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on 22 June 1998

Chairman: Mr. Kamel Morjane (Tunisia)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) Canada – Certain measures concerning periodicals: Status report by Canada (WT/DS31/9/Add.2)

The Chairman recalled that Article 21.6 of the DSU required that : "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved." He drew attention to document WT/DS31/9/Add.2 which contained Canada's third status report regarding its progress in the implementation of the DSB's recommendations.

The representative of Canada said that her Government was pleased to present its third status report on the implementation of the DSB's recommendations on this matter. As noted in the report, Canada continued to review and discuss compliance options at the highest level and hoped to fully implement the DSB's recommendations by 30 October 1998.

The representative of the United States expressed her delegation's appreciation for the statement made by Canada and said that although eleven months had elapsed after the adoption of the Reports of the Appellate Body and the Panel, Canada had not yet provided any outline of the proposed changes to dismantle its WTO-inconsistent regime nor disclosed the specific options it was currently considering. The statement made at the present meeting appeared to give the impression that Canada was using the reasonable period of time not for implementation but for delay. Her delegation was concerned about the options under consideration by Canada for replacing its WTO-inconsistent regime, some of which appeared not to be WTO-consistent. The substitution of one WTO-inconsistent publication regime for another of the same nature would not constitute a valid implementation of the DSB's recommendations. With only four months before the expiry of the reasonable period of time, her delegation called on Canada to provide an early opportunity for the United States and other interested Members to consult on the proposed changes.

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

2. European Communities – Customs classification of certain computer equipment

(a) Report of the Appellate Body (WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R) and Report of the Panel (WT/DS62/R – WT/DS/67/R – WT/DS/68/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS62/10 – WT/DS67/8 – WT/DS68/7 transmitting the Appellate Body Report in "European Communities – Customs Classification of Certain Computer Equipment" which had been circulated in document WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/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 (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 the European Communities expressed the Community's satisfaction with the Appellate Body Report. The Community had appealed the Panel's findings that the EC had accorded to imports of LAN equipment from the United States treatment less favorable than that

provided for in its Schedule and thus had acted inconsistently with its obligations under Article II:1 of GATT 1994. The Community had argued that the Panel had erred in interpreting Schedule LXXX, in particular, by reading Schedule LXXX in the light of "legitimate expectations" of an exporting Member, and in placing the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation conducted under the GATT/WTO, solely on the importing Member. The Appellate Body had clarified and had resolved these important questions of principle.

First, the United States had explicitly challenged the practices of two member States which indicated that not only the Community but also the United Kindgom and Ireland had been responsible for the tariff practices examined by the Panel. For its part, the Community had clarified that it was the only defending party in this case. The Panel had accepted the Community's position although some statements contained in its Report had been ambiguous. This uncertainty had been eliminated by the Appellate Body which in paragraph 96 of its Report had stated that: "… the European Communities constitutes a customs union …. The export market, therefore, is the European Communities, not an individual member State". He underlined that the unique character of the EC customs union went beyond this consideration since it had been a Member of the WTO.

Second, the Appellate Body had stated that the interpretation of the tariff concessions agreed during the Uruguay Round negotiations should not be determined on the basis of the subjective point of view of an exporting Member. The interpretation of a Schedule should take into account the common intentions of all parties, as indicated in paragraph 84 of the Appellate Body Report: "These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to the treaty. " The Appellate Body had drawn two important conclusions: (i) in paragraph 93 of its Report, the Appellate Body had stated: "To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance". The Appellate Body had considered that "…..the Panel was mistaken in finding that the classification practice of the United States was *not* relevant"; and (ii) with regard to the question of the consistency of prior practice, the Appellate Body had considered that if consistent prior classification practice might often be significant on the contrary inconsistent classification practice could not be relevant in interpreting the meaning of a tariff concession (paragraph 95 of the Report). In this context, the Appellate Body had stated that the factual findings of the Panel had led to the conclusion that, during the Uruguay Round tariff negotiations, the practice regarding the classification of LAN equipment by customs authorities in the Community was not consistent. The Appellate Body had also confirmed the distinction which it had made previously in the case of "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products" between violation complaints and non-violation complaints under Article XXIII of GATT 1994. It had reaffirmed that the concept of "legitimate expectations" or "reasonable expectations" could only be raised in the context of non-violation complaints. The Appellate Body had confirmed the Community's view on this matter as stated in paragraph 80 of the Report.

Third, the Community's arguments regarding the correct interpretation of Article II:5 of GATT 1994 and its link with Article II:1 of GATT 1994 had been fully taken into account by the Appellate Body which in paragraph 81 of its Report had stated that: "… nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1."

Fourth, the Appellate Body had concluded that if the issue of tariff treatment of products overlapped with that of products classification, a proper interpretation of Schedule LXXX should have included an examination of the Harmonized System and its Explanatory Notes. The Appellate Body had considered that in interpreting the tariff concessions in Schedule LXXX, the decisions of the World Customs Organization (WCO) might be relevant and therefore should have been examined

by the Panel (paragraph 90 of the Report). The Appellate Body had clarified the relationship between the WTO and the WCO by implicitly accepting that the former should not deal with technical aspects regarding the classification of products and that in the area of dispute settlement concerning tariff concessions in the WTO, the provisions of the Harmonized System and its Explanatory Notes as well as the decisions of the WCO should be taken into account.

Fifth, in overturning the Panel's findings which had created an obligation to clarify a Schedule by only an importing country, the Appellate Body had confirmed the Community's argument regarding the nature of multilateral tariff negotiations and had reached the following conclusions: "… the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among all Members" (paragraph 109 of the Report). The Appellate Body had rightly concluded in paragraph 110 of its Report that: "… the Panel erred in finding that 'the United States was not required to clarify the scope of the European Community's tariff concessions on LAN equipment'. We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties".

The Community believed that the Appellate Body had confirmed most of is arguments and had clarified the interpretation of Article II:1 of GATT 1994, the manner of interpretation of tariff commitments of a Member in the light of its Schedule and competence between the WTO and the WCO regarding the classification of tariff concessions. Finally the Appellate Body had reaffirmed the unity of the Community as a customs union and its responsibility as a WTO Member.

The representative of the United States expressed her country's gratitude for the work of the Appellate Body. The United States wished to express its views on certain aspects of the Appellate Body and the Panel Reports and requested that these views be fully recorded in accordance with Article 16.3 of the DSU. Her country supported the Panel's findings which had been upheld by the Appellate Body that the US request for a panel was sufficiently specific with respect to both the measures and products involved. The Community's argument to the contrary had been properly rejected. As pointed out by the United States, such arguments would only lead to long, protracted procedural battles at the beginning of panel proceedings. In this regard, her country was pleased that the Appellate Body had shared its concerns. The United States regretted that the Appellate Body had not upheld the Panel's findings that the EC's Uruguay Round tariff concessions under heading 84.71 bound LAN equipment.

The US concern with the Appellate Body Report was twofold. First, the United States was concerned whether in this case the dispute settlement system had operated in the manner it had been intended. In fact, the Report had not resolved this dispute because it had not answered the fundamental question of whether the Community had violated its tariff binding with respect to LAN equipment. Thus, in spite of the examination by the Appellate Body and the Panel this matter remained unresolved. In other cases, the Appellate Body had not limited itself to simply identifying errors in the specific reasoning of the Panel. Instead, where permitted by the Panel's factual findings or the facts submitted by the parties that had been uncontested at the panel stage, the Appellate Body had taken the next logical step and had applied its reasoning to resolve the legal issues before it. The United States was puzzled that the Appellate Body had not found it appropriate to follow the same approach in this case. Certainty and finality were the cornerstones of an effective dispute settlement system. However, the Appellate Body Report had left substantial uncertainty as to the treatment to which Members were entitled with respect to a major article of international trade. This, in turn, might raise questions about the ability of Members to enforce other Members' scheduled WTO commitments.

Second, the United States was concerned that the Appellate Body Report not be interpreted in a manner that would ignore the basic tariff negotiations practices or undercut Members reliance on tariff nomenclature classification terms as a basis for determining existing or future tariff bindings.

Negotiated tariff bindings had long played a central role in the liberalization of international trade and should continue to do so in the future. She emphasized that while the Appellate Body had overturned the particular manner in which the Panel had relied on the EC's prior classification treatment - and hence prior tariff treatment - in interpreting the scope of the EC's commitment, the Appellate Body had made clear in paragraphs 92 and 93 of its Report that prior treatment was sufficient and could even be of great importance. It was appropriate and essential that prior treatment be given substantial weight to effectuate the understanding of all parties to tariff negotiations. Parties negotiating market-access commitments had generally placed great reliance on the actual treatment that national authorities of the importing Member had accorded to a product. This was because no matter how detailed the Harmonized System in its description of a particular product it could not cover all possible variations. The introduction of the Harmonized System was intended to facilitate trade, including tariff negotiations. Generally, the Harmonized System headings and sub-headings encompassed more than products specifically listed therein. Consequently, negotiators had expected that the tariff treatment being accorded would be a basis for the negotiations and would be maintained. An inability to consider prior treatment in determining or establishing the nature of the bindings would substantially change the manner in which negotiations were conducted. For example, the inability to rely on prior treatment would render difficult, if not impossible, some tariff negotiations techniques such as formula tariff cuts. Moreover, such a departure from tradition could well place an untenable burden on each Member to identify, as part of the negotiating process, every product within a line item in order to establish certainty with respect to the tariff treatment. Such an exercise could result in the development of a "shadow" tariff schedule that listed products not otherwise specifically listed in the Harmonized System.

Finally, the United States noted that the Appellate Body Report had questioned the extent to which Members could relay on the tariff treatment practices of individual member States of the European Community. In the United States' view this raised concerns about the stability of commitments provided by individual WTO Members which were part of the Customs Union. Her country believed that these important issues concerning existing bindings, future negotiations and customs unions which had been raised by the Appellate Body should be taken up by the General Council or the Council for Trade in Goods in the near future.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R and the Panel Report in WT/DS62/R-WT/DS67/R-WT/DS68/AB/R as modified by the Appellate Body Report.

3. Korea – Definitive safeguard measure on imports of certain dairy products

(a) Request for the establishment of a panel by the European Communities (WT/DS98/4)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS98/4.

The representative of the European Communities expressed the Community's serious concerns with regard to the measure taken by Korea on imports of certain dairy products. The Community believed that the Agreement on Safeguards had been violated by the finding of serious injury and the causal link not supported by evidence, the absence of price analysis, incorrect calculation of the quota, the delay in consultations and inadequate notifications to the WTO. On 22 January 1998, the Community had placed its request for the establishment of this panel on the agenda of the DSB meeting. However, at that meeting the EC's request had not been considered since an amicable settlement of the dispute had seemed possible. Unfortunately, consultations with Korea had not led to such a solution. Therefore, the Community had decided to resume the dispute settlement proceedings.

The representative of Korea noted the EC's statement requesting the establishment of a panel to examine Korea's safeguard measure on imports of certain dairy products. His delegation could not agree to the establishment of a panel at the present meeting. His country was convinced that its safeguard measure was in full conformity with its WTO obligations. Nonetheless, Korea had made sincere efforts to seek a mutually satisfactory solution to this matter through consultations with the Community, pursuant to the provisions of Article 4.5 of the DSU. As indicated at the DSB meeting on 22 January, a solution had been worked out in this consultations on the basis of which the Community had agreed not to seek the establishment of a panel. He regretted that in spite of this mutual understanding, the Community had proceeded with its request for a panel. In particular, his delegation was concerned that this had resulted due to an internal disagreement which had followed the Community's mutual understanding with Korea. Such an inability on the part of the Community to act according to the outcome of negotiations, which had been carried out with a proper mandate, would not only damage its credibility but would also frustrate the settlement objectives embodied in the DSU. His delegation urged the Community to reconsider this matter and to withdraw its request for the establishment of a panel.

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

4. Argentina – Safeguard measures on imports of footwear

(a) Request for the establishment of a panel by the European Communities (WT/DS121/3)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS121/3.

The representative of the European Communities said that the Community had requested the establishment of a panel on this matter since the safeguard measures imposed by Argentina were in violation of the Agreement on Safeguards. These provisional measures had been imposed without any evidence of critical circumstances as required under that Agreement. The subsequent finding of serious injury caused by increased imports had been seriously flawed. In fact, in volume terms imports had decreased each year since 1993 and in terms of value since 1994. A price analysis had not been conducted and the evidence presented had not supported the finding of serious injury for the whole footwear sector. A causal link between imports and the condition of the Argentinian industry could not be established. In particular, since Argentina had excluded the MERCOSUR countries' imports from the scope of the measure while including such imports for the injury analysis. Although required under Article XIX of GATT 1994, Argentina had not addressed the issue of why it was not reasonably foreseeable that if import restrictions on footwear were removed imports might increase. The Community was very concerned by this blatant abuse of the safeguard instruments for protectionist purposes. These measures had impaired substantial trade interests of the Community which was the sixth-biggest exporter of this product. If this case remained unchallenged it could set a dangerous precedent regarding the use of these trade instruments. For the above-mentioned reasons, the Community had to resort to dispute settlement since all attempts to find a mutually amicable solution had failed.

The representative of Argentina said that his delegation rejected the comment made by the Community that Argentina had abused the WTO instruments. Both the investigation and the measures taken were in full conformity with Article XIX of GATT 1994 and the Agreement on Safeguards. In order to give this discussion its proper context, he underlined that imports of footwear from the Community represented only 0.4 per cent of Argentina's total imports of footwear. He had mentioned this in order to make the situation less dramatic. Argentina regretted the Community's decision to request the establishment of a panel on this matter, instead of continuing the consultation process which had not yet been exhausted and could still provide positive results taking into account the interests of both parties and of other Members. For these reasons and because Argentina wished

to continue working towards a mutually acceptable solution, his delegation was not in a position to accept the establishment of a panel at the present meeting. He said that during the discussions in the Committee on Safeguards, Argentina had extensively responded to the arguments made by the Community.

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

5. Australia – Subsidies provided to producers and exporters of automotive leather

(a) Request for the establishment of a panel by the United States (WT/DS126/2)

The Chairman drew attention to the communication from the United States in document WT/DS126/2 which contained its request for the establishment of a panel pursuant to Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM). As indicated in this communication, the earlier US request for the establishment of a panel contained in WT/DS106/2 regarding the same measure had been withdrawn. It was his understanding that this implied that the United States had decided to terminate any further action in pursuance to the DSB's decision of 22 January 1998 to establish a panel at the request of the United States.

The representative of the United States said that her country requested the immediate establishment of a panel to examine Australia's provision of export subsidies on automotive leather and asked that the panel in its examination of this matter proceed in accordance with the expedited procedures contained in the SCM Agreement. It was regrettable that this matter had persisted for too long. Since 1991 Australia had provided Howe and Company Proprietary Ltd., one of its leading leather producers, with a series of subsidies that had been tied both *de jure* and *de facto* to Howe's export performance. These export subsidies had transformed Howe into a major leather exporter. In the late 1980s, exports had accounted for less than 10 per cent of Howe's total sales, while now it comprised approximately 90 per cent of Howe's business. In October 1996, the United States had invoked dispute settlement procedures with respect to Australia's grant of import credits that were directly tied to export performance under the Textiles, Clothing and Footwear and Export Facilitation Schemes. In November 1996, Australia and the United States had reached an agreement that had resolved the dispute, with Australia agreeing to remove automotive leather from its import credit schemes. However, at the time that Australia and the United States had been negotiating a settlement, Australia had agreed to provide Howe with a package of subsidies. While different in form, these subsidies had the same aim and effect as the *de jure* export subsidies they had replaced: i.e., allowed Howe to continue to expand its export activities. In particular, Australia had agreed to compensate Howe for its loss of import credits by giving the company grants up to $A 30 million and a preferential loan of $A 25 million. The United States had made considerable efforts to try to resolve this matter without the need to resort to a panel. Her country had attempted to persuade Australia to withdraw its replacement package of subsidies to Howe when Australia had first announced its existence. In fact, the United States had continued to discuss this matter with Australia even after it had requested the establishment of a panel to examine the consistency of the replacement package of subsidies with Australia's WTO obligations. The United States preferred such a resolution and was prepared to continue to seek a common ground. However, it could not ask its domestic industry to continue to compete under unfair conditions. Therefore, her delegation was obliged to request the establishment of a panel to address this long-standing dispute and, to the extent that the parties could not find a solution, to recommend that Australia withdraw the subsidies in question.

The United States regretted that this matter had again to be brought before the DSB. She hoped that other Members, including Australia recognized that the repeated requests for a panel by the United States were the direct result of its efforts to find a mutually satisfactory resolution with Australia, and reflected the US commitment to avoid recourse to a panel, if possible. In this spirit, the United States also requested that its previous request for a panel contained in document WT/DS106/2

which had effectively been suspended pending discussions between the two Governments be withdrawn. In this regard, she confirmed that the United States had decided to terminate any action in pursuance of the DSB's decision of 22 January to establish a panel at the request of the United States.

The representative of Australia said that the DSB had before it the most unusual situation which raised important procedural issues and a possible issue of precedent, as it had been made known in document WT/DS126/3 which was available in the room. This document outlined Australia's concerns with the US request for the establishment of a second panel which raised some important systemic issues that should be considered by the DSB. Australia did not dispute the right of the United States to have a panel examine its complaint regarding the consistency of a particular measure with Article 3.1(a) of the SCM Agreement. But such a panel had already been established by the DSB on 22 January 1998. The object and purpose of the DSU in this area was to ensure that a Member could not be blocked from having a hearing and Australia strongly supported that right. A Member was only required to complete the appropriate procedures contained in the DSU and the relevant covered agreement. Under such a situation a panel had been established in great haste at the request of the United States without any intention of starting its work immediately. On reflection, it would appear that the United States considered that its paper work should have been done differently and therefore requested a second panel in respect of the same complaint and the same measure. Australia considered that this was not the object and purpose of the DSU and believed that it was an attempted abuse of process. In this particular case, while panelists had not yet been selected, the panel had been established and its standard terms of reference determined. The DSU did not make any distinction of rights in this area in the post-establishment period and did not distinguish between the period before appointment of panelists, the first hearing, the interim report or the final report. The logic of the United States' position was that it could do this at any time before the circulation of a panel's final report: i.e., it could seek the termination of any panel before the circulation of its final report. Presumably, if the interim report had come out in a way that the United States did not like, it would have wished to have the flexibility to be able to start a new panel almost immediately after suspending the first one. On this logic, as soon as a complainant encountered problems with the process it could request new consultations so as it could have another panel established as soon as possible in case there might be some flaw in its approach to the first panel. The United States was not exactly a novice in the dispute settlement area and it could reasonably be expected to do its preparatory work correctly the first time around. He recalled that Australia had considered that the original US paper work had been inadequate and had raised this at the DSB meeting on 22 January but its comments had been ignored by the United States. There were also some peculiarities about this new request which would have to be addressed if a panel was established on this basis.

Australia considered that a new panel on the same issue could only be established after the first panel had lapsed or otherwise terminated. This had been recognized by the United States in the last point in its document regarding withdrawal of its request for a panel. Accordingly, the procedures for establishing a new panel could only start after the first panel had been terminated. It would be illogical on the one hand to agree that two panels on the same matter could not coexist but on the other hand to allow the complainant to start fulfilling the procedural requirements leading to the establishment of a new panel while the first one still existed. Furthermore, the DSU did not provide for the merging of two panels over precisely the same matter with the same complainant and respondent. This was not covered by Article 9 of the DSU which dealt with multiple complainants and not how to handle the same complaint with multiple panels, involving the same two parties.

He drew attention to the last sentence in document WT/DS126/2 which read as follows: " The United States also asks that, at the next meeting of the Dispute Settlement Body, its earlier request for a panel, dated 9 January 1998, circulated as WT/DS106/2, regarding the same subsidies identified in the present request be withdrawn". In fact, there was no request outstanding since a panel had been established on 22 January pursuant to that request. This meant that the US request for the withdrawal of an existing panel raised at least two important issues: (i) could the DSB terminate a panel on the request of the complainant? and (ii) could the complainant terminate a Panel

unilaterally? Australia considered that the DSU did not give the DSB the authority simply to terminate a panel at the request of the complainant once it had been established nor give the complainant the right to terminate a panel unilaterally once it had been established. To accept this would confer upon a complainant the right to terminate a Panel the day before the final report had been issued if it did not like the outcome. In accordance with the DSU provisions, the only case in which a panel could lapse was under Article 12.12 of the DSU. Otherwise a panel could only be finalized without a substantial report by mutual agreement of the parties under Article 12.7 of the DSU.

If in this case, Members gave the complainant such rights, a precedent would be created which could lead to future abuse with potentially significant damage to the dispute settlement system. Australia, which supported the automaticity of the system, was at a loss and considered that a panel established in these circumstances would be tainted and ill-founded since the United States did not have the right to a new panel at this time. A panel could be established but his country could not agree that this had been done properly because of these faulty procedures. Any panel report or subsequent proceedings would be irreparably tainted by this process since this false start would not be corrected by subsequent process. Accordingly, Australia reserved its rights on this matter. Furthermore, Australia could not agree to the US assertion that the first panel had been effectively suspended. If this were the case, certain procedures should have been followed under Article 12.12 of the DSU whereby a panel suspended its work and this was not the case.

The DSB took note of the statements and agreed to establish a panel in accordance with the accelerated procedures pursuant to Article 4.4 of the SCM Agreement with standard terms of reference.

The representative of India recognized that the DSB had taken a decision to establish a panel. He noted that the United States had referred in its request to the termination of an earlier panel and as pointed out by Australia there was no specific provision under the DSU regarding this matter. Since his delegation wished to reflect further on this matter, he sought clarification as to whether the DSB would take any decision on this issue at the present meeting.

The Chairman said that at the present meeting the DSB took note of the statements made but would not take any decision regarding the previous panel.

The representative of Australia reiterated that the DSB was in a most unusual situation at the present meeting. He sought clarification whether as of now there were two panels on the same subject with the same parties.

The Chairman said that technically as from now two panels existed on this matter. However, it was clear as the United States had indicated that this would have no impact on the first panel because in fact there would be only one panel.

The representative of Australia said that technical points were very important in this legal forum. Therefore, technically, his delegation could not accept the establishment of two panels on the same subject and with the same parties.

The representative of the United States said that her delegation had made it quite clear that the United States had terminated the first panel. She drew attention to the final part of her statement which read as follows: "… we confirm that the United States has decided to terminate any action in pursuance of the DSB's decision following our request to establish a panel (WT/DS106/2)". There was no provision in the DSU that would prevent the United States from doing so unilaterally. She drew attention to Article 6.1 of the DSU which clearly stated that: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by

consensus not to establish a panel". Furthermore, the United States had referred to Article 4.4 of the SCM Agreement which stated as follows: "If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel". She said that in her statement it was clear that the United States had eliminated its first request for a panel.

The Chairman said that since there was no consensus not to establish a new panel, Australia's arguments could be raised before the panel established at the present meeting.

The representative of Australia said that he was still uncertain about what was being decided at the present meeting. Australia had made it very clear that it recognized the US right to the establishment of a panel but that its main concern was about the fact that two panels existed on the same issue and with the same parties. His delegation did not deny the United States its right to a panel but raised the question of what should be done with the first panel. The US representative had stated that her country had unilaterally terminated the first panel but this was in contradiction with the US request seeking the DSB to terminate this first panel. The question was therefore what should be done with this first panel.

The representative of Mexico said that this matter was important and believed that the DSB was obliged to establish a panel at the present meeting because there was no consensus to the contrary. He noted that there were two opposite interpretations with regard to the procedures. The DSB was not obliged to take a position on this issue unless there was a consensus. The only course of action for the DSB would be to take note of the statements and the parties would reserve their rights under the WTO Agreement. The parties could do so by raising their concerns before the Panel and the Appellate Body, in consultations with each other or during the DSU review. From the systemic point of view, Mexico had its own view which it would not wish to raise at the present meeting.

The representative of the European Communities said that the United States had stated that it had terminated the work of the first panel. He wished to know on what legal basis the United States had taken its decision. He drew attention to Article 12.7 of the DSU which read as follows: "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB….. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached". He therefore asked on what legal basis the United States could terminate the work of the first panel and whether or not a mutually satisfactory solution had been found in the dispute with Australia.

The Chairman said that there was a number of questions and delegations had expressed different views. The DSB had established the panel following the request by the United States and there was no consensus to the contrary. Australia could raise its arguments before the panel which had just been established. He assumed that the first panel established on 22 January would remain inactive since its composition had not yet taken place. This approach had also been taken in the past with regard to similar cases.

The representative of Australia said that there was no legal basis to distinguish between the phases of the establishment of a panel. After a panel was established it existed and whether the members of a panel had been selected or not this would not change the fact that such a panel existed. In this case the panel had been established on 22 January 1998.

The representative of Japan noted that some serious legal problems were involved in this case. The Chairman had suggested that Australia could raise its arguments before the newly established panel. He was not certain whether this new panel was in a position to consider the procedural concerns raised at the present meeting. In his view, this matter should be considered by the DSB and

should not be decided by the new panel. With regard to the terms of reference he wished to know whether the terms of reference of the new panel were different from the terms of reference of the first panel. If the terms of reference were the same there was no need to have another panel. He raised the question of whether one party could terminate unilaterally the work of the panel and what would be the legal basis to do so. Article 12.12 of the DSU refered to the suspension of panel proceedings and he wished to know whether one party could suspend the work of the panel if such panel had not begun its work since panelists had not yet been selected. In particular, he wished to know whether the issues involved in these disputes were the same. If they were the same then although technically two panels existed in fact there was only one panel. If the terms of reference of these panels were the same these panels could be merged.

The representative of the United States said that her delegation had very clearly pointed out that although the panel had been established its members had not yet been selected. Consequently, no work had been done and therefore one could not suspend work which had not even begun. The United States' intention was not to engage in any procedure regarding the first panel because this panel had been terminated. The European Communities and Australia wished to discuss Article 12 of the DSU. She drew attention to the fact that both Article 12.7 and 12.12 referred to cases in which the composition of panels had already taken place and some work had been done. Therefore, this Article was not relevant to this case since members of this panel had not yet been selected and no work had been done. In addition, the terms of reference were different.

The representative of Venezuela said that this issue could be considered in the DSU review. If suspending a panel could only be done at the request of the complaining party and if the United States had not formally requested such a suspension how could the establishment of a second panel be accepted without clarifying the legal situation of the first panel. A new panel could not be established if it had not been determined what would be done with the previous panel.

The Chairman said that the work of the first panel had not been terminated because it had not even begun. Therefore, this was a very difficult issue.

The representative of the European Communities said that Article 4.4 of the SCM Agreement provided for the immediate establishment of a panel. However, a serious matter with systemic implications had been raised at the present meeting and he had not been in a position to consult with member States or his authorities. This was a shortcoming in the automaticity of the dispute settlement process which should be considered in the DSU review. He had not received a response to his question which he had asked previously regarding the legal basis for termination of work. He was aware of only one provision contained in Article 12.12 of the DSU which allowed for suspension of panel's work for a period of 12 months after which the panel would lapse. This was the only provision under which Members could terminate the work of a panel. He was surprised by Australia's arguments that there were no legal differences between the various stages of the existence of the panel. The Chairman had stated that the previous panel would remain inactive and in his view this would set a precedent that the Chairman would be terminating the work of a panel. All legal aspects of this issue which had systemic implications should be taken into consideration. Any decision concerning this panel could only be taken on the basis of the DSU provisions.

The representative of Australia said that his delegation was still puzzled about the legal basis for termination of the first panel. He was glad that it had been recognized that there was no legal distinction between the various stages of the panel once it had been established. In his view Article 12.7 of the DSU was the only guidance concerning such situations. These were very important legal issues which had systemic implications for the operation of the DSB and ran the risk of setting a precedent. If the course of action proposed by the Chairman was accepted, he would request that the record of this meeting showed clearly that the United States had unilaterally requested to terminate the first panel.

The Chairman proposed that the DSB take note of the all the points made as well as the last point made by Australia and confirm its decision to establish a panel at the present meeting. At a later stage, the DSB could revert to this issue in order to discuss the legal implications raised by several delegations.

The representative of Mexico supported the Chairman's proposal. He had some comments with regard to Mexico's position on this matter but since the Chairman had indicated that the DSB would revert to these issues at a later stage he would then take up these issues.

The representative of India said that any decision on this matter should be taken within the framework of the DSU. Therefore any clarification provided by delegations had to be examined in the light of the DSU provisions. Like Japan, he also believed that a solution to this problem would have to be found by the DSB. It was possible for the parties to this dispute to raise their concerns before the panel but the newly established panel would have standard terms of reference unless the parties decided to the contrary. This procedural issue could not be raised before the panel because it was not contained in its terms of reference. Therefore, there was a need for the DSB to find a solution on this matter. He hoped that the United States would reconsider this type of approach and that Members would be able to find a solution to this delicate matter.

The Chairman said that the DSB would revert to this systemic issue which concerned the DSU provisions and as suggested by Venezuela it could be taken up in the review of the DSU.

The representative of Cuba said that after the DSB's decision to establish a panel there had been a divergence of views regarding the legality of this decision. The legal basis in this case was not clear and still needed definition. Therefore, this decision should not be maintained since it had been taken on inaccurate legal basis. He wished to know whether or not the decision to establish a panel would be maintained since it had been taken prior to the exchange of views at the present meeting.

The Chairman said the decision to establish a new panel had not been questioned but the fact that another panel on the same matter already existed. Therefore the question concerned the revocation of the previous DSB's decision taken on 22 January and whether this could be done at the request of the complaining party. He reiterated his proposal concerning the course of action for the DSB at the present meeting, namely that the DSB take note of the statements and revert to the questions raised at an appropriate time. The decision taken at the present meeting to establish a panel at the request of the United States would remain since there was no consensus to the contrary.

The representative of Cuba said that following the statement made by the Chairman he was even more concerned because there had been an initial agreement to establish a panel which had never begun its work and there was a request for a second panel on the same issue. Therefore, there were two decisions establishing a panel to deal with the same issue. The fact that the work of the first panel had never begun could be solved by initiating such work and by selecting the members of this panel. The establishment of a second panel on the same issue would amount to a situation in which two decisions had been taken to establish two panels to examine the same matter. He drew attention to the fact that the DSU provisions always referred to the establishment of a panel not panels and this should be the guidance with regard to this matter.

The Chairman said that as he had already stated there were several legal arguments involved in this case which could be taken up by the DSB at an appropriate time.

The representative of Bulgaria noted that Australia could raise its questions before the panel and, if so, the panel would have to examine them.

The Chairman said that as he had stated previously, Australia was entitled to raise these issues before the panel or the Appellate Body.

The representative of Thailand said that in his delegation's view the only question was whether a Member could unilaterally terminate the panel already established and then request the establishment of a new panel. This matter should be resolved by the DSB before any decision regarding the establishment of another panel. Since the new panel had been established at the present meeting in the absence of consensus to the contrary, his delegation wished to reserve its rights under the WTO Agreement, in particular with regard to the interpretation of the DSU provisions.

The representative of Japan said that there were two panels and in cases in which more than one panel had been established the practice was to merge such panels. In this case, both the complainant and the respondent were the same but the terms of reference of the two panels were different therefore there should be no problem to merge these two panels. This could solve this problem and Australia could raise its concerns before the panel.

The Chairman noted Japan's suggestion and said that these issues would be discussed in the DSB at a later date but the decision to establish a new panel would be maintained. He would consult with the parties to the dispute to arrange for a discussion on this matter in the DSB. He considered that this discussion had been very useful and could be relevant in the future during the DSU review in the context of which this issue should be considered.

The DSB took note of the statements.

6. European Communities – Regime for the importation, sale and distribution of bananas

(a) Statement by Ecuador, Guatemala, Honduras Mexico, Panama, and the United States concerning implementation of the recommendations of the DSB

The Chairman said that this item was on the agenda of the present meeting at the request of Ecuador, Guatemala, Honduras, Mexico, Panama and the United States.

The representative of the United States, speaking also on behalf of Ecuador, Guatemala, Honduras, Mexico and Panama wished to express their continued deep concern regarding the Community's proposal to implement the DSB's recommendations. This case was a test of the EC's willingness to respect the multilateral trading system. In January 1998, the European Commission had approved a proposal, which if adopted by member States would fail to implement the DSB's recommendations. This proposal had been approved without consultations with the six countries regarding the requirements of the Panel and the Appellate Body Reports and in spite of their repeated requests to do so. Since then, the six countries had expressed their willingness to explore a WTO-consistent solution with the Community on the basis of either an unrestricted market or a tariff quota, only to be informed by the Commission's officials that the fundamental discrimination in the proposal would not be changed. Nothing that had been stated concerning plans for the administration of import licences gave them confidence that the Communities had correctly interpreted the analysis of the Panel and the Appellate Body concerning relevant WTO disciplines. It was their understanding that at a meeting of the EC Council of Agriculture Ministers which had just begun, the Commission would make every effort to push through this proposal in spite of the concerns expressed by the six countries and despite its obvious failure to fully comply with the DSB's recommendations. Members had just finished celebrating 50 years of international trade rules. In order for the new WTO rules to provide security and predictability in the international trading system, Members should do more than simply announce their support for WTO obligations; they should abide by them. The six countries would follow carefully the results of the meeting of the EC Council of Agriculture Ministers concerning the EC banana regime and remained ready to work with the Communities to help develop a non-discriminatory solution that would strengthen the dispute settlement system.

The representative of Ecuador said that on 25 September 1997 the Community had been requested to change its discriminatory and restrictive regime for the importation, sale and distribution of bananas which had been established by Regulation 404/93 and other supplementary rules which had seriously affected Ecuador's trade interest. On 14 January 1998, the European Commission had adopted a proposal in COM(1998) 4 Final (98/0013 CNS) to amend the regime which would be discussed under item 4 of the agenda of the current meeting of the EC Council of Ministers of Agriculture. Ecuador had examined this proposal and, in a constructive spirit and open to dialogue, had made various substantive suggestions in order for this proposal to be WTO-consistent and to comply with the conclusions and recommendations of the Panel and the Appellate Body Reports. His country had raised its views on this matter in the DSB. It had made two individual statements and joint statements with Guatemala, Honduras, Mexico, Panama and the United States. Ecuador had also voiced its concerns at the Second Ministerial Conference. It had directly conveyed its views to the European Commission and recently to each of the EC Ministers of Agriculture in letters sent to them by Ecuador's Minister of Foreign Trade.

Ecuador deplored the fact that its positive attitude had not received a similar response from the Commission which had ignored the implications that the proposed EC measure would have on the economy such as that of Ecuador where income and employment levels depended largely on banana exports and on a guarantee of access to the European market governed by predictable, non-discriminatory WTO-consistent rules. Without mentioning all aspects of the Commission's proposal that had been considered inconsistent with the WTO rules, Ecuador wished to point out the lack of will in the Commission to provide the specific terms of the new import licensing regime, the absence of assurances that the regime would not continue with inconsistencies and that it would respect the WTO rules in particular Articles I and XIII of GATT 1994 and the Agreement on Import Licensing Procedures. Ecuador also deplored the lack of safeguards for its export and import companies in the EC's market. Ecuador reaffirmed that an unsatisfactory solution would seriously affect its economy and hoped that consideration would be given to the views and suggestions made regarding the banana regime at the meeting of the EC Council of Ministers in order to guarantee a Regulation that would be consistent with the WTO rules and would comply with the recommendations of the Panel and the Appellate Body. He reserved his country's right with regard to this matter in the light of the DSU provisions.

The representative of the European Communities said that in accordance with the provisions of Article 21.6 of the DSU, six months after the date of establishment of the reasonable period of time, the Community would be required to make its status report regarding its progress in implementation. Since the reasonable period of time had been established on 7 January 1998 by the arbitrator, the Community would present its report at the next meeting of the DSB scheduled for 23 July. The Commission's proposal would be discussed at the current meeting of the EC Council of Ministers of Agriculture. His delegation noted the statements made at the present meeting. He said that with regard to the specific modalities for implementation, this proposal provided a negotiating mandate on the basis of which the Community would enter into negotiations with its supplying countries. However, at this stage, the Commission's proposal to the Council did not constitute the measures required for implementation of the DSB's recommendations. The compatibility of the measures taken by the Community to meet its WTO obligations and the DSB's recommendations could only be considered after the reasonable period of time had elapsed and the legislative measures of the Community were in place.

The DSB took note of the statements.

7. Delay in circulation of panel reports

(a) Statement by Japan

The representative of Japan, speaking under "Other Business", expressed concern that the Report of the Panel on "Indonesia – Certain Measures Affecting the Automobile Industry", which had been distributed to the parties to the dispute some time ago, had not yet been circulated to Members due to delays in translation. Japan appreciated the Secretariat's contribution to the work of this panel and hoped that the Secretariat would be in a position to circulate this Panel Report at an earlier date to enable the DSB to adopt this Report. He added that once the Report was adopted, the parties to the dispute would be required to bring the measures into conformity with the DSB's recommendations. The issue of delay in circulation of panel reports was relevant to the arguments raised by some Members during the Second Ministerial Conference, namely that panel reports should be derestricted when final reports were circulated to the parties to a dispute without a need to wait for their circulation in all official languages. He believed that this issue should be considered during the DSU review to be carried out this year.

The representative of the European Communities said that the Community which had been a party to this dispute was concerned over the delay in circulation of this Panel Report. He recognized certain constraints including financial ones but it was unusual that the Panel Report which had been completed on 22 April 1998 had not yet been circulated due to technical reasons. He recognized that the Secretariat had to mange its work within the available means but these delays amounted to a systemic problem which affected the credibility of the DSU. Members were bound by strict time periods regarding the implementation of recommendations. If the Panel Report would not be circulated in time for adoption at the DSB meeting scheduled for 23 July, its adoption might only take place in September, four or five months after it had been technically completed. In the Community's view this situation was not normal as it was not necessary to wait several months for technical reasons. Such a delay would automatically lengthen the implementation period. He believed that this problem should be considered during the DSU review.

The representative of the United States said that Japan had made a very important observation. Her delegation was also concerned about these long delays in the derestriction and circulation of panel reports. Increased resources of WTO translation activities could make an improvement but depending upon the length of reports, translation could still take a very long time. The United States believed that transparency in the WTO and the overall operation of the system would be dramatically improved if panel reports could be derestricted and circulated as soon as they had been finalized and available in a single WTO language. The official date of circulation for the DSU purposes would remain the date on which reports were available in all three WTO languages. If Members could not agree to this simple procedural modification proposed by the United States they would continue to experience the difficulties mentioned by Japan and would deny the Secretariat the possibility of informing the public of the facts of the case.

The representative of Canada said that her country considered that the issues raised by the previous speakers were important and should receive attention in the very near future. The issue of derestriction and transparency would be on the agenda of the next meeting of the General Council scheduled for 15 July where the issues raised at the present meeting could be taken up for resolution.

The representative of Mexico supported Canada's view and said that the issue of derestriction of WTO documents, in particular panel reports could be considered in the light of paragraph 7 of the Decision on Procedures for the Circulation and Derestriction of WTO Documents. Mexico believed that this was a serious problem which required an appropriate solution.

The Chairman said that delegations had raised very important and sensitive issues concerning translations and the means made available to the Secretariat. Some of these issues would be taken up

at the next meeting of the General Council and other issues would be considered by the Budget Committee. The question of delays in circulation could also be taken up during the DSU review.

The DSB took note of the statements.

8. Argentina – Certain measures affecting imports of footwear, textiles, apparel and other items

(a) Statement by Argentina regarding its agreement with the United States on implementation of the DSB's recommendations

The representative of Argentina, speaking under "Other Business", wished to inform the DSB of an agreement reached with the United States concerning the reasonable period of time and the modalities for the implementation of the DSB's recommendations. In a Note dated 5 June 1998, Argentina had proposed the following time-frames and modalities for implementing the DSB's recommendations with respect to the minimum specific import duties (DIEMs): (i) establishment of an upper limit (cap) on all import duty payments made upon clearance of textile products and clothing. Such payment should not exceed 35 per cent of the declared value of the merchandise; (ii) this would ensure and guarantee compliance with the commitment to apply import duties which *ad valorem* equivalents did not exceed 35 per cent; (iii) a Ministerial resolution would be issued confirming this upper limit and instructing the Directorate of Customs to introduce a procedure for textile and clothing imports. This procedure would come into force 90 days after the publication of the Ministerial resolution. With respect to the statistical tax, Argentina had proposed the following: (i) application of a rate of 0.5 per cent to import operations covered by the statistical tax, with maximum ceilings corresponding to ranges of value described in greater detail in the Annex to the Note; (ii) the determination of the ranges (according to the mentioned Annex) would be reflected in an article of the tax bill for the fiscal year 1999 to be submitted to Congress; (iii) the commitment undertaken by Argentina with respect to the statistical tax would enter into force on 1 January 1999.

In a Note dated 15 June 1998, the United States had stated as follows: "The United States agrees that the reasonable period of time for the purpose of Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) shall be 180 days from 22 April to conform its specific duties on textiles and apparel to the findings in the Panel and Appellate Body Reports and that this period shall end on 19 October 1998. The United States further agrees that the reasonable period of time for the purpose of Article 21.3 of the DSU shall be 242 days from 22 April for Argentina to conform its statistical tax to the findings in the Reports and that this period shall end on 1 January 1999. The United States believes that Argentina will have properly implemented the Panel and Appellate Body Reports when it institutes appropriate measures to, and in fact does: (1) ensure that its specific duties on textiles and apparel do not exceed the equivalent of 35 per cent *ad valorem*, and (2) no longer charge an *ad valorem* statistical tax without upper limits and modify such tax to approximate the cost of rendering a service to importers. Your letter of 5 June and Argentina's proposal on implementation indicates that Argentina will so conform its measures to the findings of the Panel and Appellate Body. To the extent that Argentina does so, the United States would be in a position to agree that Argentina has implemented the rulings and recommendations of the Dispute Settlement Body". Argentina had confirmed the agreement regarding the reasonable period of time and the implementation modalities contained in both letters, copies of which would be circulated to Members.

The representative of the United States thanked Argentina for the statement and for reading out the terms of the agreement between the two countries. The United States looked forward to Argentina implementing these changes to its laws and regulations within the agreed reasonable period

of time. Her delegation commended Argentina for accepting the implementation periods shorter than 15 months which constituted truly reasonable periods of time.

The DSB took note of the statements

9. Agreement of 18 May 1998 between the United States and the European Communities regarding the Helms-Burton Act

(a) Statement by Cuba

The representative of Cuba, speaking under "Other Business", noted that the agenda of the present meeting did not contain any item regarding the agreement recently reached by the United States and the European Communities on the Helms-Burton Act. He had therefore requested the inclusion of this matter under "Other Business" in order to ask the European Communities to clarify some procedural issues. At the DSB meeting on 22 April, Cuba had expressed its views about the fact that the European Communities had withdrawn its request for the establishment of a panel to examine the consistency of the US Helms-Burton Act with WTO rules. His country had recognized that it was a sovereign right of the Communities, as of any injured party, to withdraw a complaint to settle a dispute under the DSU procedures. However, there had been a great deal of information in the press about the Agreement on the Implementation of the Helms-Burton Act signed by the United States and the European Communities in London on 18 May, which had been based on their earlier Understanding of 11 April. Cuba considered that the Communities had withdrawn its request for the establishment of the panel because it had expected to reach a negotiated bilateral solution. If this was the case with the signing of the Agreement in London on 18 May, he inquired why this agreement had not been notified to the DSB in accordance with the provisions of Article 3.6 of the DSU. Cuba considered that the London Agreement constituted a mutually agreed solution on a matter formally raised under the DSU provisions and, consequently required to be notified to the DSB to enable Members to raise any point under Article 3.6 of the DSU regarding this Agreement.

He drew attention to the Decision on Notification Procedures which had established the general obligation for all Members to notify, to the maximum extent possible, the adoption of trade measures affecting the operation of GATT 1994, such notifications being without prejudice to views on the consistency of measures or their relevance to their rights and obligations under the WTO Agreement. It was obvious that the above-mentioned provisions of the WTO Agreement were intended to guarantee transparency in the WTO which had recently been discussed and which had been enunciated in paragraph 4 of the Second Ministerial Declaration. Cuba was affected by the Helms-Burton Act but to avoid politicization of the process it had not become a party to the dispute. The Helms-Burton Act was a legal manifestation of the economic warfare the United States had been waging against the Cuban people for four decades. There was no doubt, that the London Agreement had implications for investment in Cuba and for his country's trade with third parties, but a crucial fact was that this Agreement represented a legal threat to all countries which had engaged in the process of nationalization.

The Agreement reached on 18 May had not eliminated the illegal character of the Helms-Burton Act, nor had it resolved its inconsistency with the WTO's objectives. It had broadened the extraterritorial character of the Act and other provisions which were contrary to public international law. It facilitated unacceptable attempts to transpose national legislation containing provisions of extraterritorial nature to multilateral instruments which should be agreed by all countries and should safeguard public international law. This Agreement had not eliminated the measures outlined by the Community in document WT/DS38/2 in which it had requested the establishment of a panel nor had it removed the inconsistency of those measures with the WTO rules. He reiterated that Cuba wished to reserve its right under the WTO Agreement to raise this matter in the DSB, if it deemed appropriate.

The representative of the European Communities confirmed that since the April Understanding, the Community had continued negotiations with the United States. This had resulted in a package at the EC/US London Summit in May 1998. The April Understanding as well as the EC/US London Summit package had reflected a process of continued negotiations that had not yet led to a definitive and final resolution of the dispute. He also wished to underline that the Community had not withdrawn its request for the establishment of a panel nor had it terminated the work of the panel but had asked for the suspension of the panel's work pursuant to Article 12.12 of the DSU. It had done so due to the fact that it had continued negotiations with the United States. Since the work of the panel had been suspended for more than 12 months, the panel had lapsed in accordance with Article 12 of the DSU.

The representative of Cuba thanked the European Community for the information it had provided and hoped that his country would be kept informed of any further steps regarding this matter.

The DSB took note of the statements.

10. Antidumping investigation by Ecuador on imports of cement from Mexico

(a) Statement by Mexico

The representative of Mexico, speaking under "Other Business", said that he had asked for inclusion of this item on the agenda of this meeting in order to inform the DSB that in February 1998, the Ecuador's Ministry of Foreign Trade, Industrialization and Fisheries had decided to initiate an anti-dumping investigation on imports of cement from Mexico. His country believed that the decision to initiate this investigation had been taken without due regard for the disciplines of the Anti-Dumping Agreement and, consequently, should not have been initiated and, still less, continued. This view had been promptly communicated to both the Permanent Mission of Ecuador in Geneva and the appropriate authorities of the Ministry of Foreign Trade, Industrialization and Fisheries of Ecuador in Quito. In view of the fact that these contacts had not yielded the desired results and that this investigation had been inconsistent with the provisions of the Anti-Dumping Agreement, his delegation wished to place on record the following: (i) Mexico believed that the investigation in question had not been conducted in compliance with the provisions of the Anti-Dumping Agreement and should never have been initiated; and (ii) Mexico reserved the right to raise this view formally in accordance with the DSU provisions, should the need arise. In view of the excellent relations between Ecuador and Mexico, the various areas within the WTO in which they had worked together and the understandable complexity involved in the correct application of the procedures relating to anti-dumping investigations, his authorities hoped that once this situation had been reviewed by the Ecuadorian authorities there would be no need to address this matter in the DSB in future.

The representative of Ecuador said that informal discussions had been held with Mexico on this matter. Ecuador had decided to initiate its investigation to determine whether dumping on imports of cement from Mexico had occurred. This investigation had been conducted in accordance with the provisions of the Agreement on the Implementation of Article VI of the GATT 1994 which had been incorporated into its national legislation. Ecuador which was aware that this issue was highly sensitive to Mexico was nevertheless surprised by Mexico's reaction, namely that it had included the subject of the investigation on the DSB's agenda in spite of the fact that this matter did not fall within the competence of the DSB. Ecuador considered that disputes which might possibly arise during the investigation stage should be excluded from the DSB, otherwise the right of Members to initiate anti-dumping investigations would be undermined. The investigation had not yet been

terminated, and consequently there were no final results. Ecuador noted the statement by Mexico regarding its readiness to hold formal discussions in the future.

The DSB took note of the statements.

11. Review of the DSU

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", said that he wished to read out a short statement concerning the DSU review, and if delegations considered it necessary an informal consultation would be held later in the day to discuss this matter. He drew attention to the fact that since the informal consultations held on 10 June, in addition to the informal suggestions on the DSU review submitted by Venezuela, Japan and Korea, the Secretariat had also received informal suggestions from Hong Kong, China which had been circulated to delegations under Job No. 3339; DSU/4. As he had indicated at the informal consultations on 10 June, he had intended to start substantive discussions in September on informal suggestions submitted by delegations. He therefore would not invite discussions on the suggestions received thus far at the informal consultations. The main purpose of the consultations would be to determine how to proceed further. To this effect he had prepared suggestions in the form of a statement which he would read out at the present meeting. The text of this statement would be made available to delegations. He then read out the following statement: "Following discussions at the informal consultations on 10 June 1998, concerning the Review of the DSU, the Chairman suggests the following approach:

> "1. Delegations are invited to continue to submit informal suggestions concerning issues to be taken up in the DSU Review, preferably by no later than the end of July, on the understanding that Members may submit further suggestions if they so wish in the course of the Review. Substantive discussions on suggestions submitted by Members will begin late September – early October 1998.
>
> "2. The Secretariat is requested to prepare a compilation of suggestions from Members before the commencement of the substantive discussions indicated above. This compilation will also include statistical data prepared by the Secretariat on dispute settlement cases. Other possible inputs from the Secretariat may be requested at a later stage.
>
> "3. In the first instance the Appellate Body will be invited to present observations of informal suggestions received from Members and compiled by the Secretariat. Members may request further contributions from the Appellate Body as the review exercise proceeds.
>
> "4. A seminar/symposium with the participation of academics may be organized in Autumn 1998. Members should decide by the end of July on possible participation at, and funding of, the seminar/symposium.
>
> "5. It is understood that the DSU review is an exercise to be conducted by Members on the basis of their suggestion. It will be the prerogative of Members to decide on how to use any other inputs to the review referred to above".

The Chairman reiterated that if delegations considered it useful an informal meeting of the DSB would be held later in the day.

The representative of India recalled that during the consultations held in 1997, he had proposed that Members ask the Appellate Body members, individually or as a group, to make suggestions regarding the operation of the dispute settlement mechanism. At that time, many delegations had been apprehensive of this proposal. However, the Chairman in the statement made at

the present meeting had indicated that the Appellate Body members would comment on the suggestions provided by Members. India did not believe that, at any time, such a suggestion had been made as it was not good for the Appellate Body as an institution and the WTO Members to take this approach. He considered that it was not appropriate to ask the Appellate Body to comment on the Members' suggestions.

The Chairman said that he did not wish to discuss this matter in detail at the present meeting and asked if delegations wished to meet later in the day.

The representative of Bulgaria said that during the informal consultations many delegations had stated that ideas from all sources would be welcome. It seemed that there was a general consensus that only Members could make formal proposals for the DSU review, but it would be useful to have a compendium of all ideas already raised. The Chairman had not indicated that ideas could also be provided by academics or former members of panels. The Secretariat could make a compendium of these ideas, prepare a bibliography on the DSU for consideration by Members possibly at the symposium or even before the symposium.

The representative of Mexico said that points 3 and 4 contained in the Chairman's statement required clarification and therefore his delegation considered it useful to hold informal consultations later in the day.

The Chairman said that in the light of the comments made, an informal meeting of the DSB would be held later in the day to consider the points on which there was no agreement.

The DSB took note of the statements.

12. Next meeting of the DSB

The Chairman drew attention to Article 16.4 of the DSU which provided that: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." In the case of the Panel Report on "United States - Import Prohibition of Certain Shrimp and Shrimp Products", the sixty-day period would expire on 14 July. He therefore proposed that the DSB meet on 10 or 13 July solely for the purpose of considering this matter on the understanding that if one of the parties appealed the Report before the scheduled meeting such meeting would be cancelled. If this was agreeable, the Secretariat would issue a notice convening the meeting.

The representative of India said he understood that the statement just made by the Chairman regarding the Panel Report was factual. However, he sought clarification whether it was a general practice that the Chairman make such a statement. It was his understanding that the parties to the dispute were required to place an item concerning the adoption of panel reports on the DSB's agenda.

The representative of Thailand sought clarification whether it would be necessary to request the inclusion of the item regarding the adoption of the Panel Report on the DSB's agenda or whether this would be done automatically by the Secretariat.

The Chairman said that it was necessary to request the inclusion of this item on the agenda because this was not automatic.

The representative of Thailand said that his delegation's understanding was that there was no requirement under Article 16.4 of the DSU that a request be made by the parties to a dispute to place panel reports on the DSB's agenda for the purpose of adoption. On the contrary, this was automatic

and it was the duty of the DSB and the Secretariat to ensure that the adoption of panel reports took place within 60 days after the date of circulation in accordance with footnote 7 to Article 16.4 of the DSU which read as follows: "If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraph 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose". He noted that the wording of footnote 7 was different from that contained in footnote 5 to Article 6.1 of the DSU which pertained to convening a special meeting of the DSB for the purpose of establishment of a panel: "If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given". He noted that under footnote 7 there was no reference to the 10-day period. He expressed concern about a requirement which was not provided for in Article 16.4 and which was contrary to the ordinary meaning of the terms, context and purpose of this Article which should ensure automatic adoption of panel reports.

Mr. Barthel-Rosa, Secretary of the DSB said that the Secretariat had announced the possibility of holding a special meeting on 10 or 13 July in order to meet the requirement of Article 16.4 of the DSU. With regard to the question of whether the item could be automatically included on the DSB's agenda, he wished to inform delegations that this matter had been the subject of informal consultations held in 1995 in the beginning of the operation of the DSB. At that time, a number of delegations had objected to any automatic action by the Secretariat to place panel reports on the agenda since there was no consensus on this matter. Therefore, until Members decided otherwise, the practice was to have a Member to place an item on the DSB's agenda.

The representative of Thailand said that his delegation could not accept that this practice which had not been agreed by Thailand could override the DSU provisions. He therefore reserved its right with regard to this matter.

The representative of Ecuador noted the points made by delegations and the explanation provided by the Secretariat. He sought confirmation of his understanding that it was not necessary to request that status reports on implementation be placed on the agenda of a DSB meeting since this was done automatically in accordance with the provisions of Article 21 of the DSU.

The representative of India said that his delegation's understanding of the legal implications of Article 16.4 of the DSU was the same as that of Thailand. However, the practice regarding this matter was different. India believed that this matter could be considered in the context of the DSU review to ensure that the practice complied with the legal requirements.

The representative of Mexico said that it was his understanding of Article 16.4 of the DSU that if a meeting of the DSB was not scheduled for the purpose of adoption of a panel report such a meeting would have to be held. However, it was not clear how this item could be included on the DSB's agenda. He believed that the current practice should be improved so that Members would be informed of a meeting for the consideration of a panel report to enable the parties to the dispute to take a position on this matter. There was no question that a meeting would have to be convened. However, he was concerned that if no request to include this item on the agenda would be made this could amount to infringement of Article 16.4 of the DSU and the collective violation of the basic instruments.

The Chairman said that since there was no agreement, he proposed that Members re-examine the current practice regarding this matter at an appropriate time. However, it was clear, as stated by Mexico, that there was an obligation to convene a DSB meeting.

The DSB took note of the statements.