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on 19 January 2001

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

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1. United States – Definitive safeguard measures on imports of wheat gluten from the European Communities

(a) Report of the Appellate Body (WT/DS166/AB/R) and Report of the Panel (WT/DS166/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS166/9 transmitting the Appellate Body Report on "United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities", which had been circulated in document WT/DS166/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 document WT/L/160/Rev.1, both Reports 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".

2. The representative of the European Communities said that the EC was pleased that both the Panel and the Appellate Body had confirmed that the US safeguard measure on wheat gluten was inconsistent with various provisions of the Agreement on Safeguards. The rulings of the Panel and the Appellate Body had confirmed once again the EC's view that safeguard measures, which by definition affected fair trade, could only be adopted in exceptional situations meeting the very restrictive standards set by the WTO rules. This was not the case with the US measures. Therefore, this WTO-incompatible measure should be repealed immediately. There was simply no other option. This meant also that the procedure currently carried out by the US investigating authority for a possible extension of the safeguard measure for a further two-year period had to be stopped immediately. He recalled that in the Panel's proceedings, when it was clear that the measure was incompatible with the WTO rules, the United States had decided to worsen the management rules

applied to the quotas, and had made them even more restrictive and protectionist. The EC hoped that the strong signal sent at the present meeting would remind the United States that it had to stop abusing trade defense instruments, and that it had to comply with the relevant international obligations in this area.

3. With regard to the substance of this case, the EC was generally satisfied with the reasoning of the Appellate Body. First, the Appellate Body had once again confirmed the application of the principle of parallelism in safeguard cases, and that the exclusion of the NAFTA partners from the US measure, when their imports had been taken into consideration in the analysis of increased imports, was entirely unjustified. Second, the Appellate Body had confirmed that the United States had completely disregarded its notification and consultation obligations under the Agreement on Safeguards. A Member willing to restrict fair trade had to hold meaningful and well-informed consultations in good faith with affected Members. The Appellate Body had also rightly corrected the Panel's reasoning on certain systemic points: (i) it had recalled that investigating authorities had to play an active role in the identification and the analysis of all the factors relevant for the determination of the serious injury and the causal link. The investigating authority could not simply sit on the fence and wait for private parties to build the case; (ii) it had also usefully ruled that an objective assessment of the facts was not compatible with deference *vis-à-vis* the investigating authority. On the contrary, panels had to closely verify whether the investigation report provided reasoned conclusions as provided for in Article 3.1 of the Agreement on Safeguards and contained a detailed analysis, including a demonstration of the relevance of the factors examined in accordance with Article 4.2(c) of the Agreement on Safeguards; and (iii) it had clearly condemned the US refusal to provide confidential information to the Panel and to the other parties, thereby rejecting the dubious invocation by the United States of Article 3.2 of the DSU.

4. With regard to causality, the EC was pleased that the Appellate Body had confirmed that the United States had not demonstrated the existence of a causal link between increased imports and serious injury. In fact, as the Appellate Body had shown, only the US industry was most likely to be to blame for its self-inflicted injury. This clear condemnation corresponded to what the Appellate Body had stressed in its previous rulings, namely, Korea – Dairy Safeguard (WT/DS98) and; Argentina – Footwear Safeguards (WT/DS121); i.e., that the strict and unambiguous rules of the Agreement on Safeguards had to be interpreted narrowly. A loose reading of the causal link would fly in the face of the established practice of Members and would lead to increased protectionism, in particular if it spilled over to other trade defense instruments. In any event, a standard for safeguards that would be lower than for other trade defense instruments would clearly be at odds with the purpose of the Agreement on Safeguards which was to "reinforce the disciplines of GATT 1994" and "to re-establish multilateral control over safeguards". In the EC's view, the WTO rules required a Member to demonstrate that increased imports caused or threaten to cause serious injury to a domestic industry, and the Agreement on Safeguards specifically provided in its Article 4.2(b) that injury caused by other factors not to be attributed to increased imports. As the Appellate Body had found, these key requirements were clearly not met by the United States in this dispute. However, the EC also believed that given the systemic importance of the causation requirement further clarification could be needed from the Appellate Body in future cases on the definition of the causal link. Finally, the EC noted with concern the increasing and worrying practice of applying judicial economy. This was especially the case here, where systemic issues related in particular to the proportionality of the measure that had to be addressed.

5. The representative of the United States said that his country believed that it was significant that the Appellate Body had rejected the conclusion that the Agreement on Safeguards required that imports by themselves had to cause serious injury. This was a crucial development that helped to maintain the vitality of the Agreement on Safeguards, an agreement that was important to Members' overall ability to accept increased trade liberalization. In so doing, the Appellate Body had endorsed the US view that "the causal link between increased imports and serious injury might exist, even

though other factors are also contributing, 'at the same time', to the situation of the domestic industry" (paragraph 67 of the AB report). There was one aspect of the Appellate Body Report that was particularly troubling, and to which the United States would like to draw Members' attention. The United States concurred with the Appellate Body's view that the treatment by panels and parties of confidential information developed during the course of a safeguard investigation raised a "serious systemic issue" (paragraph 170 of the AB report). He believed that this was an important subject which should be addressed by Members. However, the Appellate Body had gone further by stating that it "deplored the conduct of the United States" in this connection. Contrary to the EC's statement, this was not a legal finding nor was it based on the text of any of the covered agreements. This was a gratuitous observation. The United States believed that panels and the Appellate Body had overstepped their bounds when they had arrogated to themselves the right to censure particular Members for any reason, let alone for seeking to protect confidential documents from disclosure as required under the Agreement on Safeguards. There was nothing in the mandate of either a panel or the Appellate Body that would provide for such a role.

6. Moreover, the Appellate Body Report had neglected to mention a critical fact. The United States had made plain in the Panel's proceedings that it was prepared to make all of the requested confidential information available to the Panel and to the EC, subject to reasonable measures to maintain the confidentiality of that information. The United States had obtained the consent of the submitters of the information to provide it to the Panel on that basis. In this regard, the Panel had suggested a way that this could be accomplished. The EC, and not the United States, had rejected the Panel's final proposal. The Appellate Body had also concluded that the US International Trade Commission had not made the necessary findings to support the exclusion of Canadian wheat gluten from US safeguard measure. The United States noted that the Appellate Body had not questioned the right of free-trade areas (FTA) partners to exclude each other from safeguard actions. Indeed, the United States did not understand that either the EC or any other Member in any other dispute to have questioned that right. With regard to the EC's comments made at the present meeting, no finding had been made that the United States had abused its rights. In many instances, the Panel and the Appellate Body Reports had found that the United States had acted consistently with the Agreement on Safeguards. Nor was there any finding of a complete disregard of notification obligations by the United States, but rather that notifications had been submitted but some of them had been submitted a few days too late.

7. He also wished to raise another issue related to the adoption of the DSB's recommendations and rulings. Based on the Appellate Body Report, the EC had already announced that it would apply a retaliatory tariff-rate quota (TRQ) on imports of corn gluten feed from the United States. The TRQ was set to take effect just five days from 19 January 2001. The EC had also stated that its action was consistent with Articles 8.2 and 8.3 of the Agreement on Safeguards. The United States questioned that assertion. Article 8.2 required a Member applying a safeguard measure to compensate a Member affected by the measure, and authorized the affected Member to suspend concessions if the two could not reach agreement on compensation. The suspension of concessions could not occur until 30 days after notification to the Council for Trade in Goods (CTG), during which the CTG might disapprove the measure in question. Article 8.3 suspended this authorization for three years if a safeguard measure was consistent with the Agreement on Safeguards. He noted that the EC had notified the CTG and the Committee on Safeguards of the proposal to suspend concessions. However, the minutes of the CTG indicated that the matter had never been inscribed on its agenda or considered by it. Therefore, the United States questioned how the EC could have the authority to suspend concessions without having previously ensured that the CTG had not disapproved the suspension. In light of its failure to satisfy the requirements of Article 8.2, the United States asked what grounds the EC had asserted for suspending concessions to the United States. If the EC took action on its announcement, the United States would request consultations on this matter.

8. The representative of Canada said that his country had participated as a third party in this dispute, and wished to take this opportunity to comment briefly on two issues. First issue was the non-application of the safeguard measure to imports from Canada, and second related to business confidential information. With regard to the first issue, Canada noted that neither the Panel nor the Appellate Body had expressed views on whether, as a general principle, a member of an FTA could exclude imports from other members of that FTA from the application of a safeguard measure. With regard to the second issue, the Appellate Body had reaffirmed the views it had already made in Canada Aircraft case (WT/DS70) that Members were under a duty and an obligation to respond promptly and fully to requests made by panels for information. The Appellate Body had made what Canada considered to be a highly unusual observation, namely, it "deplored" the conduct of the United States for failing to provide certain information to the Panel. Canada fully recognized the need for panels to have the information necessary to perform their assigned tasks. At the same time, due regard should be given to the carefully calibrated balance established under the DSU between State and international responsibilities as well as between the rights of complaining and responding parties. It was therefore important not to attribute to panels the power to require the provision of information in a manner that was not contemplated in the DSU. To do so would introduce an element of instability into the dispute settlement system.

9. The representative of New Zealand said that his country, which had participated in this case as a third party, supported the adoption of both Reports. New Zealand welcomed the findings of the Panel and the Appellate Body that the US safeguard measure on imports of wheat gluten violated Articles 2 and 4 of the Agreement on Safeguards, and that the United States had failed to comply with Articles 8 and 12 of that Agreement. New Zealand looked forward to prompt compliance by the United States with the findings of the Panel and the Appellate Body and the removal of the safeguard measure on wheat gluten imports. In New Zealand's view, the Appellate Body had usefully clarified the nature of the investigation which was to be conducted by the competent authorities under Article 3.1 of the Agreement on Safeguards. An investigation required a proper degree of activity on the part of the competent authorities, in particular in order to fulfil the obligation to evaluate all relevant factors that might have a bearing on the situation of the domestic industry under Article 4.2(a) of the SA. New Zealand therefore supported the Appellate Body's ruling which had overturned the Panel's finding that competent authorities needed only to examine other factors that were clearly raised by interested parties in the domestic investigation.

10. New Zealand also supported the findings of the Panel, as upheld by the Appellate Body, that the United States wrongly excluded imports from its FTA partner - Canada - from the application of the safeguard measure, after having included imports from all sources in its investigation of increased imports and their effect on the domestic industry. New Zealand had argued as a third party that a degree of symmetry was required between the imports included in a serious injury determination, and those to which a safeguard measure was applied. This was consistent with New Zealand's own practice on safeguards as an FTA partner. Article XXIV of the GATT 1994 was not a relevant consideration in this regard. The Appellate Body had also helpfully emphasised that Article 12.3 required a Member proposing to apply a safeguard measure to provide an adequate opportunity for prior consultation, and that therefore information on the proposed measure, including the nature of the remedy, had to be provided in advance of consultations. It was not sufficient that notification be of recommendations from a competent authority as was the recent US practice. Such information was not sufficiently precise to enable a Member to meet its obligations of providing an adequate opportunity for meaningful consultations. In this manner the Appellate Body had highlighted the importance of consultations between the parties as a means of resolving disputes. Similarly, the Appellate Body had found that the provision of necessary information to enable a panel to make an objective assessment of the facts contributed to a prompt and satisfactory resolution of a dispute. There was therefore an overriding interest on the part of all Members to ensure that necessary information was provided to panels to enable them to function effectively.

11. New Zealand considered that while the Appellate Body was succinct and clear in its analysis of much of the Agreement on Safeguards, it would need in the future to further clarify its interpretation of the requirements of Article 4.2(b) of that Agreement. It was a fundamental requirement of the Agreement on Safeguards and of Article XIX of the GATT 1994 that a safeguard measure could only be imposed where increased imports caused or threatened to cause serious injury to a domestic industry. Article 4.2(b) of the Agreement on Safeguards required that injury caused by other factors not be attributed to increased imports. New Zealand agreed fully with the sentiments of the Appellate Body that there had to be a direct causal link between increased imports and serious injury, and that injury caused by other factors had to be properly attributed. Where there were other factors that contributed to serious injury, in the view of the Appellate Body the injurious effects to the domestic industry caused by increased imports were to be distinguished from the injurious effects caused by other factors, and those caused by the latter not attributed to increased imports. It was not clear, however, how a Member was to follow this reasoning in its demonstration that increased imports had caused serious injury. New Zealand considered that the Appellate Body did not go far enough in explaining its own approach to causation or the standard that was to be applied by Members. This was an issue on which further elaboration from the Appellate Body would be necessary in order to ensure that Members had appropriate guidance and to avoid the provisions of the Agreement on Safeguards being exploited in the future. He recalled that the Agreement on Safeguards allowed countries to derogate from their commitments under the WTO, and it allowed restrictions to be placed on fair trade. Because of this, the Appellate Body had repeatedly stressed in the past that the Agreement on Safeguards had to be interpreted narrowly. New Zealand wholeheartedly agreed on this point. In New Zealand's view, it was imperative to have clear rules which carefully circumscribed the use of safeguards and prevented their being open abuse.

12. The representative of Australia said that his delegation would restrict its comments to one systemic issue arising from the Panel and the Appellate Body Reports. Safeguard action was action that Members could only legitimately take in exceptional circumstances. The impact that safeguard measures had on trade was far-reaching given that it applied to imports from all sources. Indeed, such action was far more disruptive than other trade remedies, i.e. anti-dumping and countervailing duties. It was essential that the rigour of the obligations set out in the Agreement on Safeguards and in Article XIX of the GATT 1994 was maintained. Any weakening of those obligations would risk a break out on safeguards. His delegation was disappointed that the Panel's articulation of the approach to the determination of causation had not been confirmed by the Appellate Body. This would have provided greater guidance and certainty to all Members about how to handle investigations. Of course, the substantive obligation to demonstrate causation had not changed. However, further guidance on these issues would be required to ensure that competent authorities make proper findings on the existence of the causal link so that recourse to safeguard measures was strictly limited to the exceptional circumstances set out in the Agreement on Safeguards and Article XIX of the GATT 1994.

13. The representative of Mexico said that although his country had not participated in the proceedings of this case, it had a substantial interest therein and had followed closely the work of the Panel and the Appellate Body. In this respect, Mexico was satisfied that the Panel and the Appellate Body had stressed that "… this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure." (paragraph 99 of the AB Report). Like other Members, Mexico noted that there was nothing in this case that affected the rights of members of FTAs.

14. The representative of Japan said that although his country had not participated in the proceedings of this case it wished to briefly comment on the Appellate Body's interpretation of Article 4.2(b) of the Agreement on Safeguards. In paragraph 69 of its Report, the Appellate Body had referred to the notion of genuine and substantial relationship of cause and effect. While the meaning of this term was not clear, Japan did not interpret this concept, introduced by the Appellate Body, as a

digression from the traditional interpretation of the causal link under Article 4.2 (b) of the Agreement on Safeguards.

15. The representative of Hong Kong, China said that his country had maintained a long-standing systemic interest in trade remedies such as safeguards to ensure that rules were followed and that measures were not abused. Hong Kong, China noted that since the Agreement on Safeguards had come into effect in 1995 the number of safeguard cases had been on the rise. For example, the number of safeguards cases in 2000, had increased seven-fold comparing with those raised in 1997. In all four adjudicated dispute settlement cases involving safeguards, the measures had been found inconsistent with the requirements of the Agreement on Safeguards in one way or another. Against this background, Hong Kong, China had read with interest the Appellate Body's rulings in this case. In some aspects, those rulings helped to clarify a number of procedural requirements under the Agreement on Safeguards. For example, the requirement under Article 4.2(a) on evaluation of all relevant factors in the investigation, the requirements under Article 8.1 and 12.3 on prior consultations with interested parties, and the notification requirements under Article 12.1 were more clearly spelt out. These rulings sent a positive signal to the relevant authorities that these procedural requirements had to be rigorously followed. However, Hong Kong, China was concerned with the lack of clarity in the Appellate Body's ruling on Article 4.2(b) regarding the establishment of casual link between increased imports and serious injury. In effect, the Appellate Body had reversed the Panel's ruling that "increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement" (paragraph 8.138 of the Panel Report, quoted in paragraph 61 of the AB Report). After reversing the Panel's ruling, the Appellate Body had then proposed a three-step procedure in regard to Article 4.2(b) of the Agreement on Safeguards (paragraph 69 of AB Report). Although the Appellate Body had set out the procedures on examination of causation under Article 4.2(b), it remained unclear how competent authorities, attributed the injuries to various factors including increased imports. It was also unclear what constituted "a genuine and substantial relationship of cause and effect" under the final step. The Appellate Body's loose interpretations in these aspects did little to prevent SG authorities from manoeuvring or even abusing the grey area in Article 4.2(b) in contradiction with the original purpose of the Agreement. Hong Kong, China, hoped that in its future rulings the Appellate Body could fully take into account systemic implications of its ruling on Article 4.2(b) of the Agreement on Safeguards as well as Members' views on this important subject.

16. The representative of Korea said that his country wished to join other Members in supporting the adoption of the Panel and the Appellate Body Reports. A safeguard measure was a derogation from Members' obligations under the WTO Agreements, which was allowed only in an emergency situation and only when used according to strict observance of substantive and procedural rules stipulated in the GATT 1994 and the Agreement on Safeguards. For this reason, previous panels and the Appellate Body Reports had consistently held that the Agreement on Safeguards had to be read strictly in light of its object and purpose and that safeguard measures could only be imposed in extraordinary circumstances when a country was faced with an emergency situation requiring immediate relief from an unforeseen increase in imports (Argentina - Footwear Safeguards, AB Report, paragraphs 93-95 and 131 and Korea - Dairy Safeguard, AB Report, paragraphs 86-89).

17. He believed that the Reports before the DSB at the present meeting would contribute to such consistent efforts to confirm the derogatory nature of safeguard measures, and to further clarify the rules to be complied with in imposing such emergency measures. In particular, Korea wished to take note of the rulings of the Panel and the Appellate Body with respect to the US obligations under Articles 12.3 and 8.1 of the Agreement on Safeguards and the application of parallelism principle in the safeguards cases. In this connection, Korea firmly supported New Zealand, with regard to the fact that Article XXIV of the GATT 1994 was not relevant for excluding FTA partners from safeguard measures. While thus supporting the adoption of the Panel and the Appellate Body Reports, Korea wished to refer to several issues of systemic interest. First, the Appellate Body had reversed part of

the Panel's interpretation of the causality standard. Korea wished to know how this ruling related to the Appellate Body's decision on Argentina - Footwear Safeguards. In that case, the Appellate Body had upheld the panel's causation standard to the effect that the serious injury must be caused by increased imports alone (Argentina - Footwear Safeguards, the AB Report, paragraphs 140-144; the Panel Report, paragraph 8.229). Furthermore, while the Appellate Body had reversed the Panel's interpretation of causality, it did not provide an alternative interpretation. In paragraph 69 of its Report, the Appellate Body had suggested a three-step application of the Article 4.2(b) standard. The final step was to determine whether the causal link involved a genuine and substantial relationship of cause and effect. The crucial question for this final step was to provide a guideline to determine what constituted a genuine and substantial relationship of cause and effect. The Panel's interpretation that imports 'in and of themselves' had to cause serious injury, provided such a guideline. However, while the Appellate Body had reversed this guideline, it had not provided an alternative. Korea wished that this crucial point be further clarified through future deliberations of the Appellate Body. Further clarification was necessary for obvious reasons. In the absence of a clear guideline, there would be a substantial temptation to interpret causality arbitrarily and to impose unjustified safeguard measures. This would be a regrettable development, particularly in view of the fact that the purpose of the dispute settlement system was "to clarify the existing provisions of WTO Agreements", as provided for in Article 3.2 of the DSU.

18. The second point concerned the exercise of judicial economy by the Panel, which was upheld by the Appellate Body. This issue had arisen on many occasions in panel challenges to safeguard decisions. Panels, which had found any errors in the investigation process, had chosen not to proceed to address other separate claims regarding the safeguard remedy measure on the grounds of judicial economy. In this case the Appellate Body had upheld such an approach. In this connection, Korea's major concern was that loose exercise of judicial economy would not lead to dispute resolution but dispute prolongation. In Korea's view, the safeguard investigation and the safeguard remedy were two separate issues. Thus, the Panel should not have avoided making a finding on the inconsistency of the remedy because of its finding of error in the investigation. As cited in paragraph 185 of the Appellate Body Report, the EC had expressed a well-justified concern that "the Panel has not clarified whether the United States could simply repeat the serious injury determination and then still proceed to apply the measure in the same way". There was a real possibility that a party could act in the manner suspected by the EC. In such a case, the inconsistency of the remedy would remain as a matter in issue to be resolved in the dispute. Thus, employing the reasoning of the Appellate Body in the case on United States - Shirts and Blouses (WT/DS33), the issue of remedy should have been addressed by the Panel. It was also important to recall that the party in violation was only required to implement the decision as to the issues reached by the Panel. All of the other claimed violations were simply "suspended" and the safeguard remedy remained in effect throughout the implementation process. Certainly, the passage of time and the cost of delay fell squarely and disproportionately on the prevailing party. The prevailing party would have no other choice than to start a new dispute settlement procedure with respect to the remedy measures. Such outcome would be unfair in view of the language and spirit which stipulated in Article 3.3 of the DSU that the prompt settlement of situations where a Member's benefits were being impaired was essential to the functioning of the WTO.

19. The representative of Argentina said that his country noted that the Appellate Body had made a number of interpretations of provisions of the Agreement on Safeguards which had introduced a degree of flexibility in the application of such measures that would not appear to be based on precedents. In particular, Argentina was surprised at the interpretations made of the causal link that should exist between the increase in imports and the serious injury or threat of injury to the domestic industry on the one hand, and the application of the principle of judicial economy on the other. In the Argentina - Footwear case, the interpretations of the Agreement on Safeguards with respect to causal link were extremely strict, to the point of including directives which were not expressly contained in the Agreement, such as the coincidence in time between an increase in imports and a declining trend

in the relevant injury factors. In this case, on the other hand, a considerable margin of flexibility was introduced for the investigating authority, in that the causal link "may exist, even though other factors are also contributing, at the same time, to the situation of the domestic industry". At the same time, Argentina had doubts as to the application made of the principle of judicial economy. Argentina was unable to see clearly what criterion had been used by the Appellate Body, in different instances in which this principle had been applied, to determine at what point in the proceedings it was no longer necessary to examine subsequent claims of inconsistency of a measure with WTO rules. Argentina considered that a discretionary application of this principle would be bad for the system. In short, Argentina expressed its concern with the double standard applied to similar cases in which the compliance of safeguard measures with the Agreement had been examined.

20. The representative of Chile said that his delegation wished to comment on previous statements concerning the Appellate Body's decision in this case. It was obvious that there were systemic concerns as to how certain standards should be applied in order to determine the casual link between increase of imports and the injury or a threat thereof to domestic industry. Several delegations had highlighted this point. Australia and New Zealand had stated that more guidance and clarity were needed in this area from the dispute settlement system and in particular from the Appellate Body. Chile shared the view that it was necessary to have greater clarity and more guidance on this issue, but given the nature of the problem such guidance should not be provided by the Appellate Body or the dispute settlement system. In Chile's view, this was a key issue that should be taken up for consideration either in the Committee on Safeguards or in the CTG in order to achieve greater clarity in the interpretation on this matter. There was no need to wait for the Appellate Body to fill the vacuum. With regard to judicial economy, Chile could neither agree nor disagree with the statement made by the EC. This was an important systemic issue and therefore should be discussed in the DSB in order to decide how panels should deal with it in future cases.

21. The representative of Brazil said that his country was neither a party nor a third party in this case. However, like other countries, Brazil was carefully examining the consequences of implementation of the Agreement on Safeguards deriving from the Panel and the Appellate Body Reports with regard to implementation of the Agreement on Safeguards. Brazil was also carefully considering the issue of business confidential information and the obligation of Members to comply with the request for information from panels.

22. The representative of Uruguay said that that his country was neither a party nor a third party in this case. Uruguay shared most of the views expressed by previous delegations, and pointed out that, as stated by Chile, any clarification or interpretation of the WTO Agreements had to be carried by Members in the General Council, which was the only WTO body authorized for this purpose. It was neither up to panels nor to the Appellate Body to interpret the WTO Agreements which were of general application.

23. The representative of the European Communities said that it was not the intention of the EC to introduce sanctions or any retaliatory action. Its action had nothing to do with the suspension of concessions under Article 22 of the DSU. The EC would simply use its right to rebalance concessions under Article 8 of the Agreement on Safeguards. A safeguard was an instrument against fair trade. Therefore, since 1947 the GATT had provided that if one Member applied a safeguard measure, the affected Members were entitled to suspend substantially equivalent concessions. He also recalled that Article 8.3 of the Agreement on Safeguards stipulated that: "the right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the Agreement". As the US safeguard measure had been found inconsistent with the provisions of the Agreement on Safeguards, the EC could use its right to re-balancing immediately. The EC had notified its intention to rebalance concessions to the CTG in July 1998 (G/L/251, G/SG/N/12/EEC/1 dated 3 August 1998). Neither on that occasion nor

at any time since, had the United States made any representation or hinted at the challenge raised at the present meeting. In addition, the EC had formally reminded the United States of the consequences of a failure to lift its safeguard measure at the 13 December 2000 meeting of the Corn Gluten Feed Monitoring Group.

24. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS166/AB/R and the Panel Report in WT/DS166/R, as modified by the Appellate Body Report.

2. Brazil – Measures affecting patent protection

(a) Request for the establishment of a panel by the United States (WT/DS199/3)

25. The Chairman drew attention to the communication from the United States contained in document WT/DS199/3.

26. The representative of the United States said that his country was requesting the establishment of a panel. The TRIPS Agreement prohibited discrimination based on whether patented products were imported or locally produced. This obligation prohibited Members from requiring local production of the patented invention as a condition for enjoying exclusive patent rights. Article 68 of Brazil's patent law, however, appeared to impose this type of local production requirement by seeming to stipulate that a patent shall be compulsorily licensed if the patented product was not produced in Brazil. If that understanding was correct, then Article 68 discriminated against US owners of Brazilian patents whose products were imported into, but not locally produced in, Brazil, and would curtail the exclusive rights conferred on these owners by their patents. This was an apparent violation of the TRIPS Agreement. Brazil's requirement that patent owners manufacture their products locally in order to maintain full patent rights was a long-standing issue for the United States. Having been unable to resolve this issue through consultations over the past six months, indeed over the past five years, the United States had no choice, but to request that a panel resolve this dispute. Of course, the United States remained interested in settling this dispute. However, until it reached that agreement with Brazil, the United States believed it would be necessary to continue with the panel process.

27. The representative of Brazil said that his country regretted that the system was going too far in the direction of litigation and too little in direction of negotiation. Brazil had held discussions with the United States and was surprised that the United States had taken the decision to request a panel against Brazil on this matter. In Brazil's view, consultations between the United States and Brazil had thus far proven to be useful to clarify questions raised with regard to its Industrial Property Law. Further consultations would allow Brazil to better clarify conditions of implementation, as provided for in its Law, and would reassure the United States as to the full compatibility of Brazil's legislation with the TRIPS Agreement. Brazil therefore encouraged the United States to reconsider its decision, and to continue consultations and discussions rather than litigation. The United States claimed that Article 68 of the Industrial Property Law was in conflict with Articles 27.1 and 28.1 of the TRIPS Agreement. Brazil totally disagreed and was confident that its Industrial Property Law was consistent with the TRIPS Agreement and was among the most advanced legislation on intellectual property in the world. In this sense, Brazil believed that the United States, by requesting a panel against Brazil, was sending a negative and self-defeating message to other developing countries who were incorporating the standards of the TRIPS Agreement into their legislation.

28. Brazil also noted that despite some vague allegations, the United States was unable to demonstrate any concrete injury caused by Article 68 of the Brazilian Law on Industrial Property to the US industry. He wished to flag the fact that the premises underlying the US request for a panel were not consistent with its own legislation on patents. Brazil wished to know how the United States would explain the consistency of Sections 204 and 209 of the US Patent Code with its own interpretation of Articles 27.1 and 28.1 of the TRIPS Agreement, in particular with regard to the local

working requirements. Under Section 204 "Preference for the United States Industry", the US Patent Code required that small business firms and universities "manufacture substantially" their inventions in the United States. Section 209 of the same Code also established a local working requirement for federally owned patents. Brazil was carefully examining these issues. For all these reasons, Brazil considered that the US request for the establishment of a panel was not justified and, therefore, could not accept it. Brazil hoped that this issue would be resolved without unnecessary resort to the dispute settlement mechanism.

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