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on 17 February 1999

Chairman: Mr. Kamel Morjane (Tunisia)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) India - Patent protection for pharmaceutical and agricultural chemical products: Status report by India (WT/DS59/10/Add.2)

(b) European Communities - Measures concerning meat and meat products (hormones): Status report by the European Communities (WT/DS26/17/Add.1 - WT/DS48/Add.1)

(c) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.1)

The Chairman recalled that Article 21.6 of the DSU required that "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable

period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the three sub-items be considered separately.

(a) India - Patent protection for pharmaceutical and agricultural chemical products: Status report by India (WT/DS59/10/Add.2)

The Chairman drew attention to document WT/DS50/10/Add.2 which contained India's third status report regarding its progress in the implementation of the DSB's recommendations concerning patent protection for pharmaceutical and agricultural chemical products.

The representative of India recalled that on 8 January 1999, his Government had promulgated the Patents Ordinance. A Bill to replace this Ordinance would be introduced in the Budget Session of Indian Parliament which would begin in the fourth week of February 1999. The matter would continue to remain in the legislative domain until the approval of the legislation by Parliament. India would continue to inform the DSB of any significant developments as they occurred.

The representative of the United States said that her delegation appreciated India's status report regarding the Patents (Amendment) Ordinance. The United States and India had held consultations to discuss the Ordinance as well as the continued US concerns regarding certain aspects of the Ordinance, which did not comply with the TRIPS Agreement. The United States considered that these consultations had been constructive and comprehensive. It hoped that discussions with India would continue in order to resolve the US concerns.

The representative of the European Communities said that his delegation had an interest in this matter, and wished to be associated with the consultations referred to by the United States.

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

(b) European Communities - Measures concerning meat and meat products (hormones): Status report by the European Communities (WT/DS26/17/Add.1 - WT/DS48/Add.1)

The Chairman drew attention to document WT/DS26/17/Add.1 - WT/DS48/15/Add.1 which contained the EC's second status report with regard to its progress in the implementation of the DSB's recommendations on measures concerning meat and meat products.

The representative of the European Communities said that pursuant to Article 21.6 of the DSU, the EC was presenting its second status report on the progress made towards implementing the DSB's recommendations. He recalled that at the previous DSB meeting, an impression had been given that the EC had attempted to block the establishment of a panel under the GATT system. Contrary to what had been stated by the United States at that meeting, the EC had supported the establishment of a panel under the previous Agreement on Technical Barriers to Trade. The problem at that time concerned technical expertise rather than a breach of the Agreement. At the present meeting, in addition to presenting the status report he wished to make some comments. The Commission had begun a process of examining implementing options, which would subsequently be taken up by the Council of Ministers, member States and Parliament. A number of risk assessment studies had been initiated some of which would be available before 13 May. Three implementing options were currently under consideration, without any conclusions thereon. The United States had recently proposed an option on labelling, namely, that all US exports of beef and beef products should be labelled to show their national origin. He welcomed the US proposal which constituted a good approach as an opening bid, but was not sufficient. The EC was considering a possible labelling solution which would indicate beef that had been treated with hormones. This was different from the US proposal. He noted that the time-period for implementation in this case had not yet expired and reaffirmed that the EC was in the process of considering implementing options.

The representative of the United States said that at the previous DSB meeting, the EC had submitted its first status report. At that meeting the United States had raised some concerns, and therefore her delegation appreciated the EC's statement clarifying its intentions with regard to compliance. She reiterated that the United States wished to avoid another dispute with the EC over compliance, but willingness on the part of both parties was essential for a mutually acceptable solution. As indicated by the EC, the parties were trying to work together to see whether such a solution was possible. The United States had presented a specific proposal on labelling, which it believed would resolve this dispute and would provide access that the United States had sought. US beef would now be labelled to allow European consumers to recognize beef of US origin. The Administration had expressed willingness to consider other EC's options aimed at providing access to US beef and had invited the EC to discuss them with the United States. These discussions were ongoing and would continue. The WTO rules required that the EC comply with the recommendations by 13 May 1999. The EC's option paper recently received by the United States was a positive step. The United States was encouraged that the EC supported the principles of the SPS Agreement and recognized, as a major exporter, the importance of this Agreement. With regard to the EC's option on labeling, the United States had recently presented to the Commission a specific proposal. The United States believed that lifting the ban, together with a suitable labelling system, presented a reasonable opportunity to resolve this issue. It strongly hoped that the EC would adopt this option as a way to lift the ban on US beef. The WTO rules allowed the losing party to propose compensation and the EC had made a reference to it in its option paper. If the EC were to make such a proposal, the United States would follow the WTO rules. However, the US position was clear, the EC's obligation was to comply with the WTO rulings by removing its ban on beef imports by 13 May 1999.

The representative of Canada said that her delegation noted with interest the EC's second status report. As stated by the EC representative, the EC had chosen as part of a 15 month implementation period to undertake additional scientific studies. It was Canada's understanding that the EC was conducting some eight scientific studies despite the fact that in a 10-year period since the ban had entered into force, the EC had not been able to provide any scientific evidence in support of its measure. Notwithstanding the method of implementation, at the end of the reasonable period of time, the EC had to be in compliance with its WTO obligations. In Canada's view, this meant that the EC had to remove its import ban on meat produced with growth hormones. The first two status reports had not given any assurances that the EC would comply with its obligations by the 13 May deadline. Comments made recently by EC officials and a communication to the Council and Parliament on the import ban clearly indicated that the EC would not be in compliance by 13 May. This raised serious concerns about the DSU objective with regard to prompt compliance with the DSB recommendations. If the EC did not comply by 13 May, Canada's expectation was that the EC would enter into negotiations over compensation. Failing proper compensation, Canada was fully prepared to exercise its rights under the DSU. Discussions between Canadian and EC officials were ongoing and her delegation hoped that it would be possible to find a mutually satisfactory solution.

With regard to the EC's comments regarding its request to provide data used by Canada to approve growth promoting hormones, she said that in August 1998, Canada had responded to the EC that under Canadian law any record containing confidential scientific and technical information provided to Government by a third party could not be disclosed without the consent of the party in question. The SPS Agreement recognized the need for countries to respect confidentiality of information which might prejudice the legitimate commercial interests of companies. Therefore, Canada had suggested that the EC contact directly the companies that had made submissions to Canada. In order to facilitate the process, Canada had provided to the EC on 4 August 1998, the names and addresses of the companies and was surprised that the EC had not yet pursued this avenue. If the EC seriously considered that this information might be relevant, it was not clear why it had not taken any steps towards obtaining such information.

The representative of Australia made comments with regard to the EC reference concerning its request to provide data. Australia and the EC had discussed this matter in the past several months

and Australia had recently reiterated its response to the EC's request in writing. On each occasion, Australia had indicated its willingness to cooperate with the EC. All scientific evidence available to Australia was also available to the EC and the responsibility for undertaking a risk assessment on the basis of these data rested with the EC. In any event, the provision or otherwise of information from Australia or any other third party should not be used as justification for delay in the domestic processes underway in regard to implementation of the DSB's recommendations. Australia regretted that the current climate relating to implementation was so adverse. The functioning and operation of the dispute settlement system was difficult to achieve in a climate of hostility and suspicion. Members had to ensure that panel and arbitration processes were permitted to function on a rational and objective basis, according to their mandates and in accordance with the legal framework of the DSU.

The representative of New Zealand said that his delegation wished to correct an aspect of the information provided by the EC in its status report, which related to the EC's request for information. New Zealand had received that request in April 1998 and had responded thereto in writing in June 1998, noting that some of the licensing information requested remained confidential for commercial reasons, and since several substances in question were manufactured by European companies that information should be readily available in Europe. He added that some of the information sought from New Zealand and other countries appeared to be available from international sources, including Codex.

The representative of the European Communities wished to comment on Canada's statement in which it had referred to a recent communication to the Council and Parliament and concluded that the EC would not be in compliance by 13 May. He questioned the validity of this comment and was not sure whether this was an interpretation or whether the said comment contained such a statement. He noted that there were many ways of complying with the recommendations. One way for which there was a precedent in North America was the abrogation of the existing legislation found to be inconsistent with WTO rules to be replaced by another one at a later date. This did not imply that the EC would do this, but since there was a precedent no conclusion should be drawn that the EC would not be in compliance. With regard to the question of confidential data, he noted the points made by Australia and New Zealand. The EC had stated that no reply had been received and those two countries had stated that they had either replied or had discussed the matter with the EC. The EC wished to do everything possible to obtain the best scientific data and to know the basis on which decisions had been taken. He noted that four countries had made risk assessment studies and had come to different conclusions than the EC. Therefore, it would be useful to know what had led those countries to take their decisions. He recognized the importance of business confidentiality. However, the EC wished to be able to provide the necessary scientific evidence to its public opinion, consumers and Parliament to the effect that hormone-treated meat was safe.

The representative of the United States said that she wished to make an additional comment with regard to one option referred to by the EC, which would not bring the EC into compliance with the DSB's recommendations. That option concerned the invocation of Article 5.7 of the SPS Agreement, which allowed a Member to protect its population on a temporary basis when scientific evidence was insufficient and there were sound reasons to believe that the measure was needed for health protection. However, this would not apply to the six growth hormones which had been tested and reviewed and were demonstrated to be safe. Invocation of this provision by the EC would not be justified and would not be acceptable to the United States. Such action would make it impossible to resolve this issue and would threaten the integrity of the WTO. She reiterated that the United States would accept nothing less than EC compliance with the WTO ruling.

The representative of Canada said that with regard to the EC's comment, Canada had removed its inconsistent legislation within a reasonable period of time. That legislation related to trade in goods. Canada had enacted a bill related to services but had chosen not to bring that bill into effect. She welcomed the EC's statement that it wished to do everything possible to have the best scientific

evidence. She suggested that since the EC had been given information regarding Canadian companies in August 1998, it should contact these companies.

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

(c) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.1)

The Chairman drew attention to document WT/DS 56/15/Add.1 which contained Argentina's status report on its progress in the implementation of the DSB's recommendations on measures affecting imports of footwear, textiles, apparel and other items.

The representative of Argentina said that in accordance with Article 21.6 of the DSU his country was presenting its status report on progress in the implementation of the DSB's recommendations. On 20 May 1998, Argentina had informed the DSB in writing that it intended to implement the DSB's recommendations. Thus far, Argentina had implemented the recommendations on specific duties on textiles and apparel by issuing Resolution No. 806/98 of the Ministry of the Economy, Public Works and Services, dated 3 July 1998, which provided that the specific duties in question might not exceed the equivalent *ad valorem* import duty bound by Argentina at 35 per cent of the customs value of the goods. This measure had been applied in Argentina since 3 October 1998. With regard to the DSB's recommendations on the statistical tax, Argentina had reduced the rate from 3 per cent to 0.5 per cent in Decree No. 37 of 9 January and had adopted the relevant budgetary estimates in conformity with paragraph B.2 of its proposal in document WT/DS56/14. Argentina and the United States had held discussions concerning the statistical tax. Both countries had agreed that Argentina would complete the implementation with regard to that tax no later than 30 May 1999. Argentina had also agreed that a decree reflecting the above agreement on implementation would be submitted for signature before 25 February and would subsequently be signed by the President and published in the Boletin Oficial de la Repùblica Argentina.

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

2. European Communities - Measures affecting the importation of certain poultry products

(a) Statement by Brazil concerning implementation of the recommendations of the DSB

The Chairman said that this item was on the agenda at the request of Brazil.

The representative of Brazil said that first he wished to state Brazil's reasons for the inclusion of this item on the DSB agenda. On 20 October 1998, The EC and Brazil had notified the DSB that they had reached agreement on a reasonable period of time for implementation of the DSB's recommendations. That period of time would end on 31 March 1999. Since this period of time was shorter than six months - which Brazil continued to believe was far longer then necessary - the reporting obligation under Article 21.6 of the DSU would not apply in this case. In other words, an item concerning a status report on implementation would not be included on the DSB agenda.

He noted that statements had recently been made that panels' and the Appellate Body's rulings were not sufficiently precise in providing guidelines for implementation. Brazil believed that in the case at hand such a problem did not exist. The Panel had recommended that the EC notify its import licensing regime for poultry meat under the tariff-rate-quota to the Committee on Import Licensing. It was therefore difficult to envisage different interpretations of this recommendation. The Appellate

Body's recommendation in this case was also clear and non-equivocal. He drew attention to paragraphs 168 to 171 of the Appellate Body Report concerning the EC's utilisation of a representative price to apply additional duties on the out-of-quota imports of poultry. Brazil recognized that the EC did not have an obligation to discuss implementation issues before the expiry of the reasonable period of time. It therefore appreciated the information provided by the EC concerning its views on implementation. Brazilian authorities were currently reviewing that information. His delegation hoped that in light of this information and due to Brazil's continued contacts with the EC, it would not be necessary to raise this issue in the DSB. He stressed that it was important that cases in which solutions were simple and clear, were resolved expeditiously and were removed from the DSB agenda without complications.

The representative of the European Communities wished to assure Brazil and the DSB that the EC would respect its WTO obligations within the required time-limit. The ongoing legislative process was relatively simple and required a decision by the Commission following its consultations with member States. He reassured Brazil that the process of implementation and consideration of the measures adopted was an internal matter which did not preclude any discussions with Brazil.

The DSB took note of the statements.

3. United States - Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom

(a) Request for the establishment of a panel by the European Communities (WT/DS138/3 and Corr.1)

The Chairman recalled that the DSB had considered this matter at its previous meeting and had agreed to revert to it. He drew attention to the communication from the EC contained in WT/DS138/3 and Corr.1.

The representative of the European Communities said that its request for the establishment of a panel had already been submitted to the DSB at its previous meeting. He recalled that the EC's request was contained in document WT/DS138/3 and Corr.1. The corrigendum which had been circulated at a later date, had been sent to the United States by fax on 22 January.

The representative of the United States said that her delegation accepted the establishment of a panel at the present meeting. As indicated at the previous DSB meeting, the United States believed that the EC had grossly distorted the actual situation by its description of how the US countervailing duty authorities had taken into account the privatization of British Steel Corporation. The United States intended to vigorously defend the US procedures and its action before the panel. As indicated at the previous DSB meeting, the terms of reference for the panel to be established at the present meeting would cover the issues referred to by the EC in its request for a panel contained in WT/DS138/3, dated 14 January. The United States intended to bring this issue before the panel, if necessary.

The representative of the European Communities wished to know whether the fact that the corrigendum had not been circulated 10 days prior to the previous DSB meeting was being challenged by the United States.

The representative of the United States said that it would raise this issue before the panel.

The representative of the European Communities wished to know whether or not the terms of reference for the panel covered both the EC's request in WT/DS138/3 as well as the corrigendum. It was his understanding that this was the case and that the United States would then bring the matter

before the panel. He hoped that it would be possible to proceed in the manner outlined by him since it was not constructive to delay the establishment of a panel for one month on the basis of a procedural issue while the substance of this matter dated back to 1995. To delay the establishment of a panel on a point of procedure did not seem to be reasonable. He asked whether the United States considered that the terms of reference covered both the EC's request and the corrigendum.

The representative of the United States said that on 22 January the United States had received a corrigendum from the EC to its panel request. That correction constituted a substantial change to the EC's panel request. The United States was concerned that the corrigendum, which had been submitted after the deadline for inclusion of items on the DSB agenda, would alter the substance of the EC's request. From the procedural point of view, the DSB could not have considered this last minute change at its previous meeting. Therefore, the United States would maintain its position with regard to the terms of reference and, if necessary, would raise this issue before the panel.

The representative of Mexico said his delegation believed that the parties to the dispute had the right not to agree to any substantial change made to a panel request between the first and second meetings of the DSB at which such a request was considered. He recalled that in the Cement case (WT/DS60), the Appellate Body had based its decision on Mexico's request for a panel. Therefore, a party making a request for a panel had to ensure that such a request was properly drafted. If Members had substantive or procedural objections with regard to a panel request such objections should be indicated at the time that request was under consideration. Whatever the DSB's decision at the present meeting, Mexico believed that any panel request should not be changed between the first and the second meetings at which such a request was on the DSB agenda. From the systemic point of view, some predictability and certainty should be ensured.

The representative of the European Communities said it was his understanding that the United States was not in a position to agree that the terms of reference for the panel also covered the corrigendum. He, therefore, proposed that the EC request in document WT/DS138/3 and Corr.1 should be considered as being before the DSB at the present meeting for the first time. The EC would place this matter on the DSB's agenda for the second time as soon as possible.

The Chairman said that two options were possible at the present meeting: the DSB could establish a panel on the basis of the EC's request in WT/DS138/3 or this meeting could be considered to be the first meeting at which both documents WT/DS138/3 and Corr.1 were under consideration for the first time, and the DSB would agree to revert to this matter.

The representative of the United States said that in light of the fact that the EC agreed with the principle that a panel request could not be amended through a corrigendum, and recognizing that no improper precedent would be set, her delegation would accept the establishment of a panel on the basis of the first consideration of EC's request and the corrigendum by the DSB at the present meeting.

The representative of Mexico said that it was his understanding that a panel would be established on the basis of the EC's request contained in WT/DS138/3 and Corr.1.

The Chairman confirmed that the United States, in a spirit of cooperation, had indicated that it was ready to accept the EC's request and the corrigendum following the first consideration thereof by the DSB at the present meeting.

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

The representatives of Brazil and Mexico reserved their third-party rights to participate in the Panel's proceedings.

4. United States - Sections 301-310 of the Trade Act of 1974

(a) Request for the establishment of a panel by the European Communities (WT/DS152/11)

The Chairman drew attention to the communication from the European Communities contained in WT/DS152/11.

The representative of the European Communities said that time-limits under Sections 301 to 310 of the 1974 Trade Act had made it impossible for the US Administration to follow the obligatory Article 21.5 process in cases where there was disagreement with another Member about the conformity of the latter's implementing measures. As a result, the United States had to make a unilateral determination of non-conformity and to request authorization from the DSB to suspend concessions on that basis. The EC believed that Section 301 violated fundamental provisions of the DSU and the GATT 1994, both of which prohibited unilateral determinations of conformity as well as unilateral measures. The EC wished to pursue this issue because this was not an academic exercise. The EC had expected that the application of this legislation would be consistent with the WTO obligations of the United States. However, a recent case had proved that the legislation was used to exert pressure on Members whose implementation measures did not satisfy the desires and claims of the United States, and the industries concerned, as opposed to being satisfactory in terms of WTO rules. It had therefore become urgent for a panel to examine the conformity of the legislation, and the EC was making that request to this effect.

The representative of the United States said that her country could not join in a consensus for the establishment of a panel to examine its domestic law. The EC's argument that the US law was inconsistent with the WTO obligations of the United States had no basis. The EC's request to examine a US domestic law was yet another attempt by the EC to divert the DSB's attention from the real issue, namely the EC's failure to implement a WTO-consistent banana regime, and to force its interpretation of Articles 21.5 and 22 of the DSU on other Members. This was not an appropriate use of the dispute settlement mechanism, in particular, since the EC's claims were without merit. The EC had claimed that Section 306 of the Trade Act of 1974 was inconsistent with the WTO because it allowed the United States to take action before a multilateral determination had been made that a Member was not in compliance with its WTO obligations. The EC's assessment of section 306 was factually and legally incorrect. First, section 306 was a discretionary not a mandatory statute. As a result, the EC's complaint was not ripe until such time as the United States took action under section 306. Second, any specific US action would be completely consistent with the WTO, if the DSB authorized the suspension of concessions prior to the implementation of the action, or if the action that the United States decided to take did not impinge on its WTO commitments. The United States fully respected the DSU provisions with regard to an automatic establishment of a panel. Unfortunately, it appeared that the EC wished to take advantage of these automatic provisions to further divert attention from its failure to implement a WTO-consistent banana regime and to force its interpretation of Articles 21.5 and 22.

The representative of Cuba said that his country considered that apart from the banana dispute, the US Trade Act of 1974 and its Sections 301-310 had negative implications which should be examined by a panel in order to determine its inconsistency with the WTO principles. As Cuba had already indicated at the 25 November DSB meeting, the US Trade Act of 1974 implied unilateralism and thereby threatened the multilateral system and in particular small countries which could not retaliate. The fact that one important Member maintained such law also threatened the credibility and transparency of the WTO system, at the time when discussions were being held on how to improve its public image. This legislation was contrary to the WTO rules. Therefore, Members should refrain from applying such provisions and remove such legislation.

The representative of the European Communities said that since the EC was making its request for the first time, the United States had the right not to join in the consensus at the present

meeting. With regard to the US comment that Section 306 was discretionary, he said that under the DSU terms that legislation was a measure. Based on the wording of the relevant sections, and in accordance with the US publications in the Federal Register, the time-limits within which the US had to make determinations and apply sanctions were mandatory. He announced that the EC would be requesting a special DSB meeting within the next 15 days pursuant to footnote 5 to Article 6 of the DSU, in order to have a second consideration by the DSB of the EC's request in order to establish a panel.

The representative of Ecuador said that his delegation had requested to be associated with the consultations held on this matter. However, the response to its request was negative since it had been considered that the issue at hand was not related to the banana case. He expressed concern that the opposite view had been expressed at the present meeting and it seemed the EC was requesting a panel due to a disagreement related to the banana case.

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

5. Korea - Taxes on alcoholic beverages

(a) Report of the Appellate Body (WT/DS75/AB/R- WT/DS84/AB/R) and Report of the Panel (WT/DS75/R - WT/DS84/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS75/11 – WT/DS84/9 transmitting the Appellate Body Report in "Korea – Taxes on Alcoholic Beverages", which had been circulated in document WT/DS75/AB/R – WT/DS84/AB/R in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within 30 days following its circulation to 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 Korea thanked the Panel and the Appellate Body for the Reports. He expressed his country's disappointment with the outcome of the case since Korea would have preferred its argument to prevail. At the present meeting, he wished to make a few comments with regard to both Reports. First, Korea believed that the Appellate Body should have verified whether the Panel had sufficient evidence to arrive at its legal conclusions. This was a systemic concern since panels should not assume that they had sufficient evidence to make objective judgments about a foreign market. During the appellate review, Korea had pointed out that with respect to certain liquors, there was little or no evidence to meet the burden of proof under Article III:2 of GATT 1994. Korea would have wished to have had the Appellate Body determine whether the evidence presented could reasonably be deemed to satisfy a meaningful burden of proof. In particular, Korea believed that the complainants had failed to show that higher taxes reduced competitive opportunities of imported spirits in relation to soju. In light of the quality and scarcity of evidence provided by the complainants, Korea maintained that there was inadequate evidence to conclude that soju and imported spirits were like or directly competitive or substitutable products. The Appellate Body should look beyond deliberate disregard or egregious error when reviewing mistakes of panels in evaluating evidence because it was plausible for panels to make erroneous factual determinations, which merited appellate review. Korea believed that this would strengthen the appellate process.

Second, in Korea's view, the Panel and the Appellate Body had impermissibly enlarged the scope of Article III:2 of GATT 1994. Like any other Member, Korea had a systemic interest in the

manner in which Article III:2 of GATT 1994 was construed because this provision dealt with the WTO-consistency of Members' tax regimes. If it was wrongly interpreted, it could become overly intrusive in the internal affairs of a Member. Korea believed that the Panel had given this provision an impermissibly broad interpretation, potentially rendering it as a vehicle for harmonizing taxes which the drafters of GATT did not intend. On numerous occasions both at the Panel's and the Appellate Body's proceedings, Korea had stated that the word "directly" had to be construed strictly before two products were deemed directly competitive or substitutable products since all products competed at some level for consumers' budgets. Instead of imposing a strict requirement by emphasizing the word "directly", the Panel broadened the ambit of directly competitive or substitutable products by relying on potential competition.

Korea contended that the Panel's reliance on potential competition to find soju and imported alcoholic beverages directly competitive or substitutable raised systemic concerns because it was far too speculative. By allowing comparison of products which could "reasonably be expected to become directly competitive in the near future" (Panel Report paragraph 10.48), complaining parties had in effect been relieved of their obligations to prove that lack of actual competition was the result of the tax measure in question. Korea believed that there was an inherent danger in speculating about how a market would evolve in the future. In response to Korea's argument on such a danger of speculation, the Panel had emphasized that a Member should not have to resort to the dispute settlement mechanism repeatedly just because the market in question did not change sufficiently. He pointed out that the Panel's prediction about a market might prove wrong. In fact, Korea had produced compelling reasons why soju and imported spirits had not and would not compete in the Korean market: large difference in pricing policies, different taste of various drinks and different end-uses. Korea wondered what recourse the Panel might have in the future, should its prediction about future competition between soju and imported spirits fail to materialize. Upholding the Panel's interpretation of Article III:2, the Appellate Body stated that the Panel's legal finding was not a speculative one concerning the future, but was based firmly in the present, just because the Panel had concluded that "there is sufficient unrebutted evidence in this case to show present direct competition between the products" (Panel Report, paragraph 10.98). As he had already stated, the Appellate Body had not verified whether the Panel's legal conclusion was substantiated by sufficient evidence. It had simply referred to the Panel's finding.

Third, Korea regretted that the Panel and the Appellate Body had deviated from the market-based approach adopted in another case. Korea had argued during the proceedings that the market-based approach adopted by the Panel and the Appellate Body in the case related to Japan's liquor taxes should have been applied in the case at hand. As the Panel in Japan's case held, the appropriate test to define whether two products were like or directly competitive or substitutable was the "marketplace", and the determination of whether two products were like or directly competitive or substitutable had to be based upon a case-by-case analysis because "responsiveness of consumers to the various products offered on the market … vary from country to country."[1] The Panel in this case had not based its findings and rulings on a rigorous analysis of the Korean market and had instead relied on the evidence from a third market, namely the Japanese market. The Panel had reached its conclusions about the Korean marketplace too easily, and its findings about the Korean market, culture and consumers were extremely shallow. Although markets in Korea and Japan might share many similarities in several areas, differences were also abound. There were salient differences between the two markets for alcoholic beverages and in its submissions Korea had pointed them out in detail. Korea believed that the Panel should have relied more on the consumer response in the Korean market in determining whether soju and imported liquors were directly competitive or substitutable products. Upholding the Panel's findings in this respect, the Appellate Body had stated that the Panel had not erred in considering the Japanese market to arrive at its conclusions about the Korean market because when a market had been closed , there might be lingering effects of that closure. With all due respect,

[1]Panel Report, Japan – Taxes on Alcoholic Beverages (WT/DS8/R-WT/DS10/R-WT/DS11/R; paragraph 6.28).

however, Korea found that an essential step had been omitted in that analysis: i.e. the Appellate Body report did not state that it was proven in this case that there had been such lingering effects of market closure in Korea. Although his country still had systemic concerns about the findings of the Panel and Appellate Body, it accepted the adoption of the Reports at the present meeting. Korea was now in the process of exploring modalities for implementing the recommendations of the Panel and the Appellate Body and would inform the DSB, in accordance with Article 21.3 of the DSU, of its undertaking in this regard.

The representative of the United States said that her delegation wished to praise the Reports of the Panel and the Appellate Body, and to make some general comments. The United States considered that both Reports were of high quality. The Panel had been presented with a complex assortment of new factual, economic and legal issues. The Panel's careful weighing of evidence and its focus on market realities were truly exemplary, setting a high standard for future panels. Its legal analysis was comprehensive and fully underscored the broad application of Article III of GATT 1994 in safeguarding equal competitive opportunities for imports in matters of internal taxation. In affirming each issue subject to appeal, the Appellate Body had properly recognized the high quality of the Panel Report. The Appellate Body Report also set a high standard, in conveying the real meaning of Article III obligations. Its thoughtful clarifications should help to resolve this in future disputes. She noted that Article 21.3 of the DSU required Korea to state its intentions with respect to implementation within the next 30 days. The United States was interested in engaging constructively with Korea on the matter as soon as possible. Her delegation looked forward to working towards a prompt resolution of this dispute as envisaged under the DSU.

The representative of the European Communities said that the Korean Liquor Tax Law of 1949 and the Korean Education Tax Law of 1982 had imposed respectively an *ad valorem* tax on all distilled spirits and a surtax on the sale of most distilled spirits which in practice had resulted in less favourable treatment for imported spirits as compared with national spirits, in particular soju. The Appellate Body had confirmed the Panel's findings according to which these measures discriminated against imports. This case was important, both economically and legally. Economically, large interests of the European industry were at stake. Legally, the EC welcomed that the discriminatory effect of tax measures on imported products had again been clearly recognized as a violation of the national treatment provisions of Article III. He thanked the Panel and the Appellate Body for their work.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS75/AB/R - WT/DS84/AB/R and the Panel Report in WT/DS75/R-WT/DS84/R as upheld by the Appellate Body Report.

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/92)

The Chairman drew attention to document WT/DSB/W/92 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 in document WT/DSB/W/92.

The DSB so agreed.

7. Election of Chairperson

The Chairman recalled that at its meeting on 16 February 1999, the General Council had taken note of the consensus on a slate of names for chairpersons to a number of WTO bodies including the DSB. On the basis of the understanding reached by the General Council, he proposed

that the DSB elect Mr. N. Akao (Japan) as Chairman of this body. He said that Mr. Akao was well-known to all Members. In October 1996, he had become a representative of Japan to the United Nations and WTO. His active contribution to the work of the WTO as head of the Delegation of one of the trading partners and a major participant in the multilateral trading system was well-known and appreciated. In 1998 Mr. Akao had served as Chairman of the Council for Trade in Services and had fulfilled his functions when significant results had been obtained in this area. In the context of the DSB, all Members had appreciated his experience, knowledge and constructive attitude. He proposed that the DSB elect Mr. N. Akao (Japan) as Chairman of this body by acclamation.

The DSB so agreed.

The representative of Canada said that until recently the dispute settlement system had worked well and only a few minor changes had been required. It was understood that the real test of the system would come with implementation. Mr. Morjane had become the DSB Chairman when the real test had arrived and he had discharged his responsibility with skill, integrity and fairness. He always had in mind the long-term interests of the WTO, the dispute settlement system, and the multilateral trading system. Canada was pleased with the election of Mr. Akao as Chairman of this body and looked forward to working with him.

The representative of the United States said that Mr. Morjane had presided over the proceedings of the DSB during a difficult year and had had to deal with many different disputes. The DSB was the backbone of the WTO and Mr. Morjane's experience, leadership and integrity had helped delegations to overcome difficult situations. On a personal note, she expressed admiration for his patience and fairness not only to the United States but also to other delegations in their attempts to seek solutions to disputes. The United States welcomed Mr. Akao as new Chairman of the DSB and looked forward to working with him.

The representative of Ecuador wished to associate his delegation with the statements made by previous speakers. He wished to pay homage to Mr. Morjane's ability and intelligence in handling delicate issues which had been brought to the DSB. He highlighted his efforts towards the DSU review. He had carried out his duties with regard to matters which had systemic significance and importance for all Members. He thanked for his contribution towards strengthening and safeguarding of the dispute settlement system. He asked Mr. Morjane to convey to Mr. Akao his delegation's undertaking to work with him in the DSB.

The representative of Australia said that it was well recognized that Mr. Morjane had presided over an extremely difficult year in the DSB. He had discharged his duties with tremendous fairness and skill, and Members were enormously impressed with how he had handled his position. He had discharged his duties with enormous dignity that had helped the whole DSB process. As a personal reflection, he was delighted to have worked with Mr. Morjane as a colleague through his Chairmanship of the DSB which in the normal course of his country's policy interests might not have been possible. Australia welcomed the appointment of Mr. Akao as Chairman of the DSB and believed that he had the necessary skills and independence of mind to perform his duties. His delegation looked forward to working with him.

The representative of Turkey said that previous speakers had already made comments on Mr. Morjane's qualities. He therefore only wished to underline one point. The dispute settlement system was a unique and important mechanism in the framework of international relations which required a prudent leadership having both a sense of responsibility and wisdom. Mr. Morjane had these qualities and had carried out his duties with professionalism in difficult circumstances. He had contributed a great deal to this system with his wisdom and professionalism. His delegation believed that Mr. Akao had the same qualities.

The representative of Argentina, speaking also on behalf of the GRULAC countries, thanked Mr. Morjane for his efforts carried out in a very difficult year and for the clarity and wisdom with which he had dealt with all the challenges that had taken place in 1998. He welcomed Mr. Akao as a new Chairman of the DSB.

The representative of Japan, speaking on behalf of Mr. Akao, apologised for his absence. Mr. Akao had asked him to convey his sincere thanks and appreciation to Mr. Morjane for his tireless efforts in presiding over the DSB meetings in an able, calm and skilful manner. Mr. Akao had indicated that he would need Mr. Morjane's wise advice and support in the difficult year ahead. He thanked Members for their warm and kind words expressed about Mr. Akao who looked forward for the same degree of strong support and friendship that Mr. Morjane had enjoyed.

The representative of the European Communities thanked Mr. Morjane for his very important work he had carried out in the course of the year. Personally, he appreciated his competence, talent and kindness. This kindness went much further than the usual diplomatic courtesy and had helped to overcome very difficult moments. He welcomed Mr Akao as Chairman of the DSB and wished him all the best in his tasks ahead of him.

The representative of the Philippines, speaking on behalf of the ASEAN Members thanked Mr. Morjane and echoed the statements made by previous speakers. The ASEAN members appreciated his tireless efforts in handling difficult issues before the DSB, including the DSU review. They welcomed the election of Mr. Akao as Chairman of this body and pledged the same cooperation that had been given to Mr. Morjane.

The outgoing Chairman of the DSB Mr. K. Morjane (Tunisia) made a concluding statement subsequently circulated in document WT/DSB(99)/ST/1.

The DSB took note of the statements.