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Dispute Settlement Body
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MINUTES OF MEETING

Held in the Centre William Rappard
on 25 November 1998[1]

Chairman: Mr. Kamel Morjane (Tunisia)

Subjects discussed: Page:

Prior to the adoption of the agenda, the item concerning the Panel Report on "Japan - Measures Affecting Agricultural Products" was removed from the agenda, since Japan had appealed this Report on 24 November 1998. Also prior to the adoption of the agenda, the Chairman informed delegations that consultations continued among the parties concerned on the EC's regime for the importation, sale and distribution of bananas. It was his understanding that the parties had agreed to

[1] This meeting of the DSB was adjourned and subsequently reconvened on 15 and 21 December 1998. The discussions held on 15 and 21 December 1998 will be reflected in addenda to this document.

include this matter on the agenda of the meeting, despite the fact that a 10-day period for inclusion of items on the agenda had elapsed. In this context, he wished to recall that Rule 7 of the Rules of Procedure of the General Council which was also applicable to the DSB provided that : "The General Council may amend the agenda or give priority to certain issues at any time in the course of the meeting". Therefore, on the basis of that Rule and of the agreement among the parties, he wished to propose the inclusion of this matter on the agenda of the present meeting.

The representative of Colombia sought clarification as to how this new item would be included on the agenda.

The Chairman said that the new item would be included as the last item on the agenda and would read as follows: "EC - Regime for the Importation, Sale and Distribution of Bananas: Possible Recourse to Article 21.5 of the DSU".

The representative of Ecuador said that if the word "possible" was deleted from the title, he would have no objections to the inclusion of this item on the agenda.

The Chairman noted that there was no objections to Ecuador's proposal.

The DSB agreed to include the additional item on the agenda as proposed by the Chairman.

The Chairman said that the parties concerned needed more time and since further consultations were required the meeting could be adjourned and reconvened at a later date in order to consider this matter. He did not wish that this item be discussed at the present meeting but that the meeting be adjourned and reconvened at a later date in order to consider this matter. This would enable the DSB to meet on short notice when the respective matter will be ready for consideration.

The representative of Colombia said that the production and exports of bananas were important for her country's economy. Her delegation had no objections that the new item be included on the agenda nor that the meeting be adjourned. However, it was necessary to ensure transparency with regard to the procedures of Article 21.5 of the DSU. She therefore requested that if the meeting was to be suspended so that further consultations could be held, Colombia as a third party wished to participate in such consultations. This would enable it to be ready in case it had to prepare written submissions within a short period of time.

The representative of Japan said that his delegation supported the statement made by Colombia with regard to transparency. Japan was ready to respond to this matter in a very flexible manner but at the same time it was important to ensure transparency. This meant that the procedures contained in Article 21.5 of the DSU were to be followed. He noted that the minimum requirement under that Article was that a panel request had to be made in writing and that the measures at issue and the legal claims be specified therein. He underlined that a panel could not be established without a written request specifying the measures and legal claims. Japan believed that that the suspension of the meeting would enable the parties to prepare a written request.

The Chairman said that the circumstances were rather exceptional in this case and some flexibility was required since this matter was important not only for the parties concerned but also for the system.

The DSB took note of the statements.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/17/Add.3)

(b) India - Patent protection for pharmaceutical and agricultural chemical products: Status report by India (WT/DS50/10)

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 first drew attention to document WT/DS27/17/Add.3 which contained the fourth status report by the EC regarding its progress in the implementation of the DSB's recommendations concerning its banana import regime.

The representative of the European Communities said that the Community had now completed the implementation of the measures pursuant to the DSB's recommendations. As stated in its status report, both Regulations were now in force and the system would be fully applicable from 1 January 1999. He wished to report on the discussions with the parties to the dispute concerning this matter. On 13 November 1998, Ecuador had requested consultations on EC Regulation 2362/98 of October 1998. In line with its consistently expressed intention to accept expedited multilateral dispute settlement procedures concerning its banana regime, the EC had accepted the early date requested by Ecuador and had held such consultations on 23 November 1998 with the participation of several third parties. On the same occasion and in the same spirit of cooperation, the Community had also accepted separate consultations on the same subject with Mexico, after it had made its request on 20 November. It was his delegation's position that if Ecuador and Mexico wished, the Community was ready to hold further consultations to discuss matters which still required to be clarified. If not, the Community was ready to accept the establishment of a panel to be requested at the next regular or special meeting of the DSB. This implied that Ecuador and Mexico would have to follow the DSU procedures and present a written request specifying the EC's measures and the WTO provisions.

The EC had also carried out further contacts with the United States. He recalled that the United States had asked the Community to accept an accelerated panel procedure under Article 21.5 of the DSU. The Community had indicated that it was willing to follow this course, provided that Article 21.5 of the DSU would be the basis for resolving this conflict. In other words, it would not be logical for the United States to seek authorization for retaliation measures under Article 22 of the DSU until a final ruling under Article 21.5 of the DSU had been made. Should that ruling be in favour of the Community, it would be expected that the United States would accept it and would not resort to any unilateral action. The EC hoped that the United States would indicate shortly that it would be able to accept these undertakings. If so, the EC was ready to enter expeditiously into the necessary procedures for the establishment of a panel. The time-table for the procedures would depend not only on the Community but also on the United States and other countries as well as the members of the panel. If the United States was ready to accept this offer, his delegation believed that this issue could be brought to a rapid conclusion. He reiterated that if the United States would ensure the undertakings sought by the EC, which essentially meant that it would accept to act within the multilateral framework, the Community was ready to cooperate in order to reach a very rapid conclusion. This however still left the very important question of the Section 301 procedures initiated by the United States. He would revert to this issue under a different item of the agenda of the present meeting.

The representative of the United States said her delegation had carefully listened to the EC's status report on implementation. As stated in the DSB over the past nine months, it was clear that the EC's revised regime was inconsistent with the WTO rules. At the present meeting, she did not wish to

reiterate the long and unfortunate history of this dispute, in which the EC had lost three panels which had examined the GATT/WTO-inconsistent banana regime. It would be an understatement to indicate that it was unfortunate that the EC had to impose on its trading partners another inconsistent WTO-banana regime. Her delegation noted the EC's statement but several points raised at the present meeting would be addressed by the United States under agenda item 10.

The representative of Ecuador said that his country considered that both the EC Regulation No. 2362/98 of 28 October 1998 establishing the implementing provisions to Council Regulation 404/93 concerning the EC's banana import regime, published in the Official Journal L 293 of 31 October 1998, as well as Regulation No. 1637/98 of the Council of Ministers of Agriculture of 20 July 1998, published in the Official Journal of the European Communities, 1998, L 210, p. 28, were contrary to the fundamental principles and rules of the WTO. The arguments concerning these illegalities had already been made by Ecuador in the DSB on numerous occasions. It was obvious that the Community disagreed with Ecuador and other complaining parties with respect to its banana regime. The EC insisted that its measures were compatible with the WTO Agreements as well as with the recommendations of the Panel and Appellate Body while Ecuador maintained the opposite.

The DSB was required to keep under surveillance its recommendations, in particular when such recommendations concerned a need to comply promptly in accordance with Article 21.1 of the DSU. This function of surveillance of implementation of the recommendations was reserved exclusively for the DSB. No Member, still less a responding Member, could unilaterally consider that an obligation had been fulfilled unless the DSB had ruled so. Contrary to this, the EC had stated at the present meeting that it had completed the implementation of the DSB's recommendations. The Community considered that it had concluded this matter while a very serious and well-founded objection with regard to the compatibility of its banana import regime had been raised by Ecuador and other complaining parties.

At the DSB meetings on 23 July, 22 September and 21 October 1998, Ecuador had complained about a number of illegalities involved in the EC's banana regime, and had expressed its belief that the parties to the dispute were obliged to have recourse to Article 21.5 of the DSU. Ecuador had also stated that under the provisions of Article 21.5 of the DSU the existing disagreement would have to be referred to the original panel for examination and resolution. This approach, which had been sought by Ecuador for a long time, had not been accepted by the Community.

The existence of a disagreement between Ecuador and the Community concerning the measures adopted in July and October 1998 had obliged Ecuador to try to find a solution by means of a dialogue with the Community. Consultations had been held on 17 September 1998 and had been resumed on 23 November 1998, since on the first occasion the EC representatives had been unable to analyse all the issues of interest to Ecuador and the other four complaining countries with regard to import licensing.

Ecuador had participated in the consultations on the understanding that the application of Article 21.5 of the DSU did not imply or require the holding of prior consultations. The intention of the drafters of Article 21.5 of the DSU was to prevent a responding Member, in this case the EC, from delaying prompt compliance with its obligations by interpreting not only the procedures to its own advantage, but also the provisions for the holding of unnecessary consultations. The consultation was particularly unjustified, especially since it implied a long period of time thus preventing the parties from finding a prompt solution within a 90-day period laid down in Article 21.5 of the DSU. He thanked the Chairman for having chaired two additional meetings in August and September 1998 with regard to this matter. His country appreciated the efforts made by him and the time he had devoted to this matter in the hope of finding a settlement between the EC and Ecuador and the other four complaining countries. Ecuador noted that the EC had accepted that the original panel should examine and resolve this dispute and that such panel be reconvened at the next meeting of the DSB.

The representative of the Philippines said that due to the systemic implications of this matter he wished to put a question to the Community. It was his delegation's understanding that the EC expected that if a panel was established pursuant to Article 21.5 of the DSU, the United States would not take any action pursuant to Article 22 of the DSU. He wished to know what would be the EC's intentions should a final report rule that its measures were not consistent with the WTO. In other words, whether the EC would seek a reasonable period of time to comply with such a ruling or whether it would recognize that the United States and other complaining parties had the right to invoke Article 22 of the DSU.

The representative of Japan said that his delegation wished to take this opportunity to state Japan's position on Article 21.5 of the DSU. This Article could be further examined in its relationship with Article 22 of the DSU. However, if there was a dispute on the implementation of the DSB's recommendations, only after a panel had concluded that the party concerned had failed to bring the measure into compliance with the relevant WTO Agreements could the complaining party invoke the procedures of Article 22 of the DSU and not before. Even when a complaining party invoked Article 22 of the DSU, it was required to enter into negotiations aimed at reaching a mutually acceptable compensation before requesting authorization to suspend concessions

The representative of Mexico said that his delegation noted the EC's statement and wished to reiterate that the EC's banana regime did not comply with the DSB's recommendations nor was it fully consistent with its WTO obligations. Mexico, like other complaining parties, had participated in the consultations with the EC in order to find a solution with regard to this matter. He wished to underline that Mexico's participation in these consultations was without prejudice to its position on the content of Article 21.5 of the DSU. In other words, in order for a matter to be referred to a panel under that Article it was not necessary to hold prior consultations. Once the panel had given its rulings it would not be necessary to have recourse to other DSU provisions such as those related to a reasonable period of time or appeal procedures.

The DSB took note of the statements.

The Chairman drew attention to document WT/DS50/10 which contained the first status report by India on its progress in the implementation of the DSB's recommendations concerning patent protection for pharmaceutical and agricultural chemical products.

The representative of India said that in accordance with the DSU provisions, his Government was presenting its first status report contained in document WT/DS50/10 on the implementation of the DSB's recommendations with regard to this matter. On 13 February 1998, India had informed the DSB of its intentions to meet its WTO obligations. Subsequently, India together with the United States had made a statement on 22 April 1998 that 15 months constituted a reasonable period of time for implementation of the DSB's recommendations. At the present meeting, he wished to inform the DSB that a series of inter-departmental and inter-ministerial consultations had been initiated and his Government was in the process of examining various options for the implementation of the DSB's recommendations.

The representative of the United States said that her delegation appreciated the comments made by India regarding its progress towards implementation of the DSB's recommendations with regard to patent protection for pharmaceutical and agricultural chemical products. Her country was encouraged that India was actively considering its compliance options and would welcome the continuation of the consultations being held with the United States on a regular basis, over the next seven months, in particular when a bill would be presented to the Indian Parliament.

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

2. Australia – Measures affecting importation of salmon

(a) Implementation of the recommendations of the DSB

The Chairman recalled that in accordance with the DSU provisions, the DSB maintained 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 6 November 1998, the DSB had adopted the Appellate Body Report on "Australia – Measures Affecting Importation of Salmon" as well as the Panel Report on this matter as modified by the Appellate Body Report. This item had been inscribed on the Agenda of today's meeting at the request of Australia.

The representative of Australia said that his country would implement the DSB's recommendations and would enter into discussions with Canada on a reasonable period of time for implementation. In the process of implementation, Australia would be mindful of the provisions of Article 3.5 of the DSU.

The representative of Canada said that on 6 November 1998, the DSB had adopted the Appellate Body and the Panel Reports on this matter. The Panel and Appellate Body had found that Australia's prohibition on the importation of Canadian salmon was inconsistent with several provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) including Article 5.1 and 5 thereof, and had recommended that Australia bring its measure into conformity with that Agreement. Under Article 21 of the DSU, Australia was obliged to comply promptly with the DSB's recommendations. In order to do so, only one legitimate course of action was possible, namely Australia had to remove its prohibition on the importation of Canadian salmon. Canada was disappointed that Australia had not provided any indication of a reasonable period of time for implementation or how it intended to bring its measure into compliance. It was Canada's understanding that no legislative action was required for Australia to bring its measure into compliance. It was within Australia's means to quickly remove its prohibition on the importation of Canadian salmon by administrative action. Canada looked forward to discussing with Australia, in the near future, the time-frame for the implementation of the DSB's recommendations, as well as the manner in which Australia intended to implement them. Canada hoped that these discussions would lead to a mutual understanding as to what constituted a reasonable period of time. Unless this matter was resolved expeditiously, Canada would request arbitration on the issue of timing pursuant to Article 21.3 of the DSU.

The representative of the United States said that her delegation welcomed the fact that this long-standing issue was on the path towards its resolution. The United States looked forward to prompt implementation of the DSB's recommendations by Australia. Her country had a long-standing commercial interest in Australia's market for salmon. The United States looked forward to working with interested parties so as to ensure that implementation was carried out on an MFN basis and requested that Australia inform Members of its implementation process, including a time-table for such implementation.

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

3. United States - Import Prohibition of certain shrimp and shrimp products

(a) Implementation of the recommendations of the DSB

The Chairman recalled that in accordance with the DSU provisions, the DSB maintained 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 6 November 1998, the DSB had adopted the Appellate Body Report on "United States - Import Prohibition of Certain Shrimp and Shrimp Products" as well as the Panel Report on this matter as modified by the Appellate Body Report. This item had been inscribed on the Agenda of the present meeting at the request of the United States.

The representative of the United States said that her country was pleased that the Appellate Body had found no inconsistency between the legislation of the United States and its WTO obligations. It was also pleased that the Appellate Body had made a number of important and positive findings that helped clarify the critical relationship between the WTO rules and measures taken to protect the environment. At the same time, however, as noted at the DSB meeting on 6 November, the United States disagreed with the Appellate Body's conclusions that the administration of the law constituted arbitrary and unjustifiable discrimination. At that meeting, the United States had agreed to the adoption of the Appellate Body Report and had highlighted its important findings. At the present meeting, she did not wish to reiterate the US position on this matter in detail. She only wished to recall that the Appellate Body had confirmed the importance for the interpretation of the WTO Agreement of the Preamble's emphasis on the goal of supporting sustainable development, including the protection and preservation of the environment. This had made it clear that support for sustainable development, including the protection and preservation of the environment was integral to the WTO objectives and not an afterthought or secondary consideration. The United States also welcomed the Appellate Body's statement that sovereign states could and should "adopt effective measures to protect endangered species such as sea turtles."

As provided in Article 21.3 of the DSU, it was the United States' responsibility to inform the DSB of its intentions with respect to the implementation of the DSB's recommendations. The United States' intention was to implement the DSB's recommendations with regard to this matter. Her country would implement the DSB's recommendations in a manner consistent not only with its WTO obligations but also with its firm commitment to the protection of endangered species, including sea turtles. She recalled that the Appellate Body Report had not suggested that the United States weaken its environmental laws in any respect and her country did not intend to do so. She also recalled that during the dispute settlement proceeding, the parties to the dispute had emphasized the importance they attached to the protection of sea turtles, recognized internationally as being threatened with extinction. The United States appreciated this sentiment and hoped that one could build upon it to work together in addressing this critical conservation issue effectively and comprehensively. In accordance with the DSU provisions, the United States would require a reasonable period of time to complete the compliance process and would meet the complainants to further discuss this matter.

The representative of Thailand said that her country appreciated the fact that the United States had supported the adoption of the Appellate Body's ruling at the DSB meeting on 6 November 1998. Members recognized the fact that the United States was aware of the importance of the dispute settlement system and appreciated its efforts to support this system were recognized by Members. Thailand also appreciated the positive steps to be taken by the United States towards implementation of the Appellate Body's ruling in this case.

In paragraph 188 of its Report, the Appellate Body had noted that the US trade measure was inconsistent with Article XI of GATT 1994 and had recommended that the United States bring its measure into conformity with its WTO obligations. It was therefore indisputable that the US shrimp embargo violated Article XI and was not justified under Article XX. Thailand had already stated that it wished the United States to remove immediately its shrimp embargo. At the present meeting, she reiterated that her country wished the US embargo to be lifted. Thailand believed that this should be the first step towards implementation in good faith. This should be done before any further discussion on turtle conservation issues. Given the rather unambiguous nature of the Appellate Body's findings, there was no reason that any portion of this embargo should now remain in place.

Once the embargo was lifted, Thailand hoped that the United States would turn its attention to a review of Section 609 of Public Law 101-162 and its enabling regulations, with a view to amending it in order to comply with the WTO obligations. In her country's view, this law and the applicable regulations and guidelines were vague and had been drafted in such a way so as to invite cases of abuse and the violation of treaty obligations specified in the Appellate Body Report. By taking the necessary corrective measures, the United States could move to better protect the negotiated rights of its trading partners. It could assure that its trading partners were treated fairly and equally and that their due process rights, newly identified by the Appellate Body, were guaranteed.

The Appellate Body had correctly identified the need for international cooperative approaches to resolve cross-border environmental problems. However, her delegation wished to emphasise that the fulfilment of conservation objectives should begin at the national and local level. Thailand believed that the most successful conservation efforts would be for legislators and citizens to identify and formulate programmes using local technologies, resources and knowledge. Her delegation looked forward to discussions with the United States with regard to the timing and the manner of implementation.

The representative of Pakistan said that his delegation appreciated the fact that the United States had supported the adoption of the Appellate Body's ruling at the DSB meeting on 6 November 1998. It also appreciated the US interest in implementing the findings of the Appellate Body in this case. His delegation, however, wished to point out that the shrimp imports from Pakistan were still under the embargo and, as a result considerable financial damage was being caused to shrimp fishermen in Pakistan. He noted that Pakistan's fishermen relied almost exclusively on artisanal fishing methods, which by their very nature, did not result in the death of sea turtles. The Appellate Body had noted that the US had not sufficiently considered local conditions when it had imposed its embargo. This in particular applied to Pakistan. He therefore called upon the United States to lift its embargo immediately. Sustainable development could not be achieved if economic development was stifled. Given the unambiguous nature of the Appellate Body's findings, there was no justification for the continuation of the US embargo.

The Appellate Body had found that cooperative measures to assure turtle conservation did not need be pursued in the shadow of the shrimp embargo. It had also found that the US trade measure was flawed for a number of reasons. On the basis of these findings, his delegation believed that the United States should lift its embargo. By amending its law, and in particular the enabling regulations, the United States could assure that the local conditions of all affected Members were properly ascertained and similarly situated Members were treated in the same manner. Such an approach would constitute a constructive means of protecting both trade and environmental interests and would demonstrate the much appreciated US commitment to dispute settlement system. His delegation looked forward to consultations with the United States on this matter.

The representative of Malaysia said that the Panel and the Appellate Body had ruled that the measure of the United States was inconsistent with its obligations under the WTO Agreement. At the DSB meeting on 6 November 1998, Malaysia had stated that the lifting of this import prohibition was imperative, unconditional and should be done immediately. It had also stated that the United States

should, *inter alia*, eliminate all conditions which had caused the US measure to be ruled as being applied in a manner which constituted "unjustifiable discrimination" or "arbitrary discrimination" between countries where the same conditions prevailed. At the present meeting, his delegation did not have any new information to add with regard to the question of implementation and wished to insist that the United States gave effect to the Appellate Body's decision and lifted the embargo immediately.

The representative of India said that his country requested full and prompt implementation of the DSB's recommendations by the United States.

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

4. 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 recalled that the DSB had considered this matter at its meeting on 21 October and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS132/2.

The representative of the United States said that, as stated at the DSB meeting on 21 October, for several months, the United States had been engaged in an effort with Mexico to try to resolve its outstanding concerns with regard to Mexico's anti-dumping measures pertaining to high-fructose corn syrup. However, it had not been possible to reach a satisfactory solution. As a result, US exports of this product continued to face unjustified barriers in Mexico. The United States believed that Mexico's anti-dumping mesures with respect to high-fructose corn syrup were inconsistent, in important respects, with its obligations under the Anti-Dumping Agreement, and in particular, Article VI of the GATT 1994. Since Mexico had not taken any action to address the United States' concerns in this area, her delegation requested the establishment of a panel at the present meeting. The United States remained interested in resolving this issue through bilateral negotiations with Mexico, which would not be precluded by the fact that a panel be established at the present meeting.

The representative of Mexico said that this was the second time that the United States had requested a panel to examine this matter. He recalled that at the DSB meeting on 21 October 1998, when this request had been considered for the first time, Mexico had stated that it was not in a position to agree to the establishment of a panel since it had not finished the examination of the content of the US request. Following its examination of document WT/DS132/2, Mexico considered that the DSB should not agree to the establishment of a panel since this request did not meet the requirements of the DSU and the Anti-Dumping Agreement. Thus, among its other deficiencies, the US request for a panel contained in WT/DS132/2 did not provide a summary of the legal basis sufficient to present the problem clearly, as laid down in Article 6.2 of the DSU. Furthermore, this request did not indicate how a benefit accruing to the United States, directly or indirectly, under the Anti-Dumping Agreement had been nullified or impaired, or that the achieving of the objectives of the Agreement was being impeded, as stipulated in Article 17.5 of the Anti-Dumping Agreement. If it was not possible to reach a consensus not to establish a panel, Mexico would reserve the right to present these and other preliminary objections to the panel, and wished to place on record that the US request did not challenge either the provisional measure or the anti-dumping duties collected.

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

The representative of Jamaica reserved its third-party rights to participate in the Panel proceedings.

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

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

The Chairman recalled that the DSB considered this matter at its meeting on 21 October and had agreed to revert to it. He drew attention to the communication from Canada contained in document WT/DS135/3.

The representative of Canada said that on 20 May 1998, Canada had requested consultations with the Communities concerning the measures taken by France regarding the prohibition of asbestos and products containing asbestos. The consultation which had been held on 8 July 1998 had not resulted in a mutually satisfactory solution. Therefore, at the DSB meeting on 21 October, Canada had requested a panel to examine this matter. This request had been refused by the Community. At the present meeting, Canada wished to reiterated its request for the establishment of a panel to examine the French measures concerning asbestos and products containing asbestos.

The representative of the European Communities said that in 1996 France had prohibited the production, sale, use and importation of asbestos as well as products containing asbestos. Asbestos fibres had been proven to be cancerous products and several thousands of people died every year from the effects of asbestos. Scientific data available indicated that there were substitute products which were safe. Several other member States of the EC had also prohibited asbestos. The Community believed that the French measure was applied in a non-discriminatory manner, it was fully justified for reasons of public health and it was entirely compatible with its obligations under the WTO. Canada, which had a different position on this matter, had requested the establishment of a panel.

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

The representative of the United States reserved its third-party rights to participate in the Panel proceedings.

6. Canada – Patent protection of pharmaceutical products

(a) Request for the establishment of a panel by the European Communities (WT/DS114/5)

The Chairman drew attention to the communication from the European Communities contained in the document WT/DS114/5.

The representative of the European Communities said his authorities wished to request the establishment of a panel on Canada's implementation of Articles 27, 28 and 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the area of pharmaceuticals. Under Canadian patent legislation, a person who was not the patent holder might, without the consent of the patent holder, use a patented invention to: (i) carry out experiments and tests required to obtain marketing approval of a copy of the patented medicines before the expiration of the relevant patent; and (ii) manufacture and stockpile patented medicines for a period of up to six months before patent expiry for sale after expiry.

The TRIPS Agreement, however, obliged Members to provide that the holder of a patent had the exclusive right to prevent others from making and using patented inventions for a period of 20 years. Two rounds of consultations aimed at finding a solution to this problem had not led to any results. Therefore, the European Communities and their member States requested the establishment

of a panel to examine the matter in the light of the relevant provisions of the TRIPS Agreement and to find that Canada had failed to conform to the obligations contained in Articles 27, 28 and 33 of the TRIPS Agreement and had thereby nullified or impaired benefits accruing directly or indirectly to the European Communities and their member States under the TRIPS Agreement.

The representative of Canada said that her country was disappointed that the EC had chosen to request the establishment of a panel to challenge certain aspects of Canada's patent laws and regulations. Canada believed that this challenge was intended to strike not just the Canadian model for patent protection but also the model used by many other Members. This was a vital issue for Canada and had implications for many other Members. The panel request challenged the objectives of the TRIPS Agreement designed to balance a competitive investment and research and development climate with social welfare. In focussing on the pharmaceutical sector, the EC was challenging essential measures that many Governments had in place to balance interests of innovators and governments to ensure affordable access to medicines. Canada supported the effective protection of intellectual property rights. It had been instrumental in working with the EC and others in negotiating the TRIPS Agreement that contained both minimum substantive standards and effective enforcement procedures for the protection of intellectual property rights. At the same time, however, the Agreement provided that the application of those rights had to be balanced against other important societal interests. The EC's position, in challenging Canada's legislation, would seem not to reflect that balance but, instead, a more absolutist form of protection. The TRIPS Agreement did not support such a position.

While the Uruguay Round negotiations were taking place, before any TRIPS obligations had taken effect, Canada had implemented important changes to its patent laws. These changes had significantly increased the level of patent protection available for innovator drugs. The Canadian subsidiaries of large European drug companies, through their industry association, had participated in the work leading up to those changes and not only supported them fully, but benefited directly from them. Thus, Canada's revised patent system had been implemented in anticipation of the entry into force of the TRIPS Agreement. It had been designed, in part, to ensure that Canada would meet its international intellectual property obligations. Specifically, Canada's regulatory approval exception (including its stockpiling component) had been put into place as a recognised, permissible limited exception in the soon to be finalized TRIPS Agreement. Moreover, it had been modelled on legislation of one Member which had such provisions in effect since 1984, and had been successfully safeguarding its provisions during the TRIPS negotiations. Canada's exception had been known by the EC long before the conclusion of the Uruguay Round, and had been accepted by the EC at the conclusion of the Round. Canada's exception had to be seen as part of a much larger package, the primary purpose of which was to create a more favourable climate for pharmaceutical innovation. This package represented an acceptable balance between affordable public health care and effective protection of pharmaceutical inventions.

The EC was now complaining that Canada's legislation was too balanced and should be re-balanced in its favour. Canada was aware that the EC was not fully satisfied with the compromise reached under the TRIPS Agreement. The EC would have liked even greater benefits for innovators. But the negotiated minimum standard of the TRIPS Agreement was the North American model for effective and balanced patent protection. Various provisions of the TRIPS Agreement expressly contemplated a balance between the rights of producers and users of technology. It recognized the fact that Members would take measures that were necessary for the protection of public health and promotion of other public interests. This balance could be struck through the use of limited exceptions. The TRIPS Agreement allowed limited exceptions to be made to patent rights, not in the narrow, traditional sense of exceptions to other intellectual property rights, but as a general safeguard against overprotection in order to ensure public policy objectives. The EC seemed not to take into consideration that these provisions also formed a part of, and animated, the TRIPS Agreement.

By requesting a panel to examine this matter, the EC would send a signal to other Members that it considered that the balance intended to be in the TRIPS Agreement was not meant to be there after all. While the EC's case concerned the Canadian patent law, it was in fact an attempt to create a new balance between the interests of innovators and health care costs in all Member countries. The impact of this panel could be far-reaching for all Members. For these reasons, Canada could not agree to the establishment of a panel at the present meeting. Her delegation hoped that the EC would reconsider its request in light of the effect that it would have on national patent laws and on the world trading system. This was not the type of issue that should be litigated, but if it was, it would be important for all Members to be involved since it would have significant impact on them. Canada would defend its patent law vigorously, since it was fully consistent with the TRIPS Agreement.

The representative of Cuba said that his delegation noted the statement made by Canada, and wished to place on record his country's position on this subject. Cuba considered that the Canadian legislation, in particular Articles 55.2(1) and (2) of the Patent Act and the Manufacturing and Storage of Patented Medicines Regulation, was in conformity with Article 30 of the TRIPS Agreement. His country believed that the conditions laid down therein were fully satisfied. First, there was no unreasonable conflict with the normal exploitation of the patent since the patent owner continued to make use of it. Second, it did not unreasonably prejudice the patent owner's legitimate interests, as the owner maintained all exclusive marketing rights and thereby obtained the economic dividends accruing to him from those rights. Under Article 30 of the TRIPS Agreement these exceptions might be provided taking into account the legitimate interests of third parties. This meant that people who might have better access to medical products, enjoyed a better supply of them and acquired the medicines at better prices once the patent protection period of 20 years under the TRIPS Agreement had expired.

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

7. United States – Anti-Dumping Act of 1916

(a) Request for the establishment of a panel by the European Communities (WT/DS136/2)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS136/2.

The representative of the European Communities said that the basis for the EC's request for a panel were contained in document WT/DS136/2. The Community was concerned with the United States' failure to repeal the Anti-Dumping Act of 1916 which was in breach of the US obligations under Article VI of GATT 1994 and under several provisions of the Anti-Dumping Agreement. The Community was not only concerned about the existence of this Act so many years after the Anti-Dumping Agreement was in place but about the use of this Act by US industries as a means to harass foreign competitors. This was well illustrated by pending cases against Tyson Incorporated in Utah (US) and more recently by the initiation of another case on 20 November 1998, in the same steel sector.

On several occasions, the Community had informed the United States that it was willing to reach an amicable solution to this matter. It was therefore disappointed that despite repeated promises to examine this question, with a view to finding such a solution, the United States had not yet come forward with any proposal for such an acceptable solution. Given the time that had elapsed, not only since 1916 but since this matter had been raised, the Community had little choice but to request the establishment of a panel. He noted that this legislation not in conformity with the WTO Agreement, bore a resemblance to another point on the agenda to be considered in the course of the present meeting.

The representative of the United States said that her country regretted and was disappointed that the EC had taken the step of requesting a panel, given that the 1916 Act was a non-operative statute for all intents and purposes. No-one had recovered under the 1916 Act in 82 years since its enactment. Thus, the trade effects of the statute were *de minimis*. However, if the EC decided to proceed to a panel, the United States would defend the law. The 1916 Act was an antitrust, not an anti-dumping statute, and therefore was not covered by the Anti-Dumping Agreement. With regard to the statement made by the Community at the present meeting, she was aware that the Utah-based company had brought a case to the US federal district court.

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

8. Canada – Certain automotive industry measures

(a) Request for the establishment of a panel by Japan (WT/DS139/2)

The Chairman drew attention to the communication from Japan contained in document WT/DS139/2.

The representative of Japan said that on 12 November 1998, his country had requested the establishment of a panel on this matter. The measures in question included all legislation, regulations, statutory instruments and administrative practices relating to the implementation and application in Canada of the Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States ("the Auto Pact"). Under these measures, only a limited number of manufacturers ("the Manufacturers") were eligible to import motor vehicles into Canada duty-free (i.e. free of the otherwise applicable most-favoured-nation duty) and then distribute the motor vehicles in Canada at the wholesale and retail distribution levels. The duty-free treatment was contingent on two requirements; namely, a Canadian Value Added (CVA) content requirement that applied to both goods and services, and a manufacturing and sales requirement. Japan considered that these measures were inconsistent with Canada's obligations under the WTO Agreement.

On 7 July 1998, Japan had requested consultations with Canada. These consultations had been held on 27 August 1998. Prior to the consultations, Japan had submitted to Canada a questionnaire on factual issues. Canada had replied to the questionnaire only partially. During the consultations, Japan had made clear its legal claims, but Canada had declined to engage in legal discussions. Although Japan had further sought to have the original questionnaire and some additional questions answered in order to attain accurate understanding of the issue, Canada had made no further replies. More than four months had elapsed since Japan had made its request for consultations, but no mutually satisfactory solution had yet been found. Therefore, Japan requested that a panel be established at the present meeting pursuant to the relevant Articles of WTO Agreement specified in its request for the establishment of a panel with the standard terms of reference provided for in Article 7.1 of the DSU.

The representative of Canada said that in August 1998, Canada and Japan had held consultations on certain aspects of Canada's automotive trade regime. Her country believed that the consultations had been helpful in explaining Canada's automotive trade regime to Japan. Canada had proposed to hold additional consultations with Japan to discuss the legal issues outlined in its request for consultations. It was therefore disappointed that Japan had requested that a panel be established on this issue. Canada believed that its automotive trade regime was fully consistent with its WTO obligations and as such it would be vigorously defended. Canada was not in a position to accept the establishment of a panel at the present meeting.

The representative of the European Communities said that this was a matter of significant trade interest for the Community since 1 billion ECU's worth of automotive products had been exported in 1997. Two rounds of consultations with Canada had been held on the same issue. The

Community was now considering the next step. In the meantime, it wished to indicate its intention to reserve its third-party right to participate in the panel's proceedings if such a panel would be established.

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

9. Guatemala – Anti-dumping investigation regarding Portland cement from Mexico

(a) Report of the Appellate Body (WT/DS60/AB/R) and Report of the Panel (WT/DS60/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS60/11 transmitting the Appellate Body Report in "Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico", which had been circulated in document WT/DS60/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

The representative of Mexico said that his country was disappointed and surprised with the outcome of the Appellate Body Report. At the present meeting, Mexico wished to express its position on this Report in accordance with Article 17.14 of the DSU. Mexico considered that the Appellate Body Report should not be adopted by the DSB since it contained various errors of interpretation that would not only affect Mexico's rights under the WTO Agreement by the violation of Article 19.2 of the DSU, but had also established a serious precedent for the multilateral trading system. The Report had implied, among other things, that in order to begin a dispute settlement procedure relation to an anti-dumping investigation initiated in violation of the Anti-Dumping Agreement, the exporting Member had to wait until definitive anti-dumping duties had been levied in the territory of the importing Member. The main problem in this case had been reduced to establish whether in the dispute settlement procedures concerning anti-dumping, the term "measure": (i) "should be understood as a shorthand reference to the many varied situations in which obligations under the WTO Agreements might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU" as stated in the Panel Report,[2] in accordance with Mexico's arguments or, on the contrary that: (ii) Article 17.4 of the Anti-Dumping Agreement, "when read together with Article 6.2 of the DSU, required a panel request in a dispute brought under the Anti-Dumping Agreement to identify, as a specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure", as stated in the Appellate Body Report in paragraph 79, a view supported by Guatemala and the United States.

If the term "measure" were to be interpreted in line with the Panel Report it was clear that Mexico had identified the specific measures at issue in its request for a panel. On the other hand, if the specific measures at issue included only definitive anti-dumping duties, acceptance of price undertakings or a provisional measure as concluded by the Appellate Body it was questionable whether Mexico had identified one or more of these mesures in its request for a panel. According to the Appellate Body Report, Mexico had not done this.

With regard to the scope of the term "measure", the Appellate Body had made errors of interpretation by concluding that Article 17.4 of the Anti-Dumping Agreement, read together with Article 6.2 of the DSU, limited the specific measures at issue to either a definitive anti-dumping duty,

[2] Panel Report, paragraphs 7.25 and 7.26.

the acceptance of a price undertaking, or a provisional measure. This was, *inter alia,* due to the following reasons: (i) Neither the DSU nor the Anti-Dumping Agreement limited the scope of the term "measure". With respect to the DSU, the Appellate Body had determined that "measure" could include even non-binding administrative guidance by a government.[3] With respect to the Anti-Dumping Agreement, there were several examples in which the term "measure" had expressly been applied to measures other than those in Article 17.4.[4] The fact that terms: "measure" and "investigation" implied different things, did not mean that the Anti-Dumping Agreement only covered three types of anti-dumping measure;

(ii) Article 17.4 of the Anti-Dumping Agreement did not define the scope of the matter to be examined by a panel, as the Appellate Body had incorrectly stated in paragraph 79 of its Report. It implied that this was a "timing provision" which did not specify that the matter be examined by a panel. The English version of this paragraph did not contain references to the definitive anti-dumping duties or price undertakings as "measures". Both referred to "final action". Article 17.5 of the Anti-Dumping Agreement referred to the "matter" to be examined by a panel not Article 17.4 thereof.

(iii) Article 6.2 of the DSU did not define the scope of the "matter" to be examined by a panel. It required, among other things, that specific measures be identified in order to "present the problem clearly". Article 6.2 did not even refer to the term "matter". The obligation that the "matter" be examined by a panel was contained in Article 7 not Article 6.2 of the DSU.

(iv) It was contradictory to argue that Article 17.4 of the Anti-Dumping Agreement and Article 6.2 of the DSU were complementary and, at the same time, to state that the term "measure" under Article 6.2 of the DSU was reduced to only three types of measure. A reduction of the scope of the term "measure" under Article 6.2 of the DSU implied that Article 17.4 of the Anti-Dumping Agreement prevailed over Article 6.2 of the DSU, namely there was a "difference" between them. If this was not the case, and if both provisions were complementary, then the scope of the term "measure" referred to in each provision would have to be considered together with the result of a wider interpretation of the term "measure".

(v) There was no basis to claim that Article 17.4 of the Article prevailed over Article 6.2 of the DSU, thus, reducing the scope of the term "measure" of the latter to only three types of measure. That was because Articles 17.4 of the Anti-Dumping Agreement and 6.2 of the DSU were not comparable for purposes of Article 1.2 of the DSU -- rules for prevalence -- since their provisions aimed at different purposes. In order to have a comparison between equivalent provisions, a comparison between Article 17.5 of the Anti-Dumping Agreement and Article 7 of the DSU should have to be made since both referred to the "matter", or Article 17.5 of the Anti-Dumping Agreement with Article 6.2 of the DSU since both referred to written documents made by a complainant in relation to the "matter".

(vi) Direct comparison without previously reducing the scope of "measure" in Article 6.2 of the DSU, as had been done by the Appellate Body, between Article 17.5 of the Anti-Dumping Agreement and Article 6.2 of the DSU confirmed that the scope of the term "measure" under Article 6.2 of the DSU should be wider. If that were not the case, one would argue that the measures included in the complainant's request referred to in Article 17.5(i) of the Anti-Dumping Agreement were not eligible for specification under Article 6.2 of the DSU. In other words, Article 6.2 of the DSU, once reduced to three types of anti-dumping measure, would prevail over Article 17.5(i) of the

[3] Footnote 47 of the Appellate Body Report referred to "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products", as well as to "Japan – Trade in Semi-Conductors".

[4] Article 10.7 of the Anti-Dumping Agreement established that "(t)he authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as might be necessary to collect anti-dumping duties retroactively". The Spanish version of Article 13 refers to administrative measures relating to final determinations and reviews. The English text of the latter uses the term "administrative actions".

Anti-Dumping Agreement, where prevalence under Article 1.2 of the DSU worked only the other way.

(vii) In paragraph 74 of its Report, the Appellate Body stated that "all that Article 17.5 requires is that a request by a complaining party contain: (i) a written statement…" This showed that the Appellate Body had mixed the purposes of Article 17.5 of the Anti-Dumping Agreement and Article 6.2 of the DSU. Article 17.5 established the obligation for panels, not Members "to examine the matter based upon: (i) a written statement…" Article 6.2 of the DSU imposed an obligation on a complaining Member not on a panel to "identify the specific measures at issue". Therefore, if a Member complained about the non-compliance of the provisions on initiation of an anti-dumping investigation in its panel request then a panel was not only empowered to, but was obliged to examine such non-compliance.

To conclude that a panel request in relation to anti-dumping cases required that one of the three measures described in Article 17.4 of the Anti-Dumping Agreement had to be specified was not a simple procedural problem but a substantive one that had created a serious precedent for the multilateral trading system. On the basis of this ruling, any Member might now initiate an anti-dumping investigation pursuant to superficial requests, ignoring the provisions of the Anti-Dumping Agreement on initiations of investigations since even if the violation had been evident, an affected Member could not start a dispute settlement procedure as long as definitive anti-dumping duties were not in place. This was due to the fact that: (i) a panel might make recommendations pursuant to Article 19.1 of the DSU only with regard to a measure specified in the request for a panel; and (ii) the DSB's recommendations on price undertakings and provisional measures were either irrelevant to the initiation of investigation or would not be made in time. If a panel request identified the price undertakings, a panel might recommend that such undertaking be eliminated and that duties be re-established. This solution was not only unrelated to the cases in which the dispute arose as a result of the lack of compliance with the provisions on initiation of the Anti-Dumping Agreement, but was also unlikely to arise because there was no need for a finding that imposed the re-establishment of anti-dumping duties.

If a panel request identified a provisional measure, a panel might recommend that the provisional measure be brought into compliance with that Member's obligations under the Anti-Dumping Agreement. However, the time required for the DSB to make its recommendations would always exceed the maximum time in which a provisional measure could be applied pursuant to Article 7.4 of the Anti-Dumping Agreement (six and nine months, respectively). This meant that at the time the DSB made its recommendations a provisional measure be brought into conformity with the Anti-Dumping Agreement, such a measure would have already expired and the procedure would have been unnecessary. The importing Member might argue that it had already complied with the DSB's recommendations because the measure found to be incompatible with the Anti-Dumping Agreement no longer existed.

In order to be able to identify a final measure in a panel request one wait until such a measure had been imposed. If not, the importing Member might argue that such measure did not yet exist. Furthermore, it would not be appropriate to request consultations because the importing Member, like Guatemala, would argue that a final measure which had been applied later might not be examined by the panel since it was not part of the consultations.

In Mexico's view, the need to wait for the imposition of a final measure in order to initiate a dispute settlement procedure on violations of the obligations under the Anti-Dumping Agreement was not logical and did not reflect the outcome of the Uruguay Round negotiations. It also provided an incentive for Members to initiate anti-dumping investigations without complying with their obligations under the Anti-Dumping Agreement. In the worst case, a non-complying Member could illegally protect its domestic production during the time of the investigation before a final ruling by the DSB was made and might retain the anti-dumping duties through that time. This situation might

worsen if the importing Member did not respect the maximum time limits for the investigation, leaving it open indefinitely. There was an incentive to conduct investigations on the basis of a calculated risk of the importing Member and this was not acceptable. Such serious consequences should result from an evident error in the agreed texts of the Uruguay Round and not from a wrong, obscure and tortuous reasoning of the Appellate Body Report.

The Appellate Body had committed errors of fact and law in concluding that Mexico had not properly identified in its panel request a relevant anti-dumping measure: i.e., one of the three measures considered by Guatemala, the United States and the Appellate Body to be the only contestable anti-dumping measures. In paragraph 87 of its Report, the Appellate Body stated that: "After considering the terms of the panel request, and in light of Mexico's express statements at the oral hearing, we also conclude that the provisional measure was not properly identified as the specific measure at issue in Mexico's panel request. Therefore, we find that the provisional measure was not properly before the Panel". In Mexico's view this statement was flawed due to the following reasons: (i) Mexico's request for the establishment of a panel did refer, among other measures, to the provisional measure. As stated in the third paragraph of its panel request, "Mexico considers that in the anti-dumping investigation in question measures were taken that are inconsistent with, at least, Article (…) and 7 of the Anti-Dumping Agreement".[5] Article 7 of the Anti-Dumping Agreement expressly ruled on provisional measures. The Appellate Body Report had unduly translated the term "measures" contained in the Spanish version of Mexico's request as "actions" and this error had repeatedly appeared in both the Spanish and the English versions of the Report; (ii) Article 6.2 of the DSU required that the "specific measures at issue" be identified, but did not provide how such identification should be made. The Appellate Body had added new obligations on Members, in this case Mexico, by concluding that the specific measure "was not properly identified"[6]. Such a standard was neither established in the DSB, nor in the Anti-Dumping Agreement. If such a standard, which added obligations on Members ("duly" identify the measures, rather than just identifying them), had been provided for in any of these agreements, the Appellate Body would have to establish when a measure was "duly" identified and when it was not; (iii) pursuant to Article 6.2 of the DSU, the identification of the specific measures at issue had to be made in order to "present the problem clearly". The Panel Report had demonstrated that the panel had not questioned that Mexico had identified the provisional measure in its request. Even if that was not sufficient, this had not been questioned by Guatemala, as stated in its written submission to the panel: "the provisional measure adopted on 16 August 1996 is the only anti-dumping measure that was the subject of Mexico's request for consultations, dated 15 October 1996 and of its request for the establishment of a dispute settlement panel, dated 4 February 1997"; (iv) in footnote 68 of its Report, the Appellate Body had incorrectly referred to the statements made by Mexico at the hearing before it as an additional basis for its conclusion on this issue. The Appellate Body Report did not indicate what Mexico had stated. In order to respond to this more properly it was noted that: (i) at that hearing, Mexico had reiterated that it had identified the provisional measure; (ii) footnote 68, mistranslated into Spanish, referred to the second paragraph of the panel request, while Mexico had made its clarification to the third paragraph of the request, and (iii) the clarification referred to by the Appellate Body in paragraph 84 of its Report was with respect to the final resolution, not to the provisional measure. With regard to such an important matter, in which all written documents submitted by Mexico had indicated that the provisional measure had been identified, in order to make findings to the contrary, the Appellate Body should have, at least, requested a written answer from Mexico. This practise had been followed in other disputes.

He also wished to express Mexico's disapproval with regard to the manner in which receipt of the submissions of Mexico and the third party -- the United States -- had been dealt with by the Appellate Body. Pursuant to Rules 22 and 24 of the Working Procedures for Appellate Review,

[5] The Spanish version of Mexico's request contains the word "medidas", which should be translated as "measures", not "actions".

[6] Appellate Body Report, paragraphs 81 and 87.

written submissions of the appellee and the third party had been presented on the same day. Therefore, the appellee and the third party could not have been aware of the content of the submission's of the other parties. The Appellate Body had granted an extension to allow the United States to present its submission at a later date due to a timing problem related to the translation of Guatemala's written submission. It had rejected Mexico's request that its submission was presented on time, but were not shown to either Guatemala or the United States until the latter had presented its submission to the Appellate Body. This contravened the Working Procedures for Appellate Reviews and harmed Mexico by allowing the United States to be in a position to know Mexico's arguments before presenting its own submission.

The Appellate Body had erred in its interpretation when it had concluded that, in anti-dumping cases, only three types of measure could be challenged: a definitive anti-dumping duty, acceptance of a price undertaking or a provisional measure. The Appellate Body had contravened the provisions of Article 19.2 of the DSU, because its findings had diminished and added to the rights and obligations provided in the covered agreements. In this case, the rights of Mexico or any other Member under the Anti-Dumping Agreement and the DSU, as well as Guatemala's obligations under the same legal instruments. The Report had created a serious precedent for the multilateral trading system by ruling that, in order to begin a dispute settlement procedure concerning anti-dumping cases, Members would have to wait until definitive anti-dumping duties had been imposed. The Appellate Body after more than twenty months of this procedure had allowed Guatemala to continue the application of an illegal measure until another dispute settlement procedure had been finalized. Mexico therefore considered that the Report of the Appellate Body should not be adopted by the DSB, in order to correct the errors of interpretations, preserve the rights of Members under the covered agreements, and avoid the negative effects that this Report would have for the multilateral trading system.

The representative of Guatemala said that under the new dispute settlement system, the Reports would be adopted at the present meeting thereby contributing to the credibility of the system as an effective mechanism capable of bringing certainty into the multilateral trading system. Since this was the first case under the Anti-Dumping Agreement that had reached the Appellate Body stage, he wished to make a few observations regarding the importance of the case and the aspects of the system that benefited all Members. The multilateral trading system contained a set of disciplines that encouraged trade between Members and established the rights for Members. The Anti-Dumping Agreement was a legal instrument that conferred on all countries the right to initiate and conduct anti-dumping investigations when its domestic industry was injured or threatened by unfair trade practices.

The Appellate Body Report constituted an important contribution for future anti-dumping disputes. He wished to draw attention to the following points: (i) the Panel was wrong in its conclusion that the special provisions of the Anti-Dumping Agreement replaced the DSU provisions thereby relieving the applicant of the obligation to identify the specific measures at issue in a panel request, as required by Article 6 of the DSU; (ii) After a detailed and exhaustive analysis of the relationship between Article 17 of the Anti-Dumping Agreement and the DSU rules and procedures, the Appellate Body had reached the correct interpretation that the special rules and procedures listed in Appendix 2 of the DSU were complementary to the provisions of the Anti-Dumping Agreement, except if they were incompatible, and had reversed the Panel's finding. The Appellate Body considered that the Panel's erroneous reasoning "does not reflect the *integrated* dispute settlement system established in the WTO". In addition, the Panel had incorrectly given a broad interpretation to the term "measure", which it considered could be "an action taken, or not taken, during the course of the investigation". The result of this erroneous line of reasoning was that in an anti-dumping investigation, a Member would be entitled to challenge the initiation of the investigation or any isolated act in the course of the investigation, even though no anti-dumping measure was subject to examination. The Appellate Body had reversed this finding by drawing the correct distinction between the specific measures at issue and the allegations or legal basis of the complaint, stating that only the Anti-Dumping Agreement provided a specific list of the measures which might be referred to

the DSB: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. This line of reasoning did not limit the nature of the complaints that might be raised in an anti-dumping dispute. However, it did clearly indicate that for the initiation and/or conduct of an investigation to be examined, one of the identified anti-dumping measures would have to be brought to the attention of the Panel. The Appellate Body's decision had reaffirmed the fundamental right of any Member to initiate an investigation when a branch of its domestic industry was injured or threatened by injury by unfair trade practices. If the Panel's view was maintained, it would have meant that any investigated Member could resort to the dispute settlement system as a means of preventing the Member affected by unfair trade practices from conducting an investigation.

Guatemala believed that the sound legal reasoning underlying the Appellate Body's conclusions made a significant contribution to the dispute settlement system and went beyond the particular interest of Members that were parties to this dispute. With the adoption of these Reports his country would be able to renew its commitment to a system which respected the text of the Agreement subject to an integrated and coherent procedure, which represented a legitimate and effective course of action for achieving the full implementation of rights. He expressed his Government's gratitude to the Panel and the Appellate Body, and the Secretariat for their work.

The representative of the United States said that the Appellate Body had been faced with a difficult situation. While Guatemala's action was questionable, Mexico had failed to properly identify the measure at issue in its request for the establishment of a panel. In the United States' view, the Appellate Body had properly reversed the Panel's findings. First, the Appellate Body had correctly reversed the Panel's finding that Article 17 of the Anti-Dumping Agreement "replaced" the relevant provisions in the DSU. This finding was inconsistent with the letter of Article 1 of the DSU, as well as with the notion that the WTO established an *integrated* dispute settlement system. Second, it was important for the Appellate Body to clarify what constituted a "measure" and what constituted a "claim" without, at the same time, narrowing the practice established under the GATT 1947. It was essential to correct these overboard findings for the proper resolution of this dispute and for future disputes under the Anti-Dumping Agreement. Since this was the first dispute under the Anti-Dumping Agreement considered by the Appellate Body, the United States was pleased that the Appellate Body had made it clear that the parties had to comply with the provisions of the Anti-Dumping Agreement and the DSU when referring a matter to a panel for resolution.

The representative of Hong Kong, China said that his delegation noted the statement made by the parties to the dispute and the third parties. In the view of Hong Kong, China, the Appellate Body Report raised issues of serious concern with regard to the interpretation of various issues and its implications. His delegation was concerned about one important issue, namely that Members were to challenge anti-dumping investigations in cases where these were either unduly delayed or overly protracted or even repeated, without specific measures taken, as defined by the Appellate Body. His delegation had hoped that the Appellate Body would have wished to encourage some greater discipline in this area. Instead, its Report was a licence for possible further mal-administration of an Agreement which already contained imperfections and opportunities for discrimination on overly subjective grounds by importing Members. His delegation would further pursue its concerns on other occasions in future.

The representative of Japan said that his country supported the Appellate Body's interpretation that "there is no inconsistency between Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together" (paragraph 75). He drew attention to the Appellate Body's finding that a panel request in a dispute under the Anti-Dumping Agreement had to identify the specific measure at issue and that such measure had to be limited to either of the three types of measure: i.e. a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. It was Japan's understanding that such interpretation did not change the scope of matters to be raised in the consultations under Article 17.3 of the Anti-Dumping Agreement. To this effect, Article 17.3 of the

Anti-Dumping Agreement did not preclude requesting consultations regarding matters which were still in the investigation phase.

The representative of the Philippines noted that Mexico had already delved into the legal basis concerning various errors of interpretations contained in the Appellate Body Report, which would have serious implications for the multilateral trading system. Her country shared Mexico's concerns on these serious implications. The Philippines legitimately expected that the DSU, essentially a body of procedural rules, was interpreted and applied in a manner which facilitated the settlement of disputes among Members, serving to preserve their substantive rights and obligations under the covered agreements and to clarify the provisions of those Agreements. This was the underlying rationale for the existence of the dispute settlement mechanism. Thus panels had mandatory jurisdiction over any dispute on any of the provisions of the covered agreements.

In case of various possible interpretations on whether or not a matter had been properly brought before a panel, any doubts needed to be resolved in favour of upholding the jurisdiction of the panel. In any dispute, procedural due process was required. But the basic relevant inquiry into whether the requirements of procedural due process were met was whether or not a reasonable opportunity had been provided to the respondent to defend itself. The Appellate Body Report limited its examination into the requirements of Article 6.2 of the DSU and Article 17.4 of the Anti-Dumping Agreement and had construed those provisions in a manner unduly restrictive of the right of a complaining Member to seek redress under the dispute settlement mechanism. His country was concerned that if this trend continued the DSU might ultimately become another separate field of dispute, a development which was inconsistent with the underlying rationale for its very existence. In the context of the Anti-Dumping Agreement, the Appellate Body's ruling had virtually left a Member which was the target of an anti-dumping investigation with no feasible procedural option but to wait for the imposition of the final anti-dumping duty before invoking the dispute settlement mechanism. This, in the Philippines' view, was not in accordance with the letter and spirit of the Anti-Dumping Agreement. On the contrary, the Agreement stipulated clear procedural and substantive obligations on the part of investigating authorities in respect not only of the imposition of the final anti-dumping duty, but also in respect of the initiation and conduct of investigations, and imposition of provisional measures. Furthermore, in combination with the unique "standard of review" provisions specified in Article 17.6 of the Anti-Dumping Agreement, the Appellate Body, had unfortunately given rise to jurisprudence that rendered the DSU, and the Anti-Dumping Agreement, a meaningless and ineffective mode of redress.

Finally, assuming that the Appellate Body was convinced of its legal reasons for limiting the definition of "measure", her country failed to understand that it had not considered that a provisional anti-dumping duty in place had adverse effects on Mexico. Therefore, the Philippines believed that the Appellate Body, by not upholding the jurisdiction of the panel, and by construing Article 6.2 of the DSU and Article 17.4 in an inordinately restrictive manner did not promote the preservation of the substantive rights and obligations of Members under the covered agreements.

The representative of Ecuador said that his delegation had noted the statements made at the present meeting. The outcome of this case was of great significance for Ecuador as it preserved the rights of Members to pursue investigations on anti-dumping matters without intervention, particularly in order to defend their own legitimate interests. Therefore, Ecuador supported the Appellate Body's findings and its final conclusions.

The representative of India said that his delegation shared the concerns expressed by Hong Kong, China and the Philippines.

The representative of Argentina said that his delegation believed that the legal reasoning that had led the Appellate Body to its conclusions had shed light and precision on the rights and

obligations under the Anti-Dumping Agreement in relation with the DSU. His delegation supported the statement by Ecuador.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS60/AB and the Panel Report in WT/DS60/R as reversed by the Appellate Body Report.

10. United States – Unilateral section 301 procedures of the US Trade Act of 1974

(a) Recourse by the European Communities to dispute settlement procedures

The Chairman said that this item was on the Agenda of the present meeting at the request of the European Communities.

The representative of the European Communities said all delegations had worked hard together in the Uruguay Round to create a dispute settlement system that would be truly multilateral and rule-oriented in which small countries had the same rights as the large ones and where the rule of law replaced the rule of force. The DSB was now faced with a dangerous situation of a systemic nature, namely a claim by one important Member that it could be the judge and jury in its case. This situation risked the substitution of a unilateral approach for the multilateral one. In other words, it risked undermining the very core of the system. He referred to the publicly announced intention of the United States to determine, unilaterally, under its Section 301 procedures of the 1974 Trade Act, before the end of the expiry of the reasonable period of time for implementation, that the EC implementing measures in the banana case had failed to conform to WTO rules and on that basis to proceed with trade sanctions under the same legislation shortly thereafter. In particular, the United States had announced that on 15 December 1998, it would make a unilateral determination under Section 306 that the EC's implementing measures on bananas did not comply with WTO rules, as well as a determination of the products on which sanctions would be imposed. Section 301 seemed to oblige the US administration to make these determinations not later than one month after the end of the reasonable period of time for implementation before the multilateral findings on the question of whether or not the EC's implementing measures conformed to WTO rules. The United States had also announced that as early as 1 February 1999 or not later than 3 March 1999, it would, under Section 305, impose prohibitive tariffs of 100 per cent *ad valorem* on as much as US$ 1.5 billion worth of EC exports. These announced sanctions had already started to have a negative effect on trade. This decision would be taken in the absence of any multilateral determination on whether the EC's implementing measures conformed to WTO rules. As a result, the DSB would not be in a position to authorize retaliation if the United States were to ask for it, and the US retaliatory measures would be imposed unilaterally.

The United States had stated that it was clear that the EC had failed to take the correct implementing measures, that it had waited long enough, and that now, according to the language of Article 22 of the DSU, it had the right to request the DSB for authorization to suspend concessions as soon as the reasonable period of time for implementation expired on 1 January 1999. He drew attention to the fact that Article 22.2 and 6 of the DSU, which determined the right to compensation or suspension of concessions, started with a condition. This condition was that the Member concerned -- in this case the EC -- had failed to bring the measure, found to be inconsistent, into conformity. In its entire approach to the issue of compensation or retaliation, the United States seemed to forget one simple but crucial question, namely, in cases where the losing party had taken measures to implement the DSB's recommendations, who would determine whether those implementing measures complied with WTO rules or not. The reply was clear and was contained in Article 21.5 of the DSU, which read as follows: "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB] such dispute shall be decided through recourse to these dispute settlement procedures". At present, there was no agreement that the EC's implementing measures had failed to conform. The Community

considered that it had implemented the DSB's recommendations in good faith, well within the reasonable period of time and that its new regime was in full conformity with WTO rules.

He questioned whether a Member should have the right to make such a determination of non-conformity unilaterally. He believed that this was not possible for the two following reasons: (i) Article 23 of the DSU explicitly forbade Members to make a unilateral determination that a Member did not comply with the WTO rules, and obliged all Members to seek the redress of any alleged non-conformity through the DSU rules and procedures rather then its own legislation; (ii) Article 21.5 of the DSU obliged Members, where there was disagreement as to the consistency with the WTO rules of measures taken to comply with the DSB's recommendations, to decide such dispute through recourse to the DSU procedures. It was clear that this provision had been written into the DSU precisely to deal with the situation at issue. It was also clear in law and logic, that in cases where there was disagreement about the conformity of implementing measures, no request for DSB authorization to suspend concession could be made until a final ruling under Article 21.5 of the DSU on the question of conformity had been adopted by the DSB.

On the basis of the notices already published in the Federal Register and certain commitments the White House had publicly taken towards Congress, the United States intended to disregard these crucial provisions of the DSU or at least to disregard them in the banana case, because it would be difficult to imagine that the United States would take the same perspective in a case where it considered that the US Congress had implemented the DSB's recommendations. For these reasons, the President of the EC Commission had written to the US President on 10 November 1998, warning him that the EC would start dispute settlement action by 25 November unless the US had indicated before that date that it had decided to act within the WTO system. The United States was still continuing its section 301 process leading up to a unilateral determination of non-conformity by 15 December and to trade sanctions soon thereafter. He had received instructions from his authorities to request at the present meeting the initiation of dispute settlement consultations with the United States regarding the Section 301 procedures of the US Trade Act of 1974. The formal written confirmation of the request for consultations would follow shortly.

The representative of the United States said that her delegation noted that the EC had labelled every US action as unilateral while characterizing the EC's tactics as multilateral. She wished to emphasize that her country strongly believed in the WTO and in the importance of maintaining the credibility of the dispute settlement system. Like the EC, the United States had won and lost cases in a number of disputes, but in the three cases in which it had incurred losses it was implementing the DSB's recommendations. She believed that the present difficulties had a direct origin in the EC's failure to act in good faith in implementing the DSB's recommendations. If the Community now claimed that the United States was acting unilaterally, one could ask why Members were in this situation and who had acted unilaterally. The WTO had ruled against every aspect of the EC's banana regime, yet the EC intended to put into place on 1 January 1999, a system that would have virtually the same discriminatory effects. The EC had used its compliance period of more than 15 months to do nothing than tweak its measures for continued protectionism. The preparatory steps taken in the United States for invoking Article 22 of the DSU were now labelled the US "unilateralism" by the EC. This was not a case of unilateralism as the United States was acting in full conformity with its WTO obligations and in accordance with a time-table based explicitly in the DSU. Paragraphs 2 and 6 of Article 22 established a 60-day period for obtaining DSB authorization to suspend concessions after the end of the reasonable period of time. The United States had already announced that it would follow these DSU procedures. The action taken in the United States constituted the preparation for the invocation of its WTO rights. The US law required that before tariffs were raised, even in the context of multilaterally-authorized suspension of concessions, there was a need, whenever possible, for advance notice and hearings. The United States had issued a notice to that effect on 10 November, making it clear that its action would take place in accordance with the timing specified in the DSU. The US process was very transparent. The United States was pursuing the internal steps to be able to

follow the WTO procedures. This was not a threat of unilateral sanctions but rather preparation for a measured, multilaterally-authorized response to the EC's failure to implement.

Article 22 of the DSU very clearly provided a prevailing complaining party an absolute right to withdraw concessions no later than 60 days after the expiration of the reasonable period of time. Furthermore, Article 22 did not require the complaining party to delay recourse to Article 22 until a panel had ruled on the consistency of the responding party's new measures under Article 21.5. The DSU did not provide that Article 21 was a precondition to Article 22. In fact, the EC's interpretation of Article 21 would render Article 22 completely inoperative because all actions in Article 22 had to take place within the 60-day period following the end of the reasonable period of time. A fundamental principle of treaty law interpretation was that one could not adopt a reading of a treaty that would render whole clauses or paragraphs of the treaty useless. The DSU had been intended to prevent blockage and ensure predictability at four critical phases of the dispute settlement process: establishment of panels, adoption of panel reports, adoption of Appellate Body reports and authorization to suspend concessions. The only way for a request for any of these actions to be rejected was by consensus. Since a requesting party was unlikely to object to its own request each request was granted with almost virtual automaticity.

The provision related to suspension of concessions was contained in Article 22.6 of the DSU and was time-limited. Under the terms of Article 22.6 authorization had to be granted within 30 days of the expiration of the reasonable period of time, in this case by 31 January 1999, unless the EC requested arbitration under Article 22.6. If the EC was to request such arbitration, the DSU required that the arbitration be completed within 60 days of the expiration of the reasonable period of time, which in this case was 2 March 1999. Unlike other provisions of the DSU that provided for the possibility of extending time-periods, this provision did not. Following the arbitration, if the United States submitted a request for authorization to suspend concessions in line with the arbitrator's decision, Article 22.7 required that the DSB grant authorization unless there was a consensus to reject the US request which in this case would take place on 2 March 1999. Article 22 would not have been written the way it had been written -- with all its deadlines referring back to the end of the reasonable period of time -- if the negotiators had intended that recourse to Article 22 could not take place until after the completion of yet another dispute settlement proceeding under Article 21.5.

As Article 22 had been drafted, it could be argued that the only way the United States could obtain the benefit of the so-called "negative consensus rule" with respect to its request for authorization to suspend concessions was if it made its request on 21 January and followed the procedures in paragraphs 6 and 7 of Article 22. She noted that the text of the DSU did not include any other time-frame. Under such a reading of Article 22, the United States was not only fully within its rights in preparing to submit on 21 January a request for authorization to suspend concessions, it had to do so in order to obtain one of the benefits of the DSU which was automaticity with respect to suspension of concessions at the conclusion of the reasonable period of time. If further dispute settlement proceedings were a complaining party's only possible response when a defending party used its reasonable period of time to do nothing more than make token changes to measures found to violate the WTO Agreements, the message was that powerful Members needed only comply with the WTO obligations when it was convenient for them to do so. This was not the message that anyone wished to send. The WTO Agreement provided an effective mechanism to ensure compliance with the WTO obligations and not to foster prolonged non-compliance and endless litigation.

Article 3.3 of the DSU recognized that the prompt settlement of disputes was essential for the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. The EC's insistence that the United States had to have recourse to Article 21.5 as a precondition to Article 22 tipped the balance entirely in favour of the non-complying defendant. Most of all, and while the EC was prolonging the litigation, the Latin American developing countries and the American companies that built the Latin American banana trade would continue to suffer the harm caused by the EC's continued protectionism. The United States

recognized that Article 21.5 had to be clarified and expected that this would be done in the context of the DSU review. In the meantime, the United States had proposed to the EC that the panel be reconvened and that it complete its review of the modified EC regime by 15 January. It had also proposed that the entire review process, including any appellate review -- as well as arbitration on the amount of proposed US counter-measures, if requested by the EC -- be completed by 1 March. This fully conformed to the time-frames in Article 22. If the EC requested arbitration, the US action would take effect after this arbitration was completed. The United States hoped that it would be possible to proceed in this way. In response to the EC's statement at the present meeting, the United States would respond in writing to any written request for consultations in accordance with the normal procedures of the DSU.

The representative of Cuba said that his delegation wished to be associated with the statement made by the Community concerning a threat of unilateral measures to be taken by the United States. Once again, Members were faced with the threat of unilateral measures by an important Member pursuant to Section 301 of the US Trade Act of 1974 frequently condemned by the international community. The provisions of this Section were in contradiction with the progress achieved by the international trading system and continued to have negative effects on international trade relations. Once again, the WTO was faced with the dilemma of unilateralism versus multilateralism. Multilateralism constituted the essence of the WTO and its legal texts, including the DSU. It was therefore regrettable that, at this stage, the WTO had to face such a situation which affected its credibility and transparency at a time when attempts were being made to improve its public image. Despite the fact that such a threat of the application of unilateral measures had been discredited by Members, the US Trade Act was maintained. In other words, some countries continued to abuse their economic power and did not wish to fully comply with the WTO provisions and with international law. Cuba considered that this law should be terminated and Members should refrain from applying it.

The representative of Ecuador said his delegation wished to participate in the consultations referred to by the Community. This was because the consultations concerned non-compliance by the EC with its WTO obligations. This demonstrated an extreme case of a conduct which threatened the dispute settlement system and which had been condemned by Ecuador and some other banana-exporting countries. His delegation wished to be associated with the concerns expressed by developing countries that unilateral action by the EC constituted an attempt to undermine the basis of the system which was being considered as the most efficient of the WTO mechanisms.

The representative of Japan said that his country regretted that the United States and the EC had not been in a position to reach a mutually satisfactory agreement on implementation of the DSB's recommendations. Japan considered that disputes over the implementation of the DSB's recommendations should be decided through recourse to the dispute settlement procedures as provided for in Article 21.5 of the DSU. His country urged both parties to take this step and to reach a mutually acceptable time-table. His delegation noted with satisfaction that a request for consultations would be submitted in writing by the EC. This in Japan's view was necessary for transparency purposes. He noted that even if a party invoked Article 22 it was required to enter into negotiations with a view to reaching a mutually acceptable compensation before requesting authorization from the DSB to suspend concessions. These steps were built-in the DSU and Japan strongly urged the two parties to observe them.

The representative of Jamaica said that two important statements had been made by the EC and the United States regarding their interpretations of the WTO Agreement, in particular the DSU. He noted that the meeting had been delayed due to consultations on this matter. On the basis of the statements made at the present meeting it was difficult to decide on a correct approach. However, it was clear that if a request for consultations was made and the correct procedures were followed, then if not at the present meeting this would have to be done shortly. The best way to work in the WTO

was to ensure that if the procedures were clear they should not be disregarded and if the procedures were ambiguous there was a need to clarify them in an effort to reconcile the differences.

At the DSB meeting on 21 October 1998, the United States had stated that it "continued to hope that a WTO-consistent solution would be found through negotiations before it had to request authorization from the DSB to suspend concession" (WT/DSB/M/49). The United States had recognized two things: the need for the authorization from the DSB to suspend concessions, and the need to finding a mutually satisfactory conclusion through negotiations. He was not certain whether recourse to Section 301 procedures were necessary preparatory steps to enable the request once granted to allow the parties to proceed. This course of action had intensified tension. At the same meeting, the EC had stated that "it would continue this process and hoped that it would still be possible to reach a mutually satisfactory understanding and agreement on the way it had proposed to meet its obligations" (WT/DSB/M/49). At that meeting, these two parties had indicated their willingness to work in a constructive way. For its part, Jamaica had indicated that it looked forward to the EC's fourth status report and hoped that consultations carried out in Brussels, Geneva and Washington would enable the parties to make progress towards meeting the legitimate interest of those developing countries that exported bananas to the EC market and the interests of the banana-exporting countries under the Lomé Convention with respect to which the EC had international commitments and obligations. Unfortunately, the tension had intensified.

It was unusual and unfortunate that the agenda of the present meeting contained the issue of implementation of the EC's measures and a proposal related to Article 21.5 of the DSU as well as the Section 301 procedures of the US Trade Act of 1974. It seemed that there was no coherence among Members who sought to find a mutually satisfactory solution. At the same time, consultations were ongoing which involved third parties including Jamaica. If the majority of members of the DSB were not aware of these processes then they had the right to request transparency for the DSB to proceed systematically and openly to resolve these issues. Jamaica did not believe that the arguments made by the EC or the United States were conclusive as to their interpretations. If procedures were ambiguous there was a need for the DSB to clarify them. However, if procedures were clear, there was recourse to Article 21.5 of the DSU which involved accelerated procedures. Should this item be pursued, another avenue would be opened; i.e. Article 22 of the DSU dealing with the same issues. He believed that this was not the best approach for the WTO. It was not appropriate for two major trading partners to heighten tension, to distort procedures, to create confusion and to give the impression that protectionist measures could be sanctioned because of their relative trade weight. This was not addressing the legitimate concerns of the Central American and Caribbean countries. He hoped that although three parallel courses of action had been initiated, it would not be interpreted that the DSB was a confused forum and that the major trading partners were ready to engage in a trade war instead of resolving issues of concern to small trading partners in a mutually constructive way. He hoped that it would be possible to find the way to conclude this matter that this would be both in the interest of the United States and the EC.

The representative of Indonesia said that her delegation noted the statements made by the EC and the United States. At the present meeting she wished to express her delegation's position, without any intention to interfere in the positions of other Members on the issue of disagreement as to whether or not the party complied fully with the DSB's recommendations. Indonesia fully shared the view that this was a very important systemic issue which would directly affect the credibility of the WTO unless Members respected the existing provisions of the DSU. Indonesia's interpretation of Article 21.5 of the DSU was that it was for the panel to judge whether the implementing measure was consistent with the DSB's recommendations. Furthermore, pursuant to Article 22.2 of the DSU, if a Member failed to implement fully the DSB's recommendations within the reasonable period of time no Member was entitled to take retaliatory action until authorization had been granted by the DSB by means of the principles contained in Article 22.3 of the DSU.

The representative of Guatemala said that that his delegation noted the statements made by the EC and the United States and considered that it was important that the EC submit its request for consultations in writing. This might have an impact on the implementation of the relevant provisions of the DSU which were designed to ensure compliance with the recommendations of the panel and the Appellate Body. Guatemala wished to participate in these consultations.

The representative of Hungary said that he wished to express his country's serious concern about the recent developments in the banana case which might have far-reaching negative consequences for the dispute settlement system. Hungary fully appreciated the interest of both parties, the complexity of this dispute and the sensitivities attached to it by the parties involved. At the same time it was also clear that this matter was a test of the solidity of Members' commitments towards settling all trade-related disputes within the multilateral framework of the DSU. This was a very serious systemic issue and the question was what should be done if implementation of the recommendations was challenged. With regard to the compliance with the DSB's recommendations, it seemed clear that by virtue of Article 21.5 of the DSU, its assessment rested exclusively with a panel and where appealed, with the Appellate Body, and any decision in this regard could only be made through recourse to the dispute settlement procedures. Therefore, his country strongly hoped that the parties would act in a responsible manner and would be able to resolve this long-standing dispute in accordance with both the letter and spirit of the DSU within a short period of time, bearing in mind that their steps were bound to have far-reaching implications on the functioning of the multilateral system.

The representative of Norway said that his country was concerned about the fact that two very important Members seemed to be unable to find a solution to their problems which directly or indirectly affected other Members. He did not wish to give any concrete advise on how the parties should deal with their bilateral dispute. However, the parties had the responsibility of finding not only a solution to this agenda item but indirectly to ensure that the dispute settlement mechanism was not negatively affected. He believed that the parties, with the Secretariat's assistance would find the appropriate legal wording. If the parties so wished, there were other delegations that could assist in this process.

The representative of Honduras said that his delegation wished to support the statements made by Ecuador and Guatemala with regard to the relevant provisions of the DSU in order to comply with the recommendations of the Panel in the banana case. The main concern of Honduras was that the system should also be able to operate with regard to other cases.

The representative of Switzerland said that her delegation considered that this was a very important case for the operation of the dispute settlement system and the multilateral trading system. Her country had a systemic interest in this matter. In Switzerland's view, the implementation of the recommendations of the panel and the Appellate Body should be of concern to all Members. Switzerland believed that Article 21.5 of the DSU had to be applied whenever the parties to the dispute disagreed about the measures taken in compliance with the DSU provisions. A panel should be established in accordance with the provisions of Article 21.5 of the DSU and, if possible, the same panelists should serve on this panel. Under Article 21.5 of the DSU, recourse to this procedure was mandatory. Furthermore, Article 23 of the DSU prohibited unilateral actions. If a Member prepared counter-measures because it had unilaterally decided that another Member had not complied with the recommendations of the panel or the Appellate Body, such a Member would act unilaterally and thereby it was not respecting the DSU provisions. Switzerland believed that this was not acceptable. The fundamental principle of the DSU was to use the multilateral mechanism to resolve disputes. Therefore, her delegation wished to appeal to all Members to preserve the multilateral character of the WTO and in particular the DSU.

The representative of Poland said that Members were confronted with different interpretations of certain Articles of the DSU while there was a concrete problem which required a quick solution. In

Poland's view, the DSU, in its letter and spirit, was a conciliatory instrument based on multilateral rules. Therefore, relevant conciliatory, multilateral procedures should be followed and unilateral actions should be avoided. His country hoped that recourse to Article 21.5 of the DSU would be initiated shortly pursuant to the procedures of this Article with the common objective to preserve and enhance the credibility of the DSU and the multilateral trading system.

The representative of Dominica said that he was concerned with the discussion at the present meeting since his country depended entirely on exports of bananas to the EC's market. He wished to urge Members to respect the unambiguous procedural guarantees embodied in the DSU provisions. The enormous publicity given to the US threat of unilateral action and the international posturing in recent weeks had already created some damaging uncertainty and had threatened the stability in the ACP countries. He believed that the ACP countries would endorse his statement. The United States had imposed a time-frame which was likely to result in a serious and substantial breach of its WTO obligations. Most ACP countries would find it extremely difficult, if not impossible, to fit into this time-frame. While the ACP countries considered that an early resolution by a panel of this matter was desirable, they wished to ensure both in consultations and in the panel proceedings that the vital and parallel interests of ACP countries were preserved. The ACP's rights under the Lomé Convention were at the heart of this dispute. It was therefore imperative that not only the rights of ACP countries as third parties were taken into account but that the ACP countries should be given full rights of participation in the panel procedure. Procedural irregularities should never be ignored in order to serve the interests of those Members which accounted for a substantial volume of world trade. For these reasons, the procedures to be followed by the parties should be carefully examined, so that the principles of due process reflected in the provisions of the DSU were fully guaranteed.

The representative of the Czech Republic said that this was an extremely sensitive case which, if not properly dealt with, might have serious implications for the dispute settlement mechanism and the multilateral trading system. This issue involved a dispute between two major trading partners. Some fundamental principles were at stake and this long-standing case was also an important test of the credibility and viability of the multilateral trading system. In his delegation's view, trade disputes had to be solved within agreed legally binding rules. These rules were applicable to all Members and should be respected by them. Any action outside these rules would not be in conformity with the dispute settlement rules and would put at risk the whole dispute settlement system. In this particular case, a panel should determine whether a measure subject to a dispute was correct or not. His country, like others, wished to encourage both parties to the dispute to find a mutually satisfactory solution within the framework of the dispute settlement system.

The representative of Panama said that his delegation, like Guatemala, Ecuador and Honduras, also wished to participate in the consultations. Panama was interested in the systemic aspects regarding the resolution of this matter pursuant to Articles 21.5 and 22 of the DSU. His country had stated its position on several occasions that the new EC's banana regime to be implemented on 1 January 1999, was incompatible with the EC's commitments under the WTO Agreements. His delegation considered that with only a month before the expiry of the reasonable period of time, it was hardly necessary to reiterate the aspects of the EC's regime considered to be unacceptable. The six countries had been extremely clear and careful in pointing out the incompatibilities of the new regime. However, his delegation considered that it was necessary to reiterate its rejection of the EC's delaying tactics in the face of repeated and urgent calls for the original panel to examine the new regime and make a ruling on its compatibility with the WTO Agreements.

The six countries had repeatedly called upon the EC's authorities sufficiently well in advance so that by 1 January 1999 an expedited procedure under Article 21.5 of the DSU would have allowed an examination of this regime. Contrary to the publicly expressed desire of the Commission, the EC's machinery had proposed alternatives and interpretations of the DSU that would only delay a settlement of this dispute. Another example of this attitude was the stance adopted by the

Commission in the face of a request from two Members to reactivate the consultations. Despite the clarity of this request, and contrary to it, the Commission decided unilaterally that these consultations constituted a new round of consultations that were distinct from those already initiated. It is clear that the EC hoped by this manoeuvre to further delay the reconvening of the original panel.

The United States had recently proposed to the EC an expedited procedure compatible with the DSU that would enable the disagreement to be resolved according to a timetable that was clear, definite and that would not prolong this disagreement indefinitely. Objections were raised by the EC to this proposal which, in its desire to defend an indefensible regime, did not wish to fix target dates. The stance taken by the Commission created uncertainty with regard to the future effectiveness of the DSU to guarantee the rights of Members contained in the DSU. This could only undermine the foundations of the multilateral trading system and would not benefit anyone. His delegation hoped that the common sense and equity that had always governed the relations of member States of the EC with developing countries would predominate over the unusual behaviour of the EC's representatives.

The representative of Mexico said that he looked forward to the written request for consultations by the EC in order to know whether the consultations would be bilateral under Article XXIII of GATT 1994 or open to other parties under Article XXII of GATT 1994. He therefore asked the EC if it was in a position to inform Members whether the consultations would be held under Article XXII or XXIII of GATT 1994.

The representative of the European Communities said that this matter related to the US legislation which was inconsistent with the WTO Agreement. He wished to confirm that those who wished to participate in the consultations on this matter could do so, since the EC's request for consultations had been made pursuant to Article XXII of GATT 1994. However, it was up to the United States to provide an answer whether a party had a substantial interest in the matter. He wished to underline three points. The United States had made some important points with regard to Article 22 of the DSU. This was the first time that such arguments had been laid down in detail either in the DSB or bilaterally. He wished that these interesting points could have been discussed at an earlier stage. However, the United States did not make similar points concerning Article 21.5 of the DSU which was an obligatory procedure and it had not explained why it did not wish to pursue it. No reference had been made to Article 23 of the DSU which explicitly prohibited unilateral determination of another party's action as to whether it conformed to the WTO Agreement or not. These important points would be pursued in the consultations. Although the points made by the United States on Article 22 of the DSU were interesting, it did not provide any answer to other provisions referred to by the EC. With regard to the question raised by the Philippines on whether the EC would seek another reasonable period of time if a panel was established under Article 21.5 of the DSU and found that the EC's measures were not in compliance with its WTO obligations, he said that the answer was unequivocally no. If a panel was to find that the EC's measures were not correct the EC would have to bring the measures into conformity as soon as possible but during that period the United States or any other party that had asked for compensation would be able to do so. In accordance with the EC's reading of the DSU, there was only one reasonable period of time which would expire on 1 January 1999.

The Chairman said that important messages had been sent to the parties to this dispute which was very delicate and complex. He hoped that these messages of concern had been heard so that the WTO and its dispute settlement system would come out of this trial strengthened and more credible.

The DSB took note of the statements.

11. Adoption of the 1998 Draft Annual Report of the DSB (WT/DSB/W/86 and Add.1)

The Chairman said that in pursuance of the procedures for an annual overview of WTO activities and for reporting under the WTO contained in document WT/L/105, he was submitting for

adoption a draft text of the 1998 Annual Report of the DSB in document WT/DSB/W/86 and Add.1. This report covered the work of the DSB since January 1998. It had been prepared in accordance with the structure of the 1997 Report. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 1998, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He proposed that following the adoption of the Annual Report at the present meeting, the Secretariat be authorized to update this Report under its own responsibility in order to include actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would then be circulated and submitted for consideration by the General Council at its meeting on 9-11 December.

The DSB adopted the draft Annual Report contained in WT/DSB/W/86 and Add.1 on the understanding that it would be further updated by the Secretariat as proposed by the Chairman.

12. India – Patent Protection for Pharmaceutical and Agricultural Chemical Products

(a) Joint statement by India and the European Communities

The representative of India, speaking under "Other Business" also on behalf of the European Communities, recalled that the DSB had adopted the Panel Report relating to the dispute "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products – complaint by the European Communities and their Member States" (WT/DS79) at its meeting on 22 September 1998. He also recalled that India had informed the DSB on 21 October 1998 of its intention to meet its WTO obligations with respect to this matter. Subsequently, India and the Community had had two rounds of bilateral consultations with a view to arriving at a mutually agreed reasonable period of time, pursuant to Article 21.3(b) of the DSU. At the present meeting, India and the EC wished to inform the DSB that, as a result of the bilateral consultations, they had agreed on 24 November 1998 on a reasonable period of time, until 19 April 1999, to implement the DSB's recommendations. He noted that this was done in the light of the time-frame agreed by India and the United States in the context of an earlier dispute relating to the same matter.

The DSB took note of the statement.

13. Rules of Conduct

The Chairman, speaking under "Other Business", recalled that at the informal meeting of the DSB on 22 June 1998 he had referred to Section IX of the Rules of Conduct which stated that: "These Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the DSB as to whether to continue, modify or terminate these Rules". At that meeting he had also recalled that since the Rules of Conduct had been adopted on 3 December 1996 there was a need for Members to consider how to conduct a review of these Rules and reach a decision in respect thereof prior to the end of 1998. Thus far, he had not detected a particular desire among delegations to conduct a comprehensive review of the Rules of Conduct. He considered that given the short period of time of applicability of these Rules, it might be more appropriate to gain more experience before such a comprehensive review could be undertaken. One approach would be to continue to apply the present rules and review them at a later stage, as necessary. He proposed that, unless delegations had objections, at its next regular meeting scheduled for 25 January 1999, the DSB could decide to continue to apply the current Rules of Conduct as contained in document WT/DSB/RC/1 and review them at a later stage, as necessary.

The DSB took note of the statement.

The meeting was adjourned.