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Dispute Settlement Body
16 January 1998

MINUTES OF MEETING

Held in the Centre William Rappard
on 16 January 1998

Chairman: Mr. Wade Armstrong (New Zealand)

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1. India - Patent protection for pharmaceutical and agricultural chemical products
- Report of the Appellate Body (WT/DS50/AB/R) and Report of the Panel (WT/DS50/R).

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS50/8 transmitting the Appellate Body Report in "India - Patent Protection for Pharmaceutical and Agricultural Chemical Products", which had been circulated in accordance with Article 17.5 of the DSU. He said that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, the 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 the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body Report."

The representative of the United States expressed her country's satisfaction that the Appellate Body had upheld the Panel's conclusions that India had not fulfilled its obligations under Article 70.8 and 70.9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In particular, with respect to Article 70.8 of the TRIPS Agreement, the Appellate Body had found that India had not established a means that adequately preserved the novelty and priority of product patent applications for pharmaceutical and agricultural chemical inventions. According to the Appellate

Body, India's current method for receiving such patent applications was inconsistent with Article 70.8(a) of the TRIPS Agreement. With respect to Article 70.9 of the TRIPS Agreement, the Appellate Body had found that India had an obligation with effect from 1 January 1995, to pass legislation to establish a system of exclusive marketing rights, and had failed to fulfil that obligation. Consequently, the Appellate Body had affirmed the Panel's conclusion that India was in violation of Article 70.9 of the TRIPS Agreement.

At the present meeting, her delegation requested that the DSB adopt the Appellate Body Report in accordance with Article 17.14 of the DSU. Moreover, the United States expected India to comply promptly and fully with the rulings and recommendations of the Panel and the Appellate Body. India had to do this by amending its laws to provide a legally sound mailbox system for filing patent applications and a system for granting exclusive marketing rights for qualifying products. The Panel and the Appellate Body had found that India should have been in compliance with the obligations of Article 70.8 and 70.9 of the TRIPS Agreement as of 1 January 1995. After such a lengthy period of non-compliance, there was no basis for any significant delay in implementing these obligations. Her delegation appreciated the careful work of the Panel and the Appellate Body and looked forward to India's prompt implementation of the rulings and recommendations of the Panel and the Appellate Body Reports.

The representative of India said that his country had recognized the fact that the Panel and the Appellate Body Reports constituted important contributions which highlighted explicitly and implicitly the complexities of the transitional provisions of the TRIPS Agreement. The entire text of this Agreement had been newly negotiated in the Uruguay Round and it occupied a relatively self-contained *sui generis* status in the WTO Agreement in spite of being an integral part of the WTO system. This was the first dispute regarding the TRIPS Agreement before the DSB and the adoption of the Reports would have significant implications for the WTO, especially for developing-country Members with regard to their obligations under the transitional provisions of the TRIPS Agreement.

In light of the importance of the Panel and the Appellate Body Reports, it was his duty to express India's views thereon which should be fully recorded pursuant to Articles 16.3 and 17.14 of the DSU. Since Members that had not been parties to the dispute or third parties could be affected by the rulings and interpretations contained in the Reports, all delegations might wish to consider the implications of the Reports upon their adoption. In this context, he wished to highlight what India perceived as serious issues or legitimate concerns regarding certain findings and observations contained in the Reports.

This dispute had essentially centred on two Articles, namely Articles 70.8 and 70.9 of the TRIPS Agreement. Article 63 of the TRIPS Agreement had been considered in connection with Article 70.8 of the TRIPS Agreement. Prior to consideration of the specific Articles, he wished to deal with a matter of serious concern to India, namely, the Panel's observations with regard to standards applicable to interpretation of the TRIPS Agreement contained in Section C of the Panel Report.[1]

According to the Panel, the TRIPS Agreement should be interpreted to protect reasonable expectations of Members regarding future conditions of competition. Based on this concept, the Panel had introduced into the TRIPS Agreement an obligation to accord inventors legal assurances during the transitional period that should be accorded only at the end of that period. The Panel had ruled that Article 70.8 of the TRIPS Agreement required India to eliminate "...any reasonable doubts as to whether mailbox applications and eventual patents based on them could be rejected or invalidated..."[2], with respect to pharmaceutical and agricultural chemical products. This interpretation would have effectively, if not explicitly, imposed on India an obligation to already provide in its

[1]WT/DS50/R, p. 47.

[2]Ibid. para. 7.29.

domestic law for the future patentability of pharmaceutical and agricultural chemical products although the transitional provisions of the TRIPS Agreement required India to make such products patentable only in 2005.

India was satisfied that the Appellate Body had taken into account its reservations with regard to the Panel's findings on the subject of the interpretation of the TRIPS Agreement, and had completely rejected the Panel's approach. In particular, it was satisfied that the Appellate Body had highlighted the fact that the Panel's invocation of the legitimate expectations of Members relating to conditions of competition merged the legally distinct basis for *violation* and *non-violation* complaints under Article XXIII of the GATT. The Appellate Body had pointed out that: "The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[3] The Appellate Body had reversed the Panel's ruling and had confirmed that India was entitled to delay the patentability for pharmaceutical and agricultural chemical products until 1 January 2005. This ruling of the Appellate Body should ensure that, in the future, panels would not create new obligations under the TRIPS Agreement on the basis of legal concepts not reflected therein. However, after providing such an exposition on the general interpretative issue, namely, standards applicable to interpretation of the TRIPS Agreement, the Appellate Body appeared to have slightly deviated from its own standards in its consideration of Articles 70.8 and 70.9 of the TRIPS Agreement.

Currently, India did not provide patents for pharmaceutical and agricultural chemical products and under the TRIPS Agreement it was entitled to a transition period of ten years for providing such product patents. However, under Article 70.8(a) of the TRIPS Agreement, as from the date of entry into force of the WTO Agreement, 1 January 1995, India was required to provide a means by which applications for patents for such inventions could be filed. His delegation appreciated that the Panel had pointed out in paragraph 7.23 of its Report that the only obligation India had to assume under Article 70.8 was that of subparagraph (a) i.e. the obligation to provide a means by which applications for product patents in pharmaceutical and agricultural chemicals could be filed. The Panel had pointed out that obligations under subparagraphs (b) and (c) of Article 70.8 of the TRIPS Agreement would become binding on India only by 1 January 2005. The issue in this dispute had not been whether India had a mailbox system. Such a system had been established in 1995, and had been used actively and extensively. The issue had been whether this system was consistent with Indian patent law. In paragraph 7.33 of its Report, the Panel had cited Article 1.1 of the TRIPS Agreement which, *inter alia*, provided that: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." The Panel had, therefore, observed that it was up to India to decide how to implement its obligations under Article 70.8 of the TRIPS Agreement, and had stated that the mere fact that India relied on an administrative practice to receive mailbox applications without legislative changes did not constitute in itself a violation of India's obligations under subparagraph (a) of Article 70.8 of the TRIPS Agreement. In the same paragraph, the Panel had also noted that the lapse of the Patents (Amendment) Ordinance 1994 which had been promulgated for the purpose of specifically addressing these obligations did not automatically mean the lack of a means for filing patent applications for pharmaceutical and agricultural chemical products in India. His country agreed with these observations. However, in paragraph 7.29, the Panel had stated as follows: "It is our view that this means that Article 70.8(a) requires the developing countries in question to establish a means that not only appropriately allows for the entitlement to file mailbox applications and the allocation of filing and priority dates to them, but also takes away any reasonable doubts as to whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing

[3]WT/DS50/AB/R, para. 45.

or priority date, the matter for which protection was sought was unpatentable in the country in question." It appeared that the Panel had come to this erroneous conclusion partly due to its incorrect interpretation of the TRIPS Agreement, which had been overturned by the Appellate Body, and partly due to its misinterpretation of Indian domestic law.

In its written and oral submissions before the Appellate Body, India had made considerable efforts to distinguish between: (i) the evaluation of the effect of an Indian statute to determine whether it violated WTO provisions; and (ii) a decision regarding a municipal law issue of whether India's action was valid under its domestic law. The first was necessary for the effective functioning of the WTO. The second was the responsibility of the Indian Government upholding India's Constitution and its laws as a sovereign government. In India's view, the Appellate Body Report had not dealt with this crucial distinction in a comprehensive manner, which resulted in avoidable confusion and consequential misinterpretation of India's obligations under Article 70.8 of the TRIPS Agreement.

The Appellate Body had upheld the Panel's interpretation of Article 70.8(a) of the TRIPS Agreement that India's mailbox system required a sound legal basis. However, it had deleted the portion of interpretation which provided that India had an obligation to "eliminate any reasonable doubts" regarding the validity of its mailbox system on the ground that it was entitled to delay the grant of product patents until 1 January 2005. India had argued before the Appellate Body that the interpretation on the elimination of any reasonable doubts had influenced the Panel's appreciation of the evidence with regard to the soundness of the legal basis of India's mailbox system. It was evident from the Appellate Body's analysis of the issue of the burden of proof that the Panel's findings had been affected by this part of its interpretation of Article 70.8 of the TRIPS Agreement.

According to the Appellate Body, the Panel Report had demonstrated that, "... the United States put forward evidence and arguments that India's "administrative instructions" pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act".[4] Yet, the only evidence that the United States had provided was its own reading of the text of the Patents Act. Nevertheless, the Appellate Body had found that, "... after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that it had "reasonable doubts" that the "administrative instructions" would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court".[5] According to the Appellate Body, this was the appropriate burden of proof even when reviewing the validity of a Member's action under its domestic law. In India's view, the Appellate Body had erred in ignoring India's interpretation of its laws and in concluding that, "... we are not persuaded that India's "administrative instructions" provide a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates".[6]

The most problematic aspect of the Report was its conclusion that the Panel's reasonable doubt about the soundness of the legal basis of India's mailbox system was sufficient to conclude that India had not complied with Article 70.8(a) of the TRIPS Agreement. Neither the Panel nor the Appellate Body had considered it relevant that, between 1 January 1995 and 15 October 1997, India had received over 1,924 mailbox applications and that none had been rejected or invalidated. The Appellate Body had not addressed India's written arguments on the appropriate standard of proof in adjudging the validity under India's domestic law of its mailbox system, and the appropriate level of deference that a panel should give to the determination of a sovereign Member that its action

[4]WT/DS50/AB/R, para. 74.

[5]Idem.

[6]WT/DS50/AB/R, para. 70.

complied with its laws. In its written submission, India had noted that previous GATT panels had given the "benefit of the doubt" to Canada in the *Gold Coins* case[7] and to the United States in the *Malt Beverages* case[8] in the context of the interpretation of their domestic laws.

India believed, that as demonstrated in paragraph 62, the Appellate Body seemed to have been influenced in its assessment of India's mailbox system, established through administrative instructions, by the fact that administrative instructions had not been the initial means chosen by India to meet its obligations under Article 70.8(a) of the TRIPS Agreement. India considered that this was particularly unfortunate, since it had argued before the Appellate Body that the fact that India had initially selected one route for complying with its obligations under Article 70.8 of the TRIPS Agreement, and had subsequently taken recourse to another route, did not, *ipso facto*, make the subsequent route less valid. In fact, the Panel had clearly stated that the lapse of the Patents (Amendment) Ordinance 1994 did not automatically mean the lack of a means for filing patent applications for pharmaceutical and agricultural chemical products in India.

India had argued before the Appellate Body that panels and the Appellate Body should give special deference to the determination of Members with regard to their domestic law. This was not the same as deference to a Member's interpretation of WTO provisions, or deference to the determination of whether a particular factual situation met WTO standards. In this case, the issue before the Appellate Body had been the level of deference to be given to the determination of the Member with regard to its domestic law. The Appellate Body seemed to have overlooked the fact that India was not advocating a policy of total deference. It had merely recommended that the burden of demonstrating that a measure taken by a Member to comply with its WTO obligations was invalid under its domestic law should be placed on the Member challenging the validity of such a measure, and that the Member should be required to provide compelling evidence of such invalidity. In India's view, the United States had not provided such compelling evidence of invalidity.

India believed that the Panel had committed a legal error in ruling that India had failed to observe transparency provisions contained in Article 63.1 and 2 of the TRIPS Agreement. This ruling was surprising not only because the Panel's terms of reference had not mentioned Article 63 of the TRIPS Agreement, but also because the United States had requested a ruling on this provision only in the alternative, if the Panel were to find the mailbox system to be consistent with the TRIPS Agreement. India was not concerned about the ruling on Article 63 of the TRIPS Agreement as such but about the recommendation that followed from it, i.e. the recommendation that the existing mailbox system, found to be inconsistent by the Panel, should be notified. There was no example in the history of the GATT and the WTO that a panel had recommended the notification of a measure that needed to be modified. India believed that such a requirement should not have been imposed. It also believed that a panel should make findings exclusively on the issues presented to it by the parties to the dispute.

It was particularly surprising that in paragraph 6.11, the Panel had justified its ruling on Article 63 of the TRIPS Agreement, which was a claim made by the United States only in the alternative, as follows: "Rather, in view of the Appellate Body's observation on the limitation of its mandate under Articles 17.6 and 17.13 of the DSU in its recent Report on the *Periodicals Case*, the Panel felt all the more strongly the need to avoid a legal vacuum in the event that, upon appeal the Appellate Body were to reverse the Panel's findings on Article 70.8". It was perhaps the first time that a panel had ruled on a claim in the alternative in anticipation that its ruling on the main claim of the complaining party would be overturned.

[7]Panel Report, Canada - Measures Affecting the Sale of Gold Coins, L/5863.

[8]Panel Report, United States - Measures Affecting Alcoholic and Malt Beverages, DS23/R (BISD 39S/206).

In light of the above, India was satisfied with the observations of the Appellate Body contained in paragraph 90. He hoped that in future those invoking dispute settlement provisions would pay special attention to this paragraph which read as follows: "With respect to Article 63, the convenient phrase, "including but not necessarily limited to", is simply not adequate to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the TRIPS Agreement does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel". India believed that this ruling would ensure that the phrase, "including but not necessarily limited to", would not be as frequently used in the future as it had been in the recent past.

With regard to Article 70.9 of the TRIPS Agreement, at issue was not whether India had denied exclusive marketing rights to eligible products. So far, India had not received any request for the granting of such rights. The issue was whether India was required to establish in its domestic legislation a system for the granting of such rights before any product became eligible. Article 70.9 of the TRIPS Agreement did not stipulate the creation of a system for the granting of exclusive marketing rights. Nevertheless, the Appellate Body, which in previous cases had emphasized that the interpretation of WTO agreements had to be based on their terms, and which in this case had stated that the duty of a treaty interpreter was to examine the words of the treaty to determine the intentions of the parties, had found that the establishment of such a system was required under Article 70.9 of the TRIPS Agreement. The text of Article 70.9 established an obligation to provide exclusive marketing rights to particular products after specified events had occurred. However, the Panel had interpreted this provision as if it obliged Members to authorize their competent authorities to grant exclusive marketing rights whether or not rights were due. Therefore, the Panel had found the mere lack of such authority to be sufficient to consider that India had not complied with Article 70.9 of the TRIPS Agreement. India had requested the Appellate Body to examine the Panel's interpretation in accordance with the principles of the Vienna Convention: i.e. on the basis of the terms of Article 70.9, its context and objective. India had pointed out that many provisions in the TRIPS Agreement, in particular Articles 42-48, explicitly provided for the creation of the authority to accord rights under domestic law. However, there was no wording to that effect in Article 70.9 of the TRIPS Agreement and the purpose of this provision was to permit Members to postpone legislative changes in a sensitive area. The Appellate Body had repeatedly emphasized that the interpreter must examine the language of the treaty. Moreover, it had rejected the notion of reasonable expectations which the Panel had used to justify the expansion beyond its terms of the obligations under Article 70.9 of the TRIPS Agreement. Therefore, it would have been logical for the Appellate Body to reverse the Panel's ruling on Article 70.9 of the TRIPS Agreement.

In response to India's appeal with regard to Article 70.9 of the TRIPS Agreement, the Appellate Body had made three findings. The first was that Article 70.9 had entered into effect on 1 January 1995. This was a matter on which the United States and India had agreed. The dispute had related to the content of this provision, not to the date of its entry into effect. The second was that, currently, India did not have a system for the granting of exclusive marketing rights. Again, this was not in dispute. The question was whether Article 70.9 of the TRIPS Agreement required India to have such a system. The third finding was that India's arguments had to be examined in light of Article XVI:4 of the WTO Agreement, according to which each Member had to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreement. However, the Appellate Body had not explained how this provision could determine the scope of the obligations with which the domestic law must be brought into conformity. Article XVI:4 of the WTO Agreement was only relevant once it had been determined that there was an obligation under one of the WTO agreements that required a modification in domestic law. Having made these three findings, the Appellate Body had rejected India's appeal. The interpretative issues which India had submitted to the Appellate Body had not been examined. It was particularly distressing that the Appellate Body

had not considered it necessary to deal with India's submission to the effect that the Panel's interpretation of Article 70.9 of the TRIPS Agreement had the consequence that transitional arrangements would allow developing countries to postpone legislative changes in all fields of technology except in the most sensitive ones. He regretted that the Appellate Body had not taken into account the point made by India to the effect that the Panel's ruling had ignored the implicit option available to developing countries in the TRIPS Agreement to reduce the transition period, if they so wished, and to provide product patents even before the end of the transition period instead of having to accept the obligation of providing exclusive marketing rights. India was surprised that the Appellate Body had chosen to read into Article 70.9 the phrase "as from the date of entry into force of the WTO Agreement" found in Article 70.8(a), thus ignoring its observations on the subject of general interpretation of the TRIPS Agreement.

In connection with Article 70.9 of the TRIPS Agreement, he also wished to consider paragraphs 7.62 and 6.19 of the Panel Report. During the proceedings, India had pointed out that it considered it inappropriate and procedurally indefensible for the Panel to place reliance on unsubstantiated and contested evidence by interested companies of one of the parties to the dispute presented at the time of the second substantive meeting. In its second written submission to the Panel, the United States had submitted a document in which it had been claimed that one company was in a position to request exclusive marketing rights in India. As indicated in the fourth indent of paragraph 4.29 of the Panel Report, India had pointed out that its research had not revealed any case in which a product for which a patent application had been filed after 1 January 1995, had received marketing approval in India and had become eligible for exclusive marketing rights under Article 70.9. India had also pointed out that the letter from Dr. H.E. Bale, Jr., provided by the United States in its second written submission had merely stated that one company was ready to request the granting of exclusive marketing rights from the Indian health authorities. It had also pointed out that this request was obviously a request for marketing approval and not for exclusive marketing rights. In paragraph 6.19, the Panel had stated that India had presented no counter-evidence other than the comment contained in the fourth indent of paragraph 4.29. His delegation was surprised about this comment since India could not provide any evidence to establish that it had not received a request for exclusive marketing rights. Those who claimed that they had made a request for exclusive marketing rights should produce necessary evidence and prove that the conditions for obtaining exclusive marketing rights had been met. It was surprising that the Panel had given so much consideration to a document provided by the United States along with its second written submission.

India recognized that the final results of the Panel proceedings were substantially more limited than those originally sought by the United States. It also recognized that the Appellate Body had rectified some of the errors contained in the Panel Report. However, the Appellate Body's conclusions were particularly disappointing because India had always accepted its obligations under Article 70.8 and 70.9 of the TRIPS Agreement. This dispute was only about how and when India should carry out these obligations. The Appellate Body's interpretations of Articles 70.8 and 70.9 of the TRIPS Agreement had reinforced and accelerated the obligations of developing countries with respect to transitional arrangements that had been intended to provide political flexibility on the sensitive issue of patents for pharmaceutical and agricultural chemical products. India regretted the Appellate Body's findings particularly as it had not disputed its obligations under the Agreement and the only issue was the manner of implementation. The overall effect of the Reports appeared to be a certain amount of dilution of what developing countries, like India, had considered to be the flexibilities available to them under the transitional provisions of the TRIPS Agreement.

Notwithstanding its reservations and concerns about certain rulings and observations contained in the Panel and the Appellate Body Reports, India recognized the important contributions of the Reports in promoting a serious and informed debate with regard to the transitional provisions of the TRIPS Agreement. He thanked the Chairman and the members of the Panel and the Appellate Body for their work and their significant contribution in the new areas of the TRIPS Agreement as

well as the WTO and the Appellate Body Secretariats for their assistance in the proceedings. He also thanked the US delegation for maintaining an atmosphere of professionalism as well as cordiality and goodwill in the proceedings.

India recognized that the Appellate Body members had to work under time pressure and that they had to deal with sensitive legal issues. It was understandable that, unlike panels, the Appellate Body reports did not contain all the points made by the parties to the dispute. However, if the objective was to maintain a vibrant and credible dispute settlement system, it was necessary that outside legal experts not involved in a dispute could study the Appellate Body reports and provide their comments and views through articles published in journals. In his view, the process of studying the Appellate Body reports by non-partisan legal experts would be considerably facilitated if the submissions made by the parties to the dispute were attached to the reports as annexes. He recognized that this was a matter for the Appellate Body to decide, but he wished to take this opportunity to make this suggestion through the Chairman for consideration by the Appellate Body.

India's faith in and commitment to the multilateral process was well-known. India believed in the resolution of disputes within the framework of the dispute settlement mechanism. In this context, he recalled the following statement made in the DSB with regard to the salient features of the dispute settlement system: "The dispute settlement mechanism contains a number of basic principles outlined in Article 3.2 of the DSU which together with Article IX and X of the WTO Agreement constitutes a backbone of the system. The main objectives of the dispute settlement system were: (i) to help create legal certainty and predictability in international trade by strictly respecting the legal agreements accepted by Members; (ii) to preserve the rights and obligations of Members under the covered agreements, not only by ensuring compliance by Members with their obligations, but also by upholding their legitimate rights of action against unjustified allegations; (iii) to permit clarifications of existing legal provisions in accordance with customary rules of international law, in particular the Vienna Convention on the Law of Treaties. However, interpretations to fill gaps and the creation of additional obligations were reserved for Members, not for panels or the Appellate Body."[9] It was against the background of these objectives of the dispute settlement system and limitations of panels and the Appellate Body that he had highlighted certain issues and concerns arising from the reports. His delegation urged the DSB to bear in mind these issues and concerns while considering the adoption of the reports.

The representative of Colombia thanked India for its detailed statement. Her delegation supported India's proposal concerning the need to find ways to disseminate written submissions made by the parties to the Appellate Body. The strict time-limits did not permit the Appellate Body to follow procedures similar to those of panels, whereby the parties to the dispute and third parties had an opportunity to review and submit comments on the summary of their arguments. Therefore, India's proposal to disseminate written submissions made by the parties to the Appellate Body could help experts and academics to analyze the WTO legal system. Colombia supported India's initiative to request the Chairman to make this proposal for consideration by the Appellate Body.

The representative of Switzerland said that his country supported the Panel's conclusions, upheld by the Appellate Body, that India had not fully implemented its obligations under Article 70.8 and 70.9 of the TRIPS Agreement. Switzerland wished to know how India would implement the conclusions of the Panel upheld by the Appellate Body. His delegation believed that India would inform the DSB within the next 30 days of its intentions in respect of implementation in accordance with Article 21.3 of the DSU. In particular, his country wished to know how foreign applicants would be informed of the system that India would put in place, and how India would take into account the interests of those persons who would have filed an application had the proper system been in place.

[9]WT/DSB/M/37, p. 15.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS50/AB/R and the Panel Report in WT/DS50/R as modified by the Appellate Body Report.

2. United States - Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above from Korea
   - Request for the establishment of a panel by Korea (WT/DS99/2)

The Chairman recalled that the DSB had considered this matter at its meeting on 18 November 1997, and had agreed to revert to it. He then drew attention to the communication from Korea contained in document WT/DS99/2.

The representative of Korea said that on 6 November 1997, his country had requested the establishment of a panel to examine its complaint with regard to this matter. Subsequently, the request for a panel had been circulated in document WT/DS99/2 on 7 November 1997. At the DSB meeting on 18 November 1997, the United States had not consented to the establishment of a panel. However, since then no progress had been made towards the resolution of this issue. Therefore, pursuant to Article 6.1 of the DSU, Korea had requested the inclusion of its request for a panel on the agenda of the present meeting. He requested that the DSB establish a panel with standard terms of reference as set out in Article 7 of the DSU.

The representative of the United States said that her delegation accepted Korea's request for the establishment of a panel. In the view of the United States in determining not to revoke the anti-dumping order on the DRAMS from Korea, the procedures and standards used by the Department of Commerce as well as its application of the facts to the law had been in full conformity with the Anti-Dumping Agreement and the GATT 1994.

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

3. United States - Measures affecting textiles and apparel products
   - Statement by Hong Kong, China

The representative of Hong Kong, China, speaking under "Other Business", recalled that at the DSB meeting on 30 July 1997[10] ,his delegation had made a statement regarding the consultations requested by the European Communities with the United States with regard to changes in the US rules of origin for textiles and apparel products (WT/DS85/1). Hong Kong, China had an interest in this matter. His delegation had then asked whether a mutually agreed solution had been reached by the parties to the dispute in this case as it had been reported in the media and, if so, when such a solution would be notified under Article 3.6 of the DSU. He recalled that in accordance with Article 3.6 of the DSU: "Mutually agreed solutions to matters formally raised under the consultations and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant councils and committees, where any Member may raise any point relating thereto."

Nearly six months had elapsed since then, but the DSB had not been informed of developments by the parties concerned. He therefore wished to take the opportunity at the present meeting to enquire again if a settlement had been reached and, if so, when a notification would be forthcoming. He believed that, as demonstrated in this case, there was an institutional or systemic

[10]WT/DSB/M/36.

issue arising from the operation of Article 3.6 of the DSU. To the extent that mutually agreed solutions had multilateral implications, they were justifiably matters of concern to Members. In his delegation's view, whether such concerns were adequately addressed under the provisions of Article 3.6 of the DSU or whether more should be done, *inter alia*, to enhance transparency, was a question which required further consideration especially during the review of the DSU.

The representative of the United States said that her country was a long-standing advocate for greater transparency. The United States and the European Communities had notified Members who had requested participation in the consultations that a settlement had been reached. As far as the reference to Article 3.6 of the DSU was concerned, the United States was currently working with the Communities on a timing for notification and the nature of the actual agreement.

The representative of the European Communities wished to confirm that the Communities were in the process of consultations with the United States with the view to examining the possibility of a notification.

The representative of Japan supported the statement made by Hong Kong, China. He believed that transparency in the consultations under the DSU was very important. His delegation enquired as to the reasons delaying this notification.

The DSB took note of the statements.

4. Election of Chairperson

The Chairman, speaking under "Other Business", recalled that in accordance with the rules of procedure for meetings of the DSB (WT/DSB/9), the election of its chairperson should take place at the first meeting of the year. Currently, the Chairman of the General Council was conducting informal consultations on a slate of names for appointment of chairpersons to WTO bodies. It was expected that proposed nominations be submitted for approval by the General Council at its first meeting in 1998 which is scheduled for 19 February. He therefore proposed that the DSB formally elect its Chairperson at its next meeting following the meeting of the General Council to be held on 19 February.

The DSB took note of this information.