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MINUTES OF MEETING

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on 23 May 1997

Chairman: Mr. Wade Armstrong (New Zealand)

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1. Surveillance of implementation of recommendations adopted by the DSB

- United States - standards for reformulated and conventional gasoline: Status report by the United States (WT/DS2/10/Add.4)

The Chairman recalled that this item was on the agenda pursuant to Article 21.6 of the DSU which 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/DS2/10/Add.4 which contained a further status report by the United States with regard to its progress in the implementation of the DSB's recommendations on this matter.

The representative of the United States said that as provided for in Article 21.6 of the DSU, his country had submitted its fifth report on the implementation of the DSB's recommendations. At the previous DSB meeting, the United States had stated that on 29 April 1997, the Administrator of the US Environmental Protection Agency (EPA) had issued a proposed rule for comment which had subsequently been published in the US Federal Register on 6 May 1997. In accordance with normal US regulatory procedures, the EPA had invited all interested parties to comment on the specifics of

its proposal. On 20 May 1997, the EPA had held a public hearing on the proposal. Written comments were required to be submitted by 19 June 1997, which would be considered prior to the finalization of the regulation. The United States reiterated its hope that Members would ask their governments to review the proposal and provide comments prior to the closure of the comment period. Timely comments would ensure that the United States would take them fully into account in formulating a final rule. At the previous DSB meeting, Brazil had asked a number of questions concerning time-limits for the completion of work on the proposed rule. He said that the United States took its commitment to the timely implementation of its obligations seriously, and was on schedule towards meeting these obligations.

The representative of Brazil thanked the United States for the information just provided. His Government and Brazil's oil company Petrobrás were carefully considering the proposed rule. The representatives of Petrobrás had participated in the public hearing held on 20 May 1997. The publication of the proposed rule had been a positive sign. However, in view of the approaching deadline of 20 August 1997 for the implementation of the DSB's recommendations, Brazil, at the previous DSB meeting, had requested the United States to provide information with regard to: (a) the additional steps required under the US law to implement the DSB's recommendations; (b) the time required for each step; and (c) a schedule or chronology of the events between now and the 20 August deadline. His delegation would appreciate if the United States could provide this information.

The representative of the European Communities welcomed the detailed report which the United States had submitted at the DSB meeting on 30 April 1997, on the EPA's intentions regarding the implementation of the DSB's recommendations which would bring the Gasoline Rule into conformity with the GATT 1994. The Communities appreciated the amount of work involved in the preparation of this proposal. They, like Brazil, assumed that with respect to the timing, the United States was still firmly committed to making the necessary changes within the 15-month period ending on 20 August 1997; in other words, that it was committed not only to propose the changes but to actually implement them within that period.

With regard to the substance of the proposal, the Communities accepted the basic option proposed by the United States which would permit foreign refiners to choose either an individual or the statutory baseline. However, they were concerned in particular with regard to one aspect of the proposal which still did not seem to comply with the legal requirements of the Appellate Body and the Panel. This related to the proposed requirement of making imported conventional gasoline subject to a quality benchmark, to a monitoring mechanism and to an increase in the statutory baseline if the benchmark would be exceeded. The US authorities sought to justify this proposal, applicable only to imported conventional gasoline, to avoid the deterioration of the overall quality of such gasoline. Such deterioration would occur if foreign refiners with a below-average quality of gasoline sought an individual baseline while those with an above-average quality did not and then would subsequently lower the quality of their gasoline to that of the statutory baseline. The Panel had referred to this as "gaming". The proposal to increase the statutory baseline in such a situation would result in stricter requirements for imported gasoline than for identical domestic gasoline. The end result would be to revert to the situation when the panel had been requested. This same situation would certainly apply in terms of competition between domestic refiners which applied the individual baselines and which could lead to a degrading in quality. However, for such situations there was no proposed quality benchmark, no monitoring mechanism and, most importantly, no increase in baselines was foreseen.

The Communities believed that the US authorities again showed themselves particularly strict with regard to monitoring imported gasoline and relatively unconcerned with regard to monitoring similar potential problems arising from competition amongst domestic gasoline producers. The Communities therefore suggested that this difference in treatment be deleted from the proposal. As

stated in the Gasoline Panel Report[1] "… slightly stricter overall requirements applied to both domestic and imported gasoline could offset any possibility of an adverse environmental effect from these causes and allow the United States to achieve its desired level of clean air without discriminating against imported gasoline." He invited the US authorities to consider this.

The second concern related to overly complex and excessively strict implementing rules for foreign refiners and importers, which might have adverse effects on imports. The US authorities, while extremely concerned about any possible risk of rule-avoidance on the part of imports, were much less concerned about the behaviour of domestic producers. Many requirements in the implementing rule on imported gasoline did not apply to domestic gasoline. The Communities believed that these requirements merited careful scrutiny in this respect. In brief, the currently proposed implementing rules were much stricter for imported gasoline than for domestic gasoline. While some difference in approach might be justified by the fact that most domestically produced gasoline could be checked at the factory gate, beyond a certain point additional requirements for imported gasoline would constitute a *de facto* import barrier or, at least, would upset competitive opportunities. The Communities therefore proposed that additional requirements for imports should be strictly limited to those that were absolutely necessary. The Communities preferred if they were exactly the same as those applicable to domestic producers.

Finally, the deadline of 1 January 2002 for submitting baseline petitions did not seem necessary. It was not clear why there should be a cut-off point in time at all. The Communities believed that foreign refiners should be allowed to apply if and when they became interested in acquiring an individual baseline, i.e. if they were to experience an increased level of exports to the United States and wanted to change the basis of their imports. The Communities requested the United States to respond in writing to what extent it intended to take these comments into account.

The representative of Venezuela noted the statement made by the United States and its insistent assurances regarding the implementation of the DSB's recommendations. Currently, his Government was in the process of examining the proposed amendments to the Gasoline Rule. His delegation also noted the comments made by the Communities. His Government would submit its written comments to the EPA in due time in order to ensure scrupulous compliance by the United States with the DSB's recommendations.

The representative of the United States said that his delegation appreciated that the Communities had studied the proposed rule and he would forward their comments to the US authorities. He recalled that in accordance with the official procedures, comments should be received before 19 June 1997. He hoped that the Communities would also submit their comments in accordance with these procedures. With regard to Brazil's queries he recalled that at the previous DSB meeting his delegation had made some comments on steps and timing. The periods that had been referred to were the maximum periods of time not the minimum. For example, the 90-day period was no longer relevant as it related to the process of issuance of the proposed rule which had already been issued. His delegation was confident that the United States would be able to implement the DSB's recommendations in time.

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

[1]Panel Report on "United States - Standards for Reformulated and Conventional Gasoline", para. 6.27.

2. Indonesia - Certain measures affecting the automobile industry
- Request for the establishment of a panel by the European Communities (WT/DS54/6)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS54/6.

The representative of the European Communities said that the Communities' request for a panel was fully set out in document WT/DS54/6. The Communities had requested consultations with Indonesia on this matter on 3 October 1996. These consultations held in November and December 1996 as well as other bilateral contacts in capitals had failed to find a mutually satisfactory solution. The Communities had no alternative but to seek a solution through panel procedures. Though there had been some indications that there might be a modification in the Indonesian Car Programme, this had not materialized. The Communities found that the Programme contained a number of elements which had been in violation of the WTO Agreement. The reasons for the Communities' concerns were outlined in the above-mentioned document but in general the Communities considered that the programme was not consistent with Indonesia's obligations under the GATT 1994 as well as under the Agreement on Trade Related Investment Measures (TRIMs) and also raised some questions in relation to the Agreement on Subsidies and Countervailing Measures (SCM). The measures in question included in particular the granting of import duty reliefs for parts and components for motor vehicles contingent on local content requirements, luxury tax exemptions for certain motor vehicles also contingent on local content requirements, and exemptions from import duties and luxury taxes for motor vehicles produced by certain companies. These various reliefs or exemptions were not available to all suppliers or even to all producers in the market. The Communities were particularly concerned with the fact that this was not the only case where measures had been taken in the automotive sector which were difficult to reconcile with the TRIMs Agreement.

With regard to the procedures, this was the first case where a panel request had been made under more than one set of procedures, i.e. the DSU procedures and the specific procedures under the SCM Agreement. In addition in so far as the procedure of Annex V of the SCM Agreement was concerned his delegation requested the Chairman to hold consultations with the parties to the dispute in order to examine the question of the procedures and timetable. These consultations should take place as soon as possible so that when the DSB established a panel it would be possible to take the necessary appropriate decision on the procedures which entailed the designation of a representative who would facilitate the information-gathering process.

The representative of Indonesia said that her country did not support the establishment of a panel at the present meeting. Her Government was exploring with the complaining parties, including the Communities, whether it was possible to settle the matter without resorting to the dispute settlement procedures. Indonesia believed that these efforts should continue and therefore considered that the request for a panel was premature.

The representative of Japan recalled that at the DSB meeting on 30 April 1997, his country had requested the establishment of a panel on the same matter. At the present meeting, he wished to state Japan's position with regard to this matter. First, Japan supported the Communities' request for the establishment of a panel on Indonesia's automobile measures. Second, after Japan had made its first request for the establishment of a panel on this matter, it had made it clear that it was prepared to continue the consultations if Indonesia could submit a meaningful proposal. Japan had not requested the inclusion of this item on the agenda for the second time at the present meeting because there had not been sufficient time for holding such consultations during the period between the date of the previous DSB meeting and the deadline for the submission of items for the agenda of the present meeting. This decision reflected the importance that Japan attached to a mutually agreed solution through bilateral

consultations, which was in accordance with the spirit of the DSU. Japan had also done so in consideration to the present domestic situation in Indonesia.

However, if Indonesia did not make a proposal within a short period of time, which could provide a basis for a mutually satisfactory solution to this matter, Japan had no choice but to consider further steps towards the establishment of a panel. In particular with the continuance of the exemption of customs tariffs and luxury sales taxes on imports of automobiles from a particular country. He therefore reserved the right to request for a second time the establishment of a panel on this matter at a subsequent meeting of the DSB.

The Chairman noted that as indicated in WT/DS54/6, the Communities had not only requested the DSB to establish a panel but had also requested that the DSB initiate the procedure provided under Annex V of the SCM Agreement. That Annex set forth procedures for developing information concerning serious prejudice, and called, *inter alia,* on the DSB to designate a representative to serve the function of facilitating the information-gathering process. Because this procedure was intended to promptly gather the information needed by the parties and by the panel, it would seem that the DSB should be prepared to designate such a representative at the same meeting where it decided to establish a panel. He proposed to consult with the parties to the dispute in order to identify a representative for designation by the DSB at that particular time.

The representative of Korea expressed his delegation's interest to participate in the consultations to be held by the Chairman.

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

3. United States - Measure affecting imports of woven wool shirts and blouses from India
   - Report of the Appellate Body (WT/DS33/AB/R) and Report of the Panel (WT/DS33/R)

The Chairman said that this item was on the agenda at the request of the United States. He drew attention to the communication from the Appellate Body contained in document WT/DS33/4 transmitting the Appellate Body Report in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* which had been circulated as document WT/DS33/AB/R in accordance with Article 17.5 of the DSU. Pursuant to the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, both Reports had been issued 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 India said that his delegation was satisfied with the overall combined results of the Panel Report and the Appellate Body Report. The Panel had concluded that the US restraint on imports of woven wool shirts and blouses, category 440, from India and its extensions had violated the provisions of Articles 2 and 6 of the Agreement on Textiles and Clothing (ATC). Subsequently, the conclusions of the Panel had been upheld by the Appellate Body. Thus, India's fundamental stand taken throughout the long and arduous process of bilateral consultations and two reviews by the Textiles Monitoring Body (TMB) that the US safeguard action was unjustified had been upheld by the Panel and the Appellate Body.

At the present meeting, he wished to express India's views on the Reports in accordance with Articles 16.3 and 17.14 of the DSU in the light of what his delegation perceived as legitimate concerns arising from certain observations contained in the Reports. He believed that it was important for delegations to express their views when the DSB adopts panel and appellate body reports in the interest of the long-term viability and health of the dispute settlement system, so vital for the preservation of the rule-based multilateral trading system.

First, India believed that both the Panel and the Appellate Body had erred when dealing with the issue of the burden of proof. The United States bore the burden of proving that it had complied with the requirements of Article 6 of the ATC. Since safeguard actions were exceptional, they had to be interpreted narrowly and the United States was required to prove that it had respected all the conditions enumerated in Article 6 of the ATC. If the party challenging the invocation of a safeguard action had to bear the burden of proof, it would have to prove the contrary which was often impossible. In India's view the Panel Report had not been very clear on this point. In section VI of its Report (Interim Review), the Panel had stated that India had to submit a *prima facie* case of violation of the ATC, namely, that the US restriction had not respected the provisions of Articles 2.4 and 6 of the ATC, and that the United States would then have to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC. However, in section VII of its Report (Findings), the Panel had commented that the parties seemed to have addressed two different aspects of the burden of proof issue and had proceeded to differentiate between the burden of proof before the Panel from what the importing Member had to demonstrate at the time of its determination. India had drawn the attention of the Appellate Body to the inconsistency in the approach of the Panel as delineated in paragraphs 6.7 and 7.12 of the Report. Besides, the Panel's finding on the so-called distribution of the burden of proof was inconsistent with the finding on the same issue by the Panel Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*.[2]

In India's view Article 6 of the ATC was an exception and the GATT 1947 practice well-established that it was the party invoking an exception which carried the burden of proof. India had also submitted before the Appellate Body that the function of the rule on the burden of proof was to ensure that a dispute could be settled even if the legal claims and factual information before a panel were incomplete and this function could not be fulfilled on the basis of a panel's approach on the distribution of the burden of proof. In response to India's submission, the Appellate Body had stated that "… the Panel's findings at paragraph 7.12 and comments on interim review at paragraph 6.7 of the Panel Report are not a model of clarity …", which had "side-stepped" India's point regarding the inconsistency between these two paragraphs.

The Appellate Body had acknowledged India's point that as per customary GATT practice the party invoking a provision which was identified as an exception had to offer proof that the conditions set out in that provision were met. However, the Appellate Body had considered that previous GATT 1947 panel reports were not relevant in this case because this case involved Article 6 of the ATC which was a fundamental part of a carefully drawn balance of the rights and obligations of Members. The Appellate Body's comments on page 16 of its Report seemed to suggest that the Appellate Body did not consider Article 6 of the ATC as an exception. His delegation was concerned about the Appellate Body's approach with regard to Article 6. It was well known that Article 6 of the ATC was the only provision in the WTO legal framework that permitted Members to impose discriminatory trade measures to protect domestic producers against legitimate trade. Therefore, the principles applied to the exceptions in the GATT should apply with even greater force to Article 6 of the ATC. The only argument that the Appellate Body had provided to justify its conclusions was that Article 6 of the ATC was an integral part of the transitional arrangement in the ATC. His country could not understand the Appellate Body's

[2]WT/DS24/R.

line of reasoning. Any provision, whether an exception or not, would necessarily have to be an integral part of an agreement. Therefore, it could not be argued that a provision was not an exception because it was an integral part of an agreement. For example, exceptions to the general prohibition of quantitative restrictions under Article XI:2 of GATT 1994 were an integral part of GATT. Whether a particular provision of an agreement was an exception or a rule, depended on the terms of that provision, and on whether its application furthered, or detracted from, the fundamental objectives of the agreement.

The Appellate Body had quoted from its previous report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*. In these two cases the Appellate Body had used the argument of the balance of rights and obligations for opposite ends: in one case to justify a narrow interpretation and in the other to arrive at an expansive interpretation of the same provision of the ATC. In the report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, the Appellate Body had observed as follows: "It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint measure would encourage return to the practice of backdating restraint measures which appears to have been widespread under the regime of the MFA, a regime which has now ended, as discussed below, with the advent of the ATC. Such an introjection would moreover loosen up the carefully negotiated language of Article 6.10 which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proven".[3] In the present case, the Appellate Body had used the same thought regarding carefully negotiated language and carefully drawn balance of rights and obligations as an argument against India's position that Article 6 was an exception and should be interpreted accordingly. This clearly illustrated that the mere fact that a provision formed part of a negotiated compromise provided no indication as to whether it was a rule or an exception. India believed that the Appellate Body had failed to appreciate the context in which the ATC had been negotiated in the Uruguay Round and the objectives thereof. If an agreement with the declared purpose to eliminate a long-standing derogation from GATT and to put an end to a discriminatory quota regime contained a provision for imposing new quota restrictions, that provision could not but be treated as an exception.

Notwithstanding its disappointment over the fact that the Appellate Body could not entirely agree with India on the subject of burden of proof, India recognized that the Appellate Body had removed the confusion created by contrary statements in the Panel Report by describing them as not being "a model of clarity." On page 13 of its Report, the Appellate Body had stated that "We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the US was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the US to bring evidence and arguments to rebut the presumption."

India's second concern related to the observation contained in paragraph 7.20 of the Panel Report that "During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional or other information in support of their positions, which, we understand, may relate to subsequent events." It was pointed out that even the United States had never argued that the reference to other relevant information had implied the right to ex-post justification of the original safeguard action. In its submission before the Panel, India had pointed out that the ATC and the DSU had established a two-stage procedure under which the same measure was first submitted to the TMB and if its recommendations were not acceptable, to the DSB. The Panel had obviously erred in viewing the two-stage procedure as a two-track approach. The net result of the Panel's observation was equivalent to the TMB and the Panel reviewing two different measures:

[3]WT/DS24/AB/R, page 15.

the TMB would examine whether a safeguard action would be appropriate at the time of its examination and the Panel would examine whether the original safeguard action had been justified. It was not meaningful to require a prior review by the TMB, if the TMB and the Panel would be concerned with different matters. Besides, the Panel seemed to have completely ignored the fact that the TMB review was a substitute for consultations under the DSU before a request for the establishment of a panel could be made. If the TMB did not examine the safeguard action actually taken but instead analyzed whether on the basis of new information, a safeguard action might be appropriate, it would effectively eliminate an important step in the dispute settlement procedures. Therefore, India was surprised that the Appellate Body had dismissed the Panel's pronouncements as not constituting legal findings reviewable by the Appellate Body merely by quoting one sentence in a lengthy discussion on the role of the TMB in which the Panel used the word "we understand". The Appellate Body had observed that the statement by the Panel was purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions.

The Appellate Body had further stated "We do not consider this comment by the Panel to be a legal finding or conclusion which the Appellate Body may uphold, modify or reverse." India was not completely convinced that the Appellate Body had been right in viewing the whole issue as a "gratuitous observation by the Panel". In paragraphs 7.20 and 7.21 of its Report, the Panel had made certain observations on the subject which went far beyond what one might call "gratuitous observation". For example, in paragraph 7.21 the Panel had stated that "… such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination.", implying thereby that the TMB could consider subsequent developments to justify initial determination. India would have preferred the Appellate Body to rule clearly and explicitly that the Panel's observations on this subject had not been correct and not merely state that they had been without legal consequences. However, his delegation was glad that the effect of the Appellate Body's ruling was that the Panel's observations, which according to India were wrong, could not do any damage to the system.

India's third concern related to the subject of judicial economy. Out of the four legal claims submitted by India, the Panel had presented findings on only two legal claims and had not considered the other two. The Panel had observed in paragraph 6.6 of its Report, "Concerning India's argument that Article 11 of the DSU entitles India to a finding on each of the issues it raised, we disagree and refer to the consistent GATT panel practice of judicial economy. India is entitled to have the dispute over the contested 'measure' resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of the dispute."

India's position was that under the ATC, a Member's request for consultations, its determination of damage and causalities as well as its retroactive application of measures were separate steps in safeguard proceedings, each subject to distinct legal obligations. A finding limited to determination alone did not provide India with any assurance that the other party would cease violating the ATC in respect of the request for consultations and the retroactive application of restraint. India, therefore, believed that to resolve the dispute on these matters the Panel had to make findings on them. His country had submitted to the Appellate Body its views on this matter. However, the Appellate Body in quoting Article 11 of the DSU and on the basis of the phrase "… makes such other findings as will assist the DSB …" had concluded that there was nothing in Article 11 of the DSU which required a panel to examine all legal claims made by the complaining party. India's understanding of Article 11 of the DSU was slightly different. Any dispute brought by a Member under Article XXIII:1(a) of the GATT 1994 concerned an act or omission of another Member and was a measure. Dispute settlement procedures started with consultations on a specific measure and ended with recommendations on that measure. However, the matter that a panel had to examine in accordance with Articles 6, 7.1 and 11 of the DSU

was the legal claim made in respect of the measure. This followed from Articles 6.2 and 7.1 of the DSU according to which a panel was to examine "… the matter referred to the DSB …" in the request for the establishment of a panel, which in turn had to "… identify the specific measures at issue and provide a summary of the legal basis of the complaint … ." The matter referred to a panel was thus a legal claim made in respect of a specific measure. The Appellate Body had confirmed this when it had pointed out in its report on *Brazil - Measures Affecting Desiccated Coconut*[4] that, "… the matter referred to a panel for consideration consisted of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference."

The function assigned to a panel under Article 11 of the DSU was thus to examine all legal claims made in respect of all measures at issue. It was understandable if the Appellate Body had interpreted Article 11 of the DSU to mean that panels did not need to address in all instances all legal claims made by the parties in as much as there might be instances in which a finding on one matter would resolve the dispute on another matter. But it was not understandable when the Appellate Body had argued that a requirement regarding rulings by a panel on all the claims made was not consistent with the aim of the dispute settlement system. Article 3.4 and 3.7 of the DSU, quoted by the Appellate Body, contained references to "a positive solution to a dispute" and "satisfactory solution of the matter". By not ruling on two of India's important legal claims, the Panel had inadvertently provided scope for the possibility of two further disputes with regard to claims already submitted to a panel. Therefore, India was confused when the Appellate Body had suggested that a ruling by a panel on all legal claims made by the complaining party was not consistent with the aim of the dispute settlement system. The Appellate Body had also argued on the basis of Article 3.2 of the DSU and Article IX of the WTO Agreement that panels and the Appellate Body could not be encouraged to "make law" or to interpret the WTO Agreement and the multilateral trade agreements. Article 3.2 of the DSU contemplated the role of clarifying the existing provisions in the various agreements for the dispute settlement system. India had sought the Panel's rulings within the four corners of the provisions of the ATC and the DSU. It had never requested either the Panel or the Appellate Body to make law or provide authoritative interpretations of the WTO Agreement or a multilateral trade agreement.

It was India's understanding that sometimes parties to a dispute made specific legal claims while in other situations the panel alone drew up the list of issues for consideration based on the submissions of the parties. It was well known that GATT 1947 and recently WTO panels had made rulings on all issues raised before them. This had been acknowledged in the Appellate Body Report. Besides, the Appellate Body had addressed the issue of retroactivity in its report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* even though the US safeguard action on imports of underwear from Costa Rica had already been found to be inconsistent with the ATC. In the light of these circumstances, the Appellate Body's observations regarding the inconsistency that might arise if a panel were to rule on all the legal claims were unclear. While India could understand the Appellate Body's position that there was nothing in the DSU that compelled panels to examine all legal claims made before them, it was concerned by the further elaboration by the Appellate Body that by ruling on all the claims made by the complaining party, a panel or the Appellate Body might not be acting consistently with the aim of dispute settlement system, or they might be "making law" or providing "interpretations" which they were not authorized to do. India hoped that the Appellate Body would at an opportune moment, give a fresh consideration to this matter.

India also drew Members' attention to page 20 of the Appellate Body Report and pointed out that in the last paragraph dealing with judicial economy, the reference to paragraph 7.20 of the Panel Report appeared to be an obvious mistake for paragraph 6.6 thereof. There was another procedural point worth mentioning in this context. India appreciated that the Appellate Body had worked under

[4]WT/DS22/AB/R.

a tremendous time constraint and therefore the section which summarized the arguments of the participants might not be as elaborate or as perfect as the participants might like it to be. India had found that at least one important point it had made had not been referred to in this section. This did not cause any prejudice to his country, however, it had to be appreciated that the Appellate Body Report was an important document of interest and relevance to all DSB members. In India's view it might be necessary to present both the arguments of the participants as well as the Appellate Body's reasoning for reaching its conclusions in as great a detail as possible, so that Members who were not involved in the dispute could fully understand the position of the parties and also the thinking of the Appellate Body. All the DSB members should be able to follow the issues involved in a dispute without difficulty.

Finally, he thanked the members of the Panel and the Appellate Body who had devoted so much time and energy in dealing with this dispute. He was aware that a dispute in the area of textiles was not easy to handle and he was grateful to the Panel and the Appellate Body for their efforts and contribution. He also thanked the United States for dealing with this dispute in a professional and friendly manner notwithstanding strong differences with regard to the various elements in the dispute. He specifically thanked the United States for its assertion before the Appellate Body that India had obtained a Panel Report that sustained all its allegations regarding the violation of Article 6 of the ATC. With this assertion of the United States, India was very happy to join the consensus in favour of adopting the Panel Report and the Appellate Body Report.

The representative of the United States supported the adoption of the Appellate Body and the Panel Reports and wished to expressed its views on these Reports. The Appellate Body Report had made a very important contribution to the body of jurisprudence under the dispute settlement system. On the "burden of proof" issue, the Report had provided an extremely helpful clarification of the evidentiary burdens borne by the parties to a dispute. The Appellate Body had reaffirmed a general principle of GATT and WTO jurisprudence that a party claiming a violation of a provision of the WTO Agreement must assert and prove its claim. Once the complaining party had satisfied this obligation, the burden then shifted to the responding party to bring forward evidence and argument to disprove the claim. The Appellate Body also had not accepted arguments that there were only a handful of so-called core GATT 1994 rules and that all other provisions were exceptions. Nor had it accepted arguments that in the case of a WTO provision that allegedly constituted an "exception", the party invoking the provision was "presumed guilty" and that the complaining party bore no burden of proof whatsoever.

In this case, which had involved the application of Article 6 of the ATC, the Appellate Body had wisely refrained from using the simplistic, mechanical approach to treaty interpretation advocated by India. Instead, applying the principles of Article 31 of the Vienna Convention, the Appellate Body had ruled that Article 6 was an integral part of the ATC, which reflected a "… carefully drawn balance of rights and obligations …" and that this "… balance must be respected". Accordingly, the Appellate Body had affirmed the Panel's finding that as the complaining party, India had to bear the initial burden of presenting a *prima facie* case that the United States had failed to respect the requirements of Article 6 of the ATC.

In addition to the ruling on the burden of proof issue, the Appellate Body Report had also constituted an important reaffirmation of the principle that panels and the Appellate Body should exercise "judicial restraint" in carrying out their responsibilities under the DSU. This principle was reflected in two portions of the Report. First, the Panel, in *dicta*, had opined on the role of the TMB. India had appealed the Panel's *dicta*, but the Appellate Body had declined to address this issue and to add its own *dicta*. Instead, the Appellate Body had correctly found that the Panel's comment had not been "… a legal finding or conclusion which the Appellate Body may uphold, modify or revers."

Second, the Appellate Body had correctly found that the Panel had not committed a legal error when it had refrained from ruling on certain claims made by India after agreeing with it that the US safeguard measure in question was not consistent with Article 6 of the ATC. In rejecting India's arguments, the Appellate Body had made a very significant statement regarding the purpose of the dispute settlement system and the function of panels and the Appellate Body within that system. The Appellate Body had stated: "… we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." In the view of the United States, this statement constituted an important reminder that the dispute settlement process should be used to resolve disputes, and not as a vehicle for bypassing the appropriate negotiation and decision-making procedures set out in the WTO Agreement.

Turning to the Panel report, the United States stated that this Panel, like the panel on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* had recognized the fundamental principle that, in reviewing factual determination made by domestic investigating authorities, it was not the function of dispute settlement panels to engage in a *de novo* review of the facts or to second-guess the factual judgments of domestic authorities when those authorities had considered all of the factors required to be considered by a particular agreement. Instead, panels were to make an objective assessment of whether, in making a determination, the domestic authorities had respected the requirements of the particular agreement. In this regard his delegation wished to comment on the Panel's position that all of the factors listed in Article 6.3 of the ATC had to be discussed. Because the list of factors in Article 6.3 was clearly illustrative, the United States did not agree with the Panel's interpretation on this particular point. However, his country agreed with the more important points made by the Panel that: (i) any of the factors in Article 6.3 might subsequently be discarded once explained (para. 7.25); and (ii) that the ATC did not impose on Members "… any specific method either for collecting data or for considering and weighing all relevant economic factors …" (para. 7.52).

In summary, notwithstanding the fact that the Panel had found a US safeguard action to be inconsistent with the ATC, and even in light of the TMB finding supporting the US action, there was much in the Appellate Body and the Panel Reports that made them acceptable for adoption. Therefore, the United States could join a consensus to adopt these Reports. As noted in both Reports, the United States had rescinded the restraint on imports of woven wool shirts and blouses from India on 3 December 1996, prior to the circulation of the Panel Report. Therefore, it had met its obligations under the WTO Agreement with respect to this matter, and it was the understanding of the United States - an understanding that the United States trusted was shared by India - that with the adoption of the Appellate Body and the Panel Reports, the matter before the DSB would be concluded, and that it no longer needed to appear on the DSB's agenda.

The representative of Hong Kong said that the Reports before the DSB concerned the second dispute related to the operation of the ATC and indeed the regime which had preceded it, the Multifibre Arrangement. Together with the previous reports on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, they provided valuable guidance for the implementation of Article 6 of the ATC.

Hong Kong supported the adoption of the Panel and the Appellate Body Reports and drew attention to two points which his delegation considered were of particular importance. First, the Panel Report had dealt comprehensively with the proper application of Article 6.2 and 6.3 of the ATC, whereby a Member wishing to implement a transitional safeguard had, as a first step, to make a determination of serious damage or actual threat thereof to the particular domestic industry in question. The Panel had stated that at the time of its determination, the importing Member had an obligation under Article 6.3 to examine at least all of the 11 relevant economic factors listed in that Article, and that some

consideration and a relevant and adequate explanation had to be provided on how the facts as a whole supported the determination (para. 7.25-27). Furthermore, the Panel had pointed out that information which was not specific to the particular industry in question was not the information required by that Article (para. 7.39).

The second point related to the burden of proof, which had been addressed by the Appellate Body. The Appellate Body had not questioned that a Member applying a transitional safeguard had to be able to demonstrate that the safeguard action was consistent with Article 6 of the ATC. It had underlined the onus a Member wishing to bring a complaint had to bear. The Appellate Body had not shifted the burden of proof in dispute cases. Rather it had confirmed that complaining parties had to provide sufficient evidence to raise a presumption that the complaint was true, i.e. a presumption that the action taken was not in conformity with Article 6 of the ATC. A presumption was, of course, a lesser standard than the full proof required from the Member applying the safeguard measure. Once the complaining party had done that, the burden of proof then shifted to the other party to rebut the presumption.

The representative of Costa Rica said that his delegation agreed with India that the comments and concerns expressed by Members with regard to panels and the Appellate Body reports had contributed to preserving the rule-based multilateral trading system. He wished to refer to one of the issues, namely the burden of proof. His delegation was surprised by some observations of the Panel and the Appellate Body which had diverged from GATT practice in this area and had constituted serious legal errors. This was an unexpected outcome because, apart from contradicting the precedents established by the GATT, it was also in contradiction with the conclusions of the panel report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*. In that case, the panel had reasoned that "… Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC. It is a general principle of law, well-established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception." Consequently, the United States had to bear the burden of proof.

The United States had not appealed this position taken by the above-mentioned panel which suggested that even the defendant had recognized the validity of that panel's legal reasoning. Curiously, the Panel and the Appellate Body had not followed those criteria and had done so without giving any convincing legal reasoning. His delegation had not found any argument that would warrant a conclusion that because Article 6 of the ATC was an integral part of the ATC, changed in any way the exceptional nature of the measure. Even in legal systems not based on common law, precedents had an undeniable value. They clarified the interpretation of the rules and provided security and predictability to the relations governed by those rules. In Costa Rica's view any divergence from the GATT and WTO precedents had to be supported by sound and convincing legal reasoning. This had not been so in this case. The observations of the Panel and the Appellate Body had diverged from past practice and had modified the balance of rights and obligations which they claimed to be seeking to protect.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS33/AB/R and the Panel Report in WT/DS33/R as upheld by the Appellate Body Report.

The Chairman drew attention to Rule 23 of the Rules of Procedure for Meetings of the DSB.[5] This was without specific reference to any of the statements made in the DSB thus far and it was really important to be able to hear fully the important arguments that would be made in this Body. He simply

[5] Rule 23: "Representatives shall endeavour, to the extent that a situation permits, to keep their oral statements brief. Representatives wishing to develop their position on a particular matter in fuller detail may circulate a written statement for distribution to Members, the summary of which, at the representative's request, may be reflected in the records of the [DSB]" (WT/L/161).

wished to draw attention to this Rule to encourage Members to do so in the future. He believed that this would be quite helpful to a large number of Members not directly involved in a dispute.

4. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/53)

The Chairman drew attention to document WT/DSB/W/53 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.