinion between the two parties about the manner of implementing the obligations under Article 70.8 (a) of the TRIPS Agreement, and the timing of the implementation of

the obligation under Article 70.9 of the TRIPS Agreement. The Panel had merely interpreted the obligations of Articles 70.8 (a) and 70.9 of the TRIPS Agreement in a particular manner. In accordance with Article 21.3 of the DSU, India was required to inform the DSB of its intention in respect of implementation of the DSB's recommendations. He therefore wished to state that it was India's intention to meet its WTO obligations with regard to this matter. In order to comply with the DSB's recommendations, India would require a reasonable period of time. His country would enter into bilateral consultations with the EC with a view to agree on a period of time for implementation acceptable to both parties. His delegation would report to the DSB on the results of these consultations.

The Chairman said that 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 to the DSB within 45 days after the date of adoption of the recommendations.

The DSB took note of the statements and of the information provided by India regarding its intentions to implement the DSB's recommendations.

7. European Communities – Measures affecting the importation of certain poultry products

(a) Reasonable period of time

The representative of the European Communities, speaking under "Other Business", informed the DSB that pursuant to Article 21.3 of the DSU, the EC and Brazil had reached a mutual agreement on a reasonable period of time ending on 31 March 1999 for compliance with the DSB's recommendations on this matter. A communication containing this information would be circulated shortly.

The representative of Brazil said that his delegation wished to confirm the understanding reached with the EC on the implementation of the DSB's recommendations in this case.

The DSB took note of the statements.

8. Czech Republic – Measure affecting import duty on wheat from Hungary

(a) Statement by Hungary

The representative of Hungary, speaking under "Other Business", said that one of the main reasons to invoke the urgency provisions of the DSU with regard to the measure imposed by the Slovak Republic (item 5 of the agenda) was a need to act expeditiously due to a potential threat that similar measures could proliferate. Unfortunately, on 9 October 1998, the Czech Republic had introduced import measures similar to those applied by the Slovak Republic. At the present meeting, he did not wish to reiterate the same arguments concerning the legal implications of the measure in question. He only wished to inform the DSB that on 13 October, Hungary had requested urgent consultations with the Czech Republic pursuant to Article 4.8 of the DSU. These consultations had been held on 20 October in Budapest. In light of the consultations, Hungary hoped that a mutually satisfactory solution would be found shortly and that it would no longer be necessary to pursue this matter in the DSB.

The representative of the Czech Republic said that his delegation had noted the statement made by Hungary. On 13 October 1998, Hungary had requested urgent consultations with regard to a

provisional safeguard measure imposed by the Czech Republic on imports of wheat originating in Hungary. He wished to confirm that in its reply to the request made by Hungary, the Czech Republic had expressed its readiness to enter into consultations and had stressed that in imposing the measure, the Czech authorities had exercised the right accruing to them from a bilateral agreement which provided a legal justification for this action. Furthermore, the Czech authorities had stated that their readiness to consult at short notice should not be interpreted as accepting the urgency provisions of the DSU in this case. He added that his country did not consider it appropriate to create any linkages between this particular measure and the measure adopted by another Member. He had been informed that the bilateral consultations were underway and he believed that there was a good prospect of reaching a successful result.

The DSB took note of the statements.

9. Next meeting of the DSB

The Chairman, speaking under "Other Business", said that the Appellate Body Report on "United States – Import Prohibition of Certain Shrimp and Shrimp Products" had been circulated on 12 October in document WT/DS58/AB/R. Pursuant to 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 Members" The 30-day period in this case would expire on 11 November. Since the next regular meeting of the DSB was scheduled for 25 November, the DSB would have to hold a special meeting before the 11 November deadline. He therefore proposed that the DSB hold its special meeting on 6 November for the purpose of adoption of the Report. Another report of the Appellate Body on "Australia – Measures Affecting the Importation of Salmon" had been circulated on 20 October in document WT/DS18/AB/R and if the parties concerned had no objections, this report could also be adopted by the DSB at its meeting on 6 November. He recalled that the current practice was to limit the agendas of special meetings only to those matters which required the convening of special meetings, without including items that could be taken up at regular DSB meetings. This practice had helped to avoid overloading the agendas of special meetings and disrupting the organization of the DSB's work through inclusion of unexpected items on agendas for special meetings. It was hoped that this practice would continue.

The DSB took note of this statement.