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Chairman: Mr. Kåre Bryn (Norway)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.3)

(b) United States - Import prohibition of certain shrimp and shrimp products: Status report by the United States (WT/DS58/15/Add.3)

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 two sub-items be considered separately.

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.3)

The Chairman drew attention to document WT/DS27/51/Add.3 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

The representative of the European Communities said that after extensive consultations with all the interested parties, the EC had put forward a proposal to modify its banana import regime. The EC considered that, under the present circumstances, the most appropriate option would be to put in place a two-stage process, namely, after a transitional period during which a tariff quota system would be applied with preferential access for ACP countries, a flat tariff would be introduced. The level of the flat tariff would be negotiated pursuant to Article XXVIII of GATT 1994 and in accordance with the negotiating directives contained in the proposal. During the transitional period, the quota management system would be a key issue. Detailed rules for administration of the tariff quota which would be adopted at a later stage were of considerable importance for the acceptability of the new regime. For this reason, the EC would seek agreement from interested countries on the management system. The EC was ready to start this process immediately. He noted that finding the means to respect its international obligations as well as other objectives constituted a considerable challenge for the EC. The EC believed that its proposal provided the best outcome to this dispute.

The representative of the United States noted that the EC's obligation in this case was to comply with the DSB's recommendations. However, the EC's proposal of 10 November 1999 would not so comply. The details of the proposal were unclear in several important respects, in particular with regard to licensing. The EC's unequal treatment of Latin American and ACP suppliers remained a problem. The United States was disappointed that the proposal did not reflect the US suggestions contained in its proposals of 25 October 1999. Nevertheless, his country welcomed the statement made at the present meeting to the effect that the EC would continue its discussions. The United States hoped that these discussions would lead to a resolution of this long-standing dispute.

The representative of Guatemala regretted that the EC status report had, once again, failed to reflect the efforts of Latin American banana-producing countries aimed at resolving the dispute, and had not taken into account their proposals. The transitional tariff-rate quota system proposed by the EC would, once more, transfer to the Latin American producers the cost of the EC's preferential programme for the ACP suppliers. The proposal would not eliminate the discrimination and would increase access for substantial suppliers for the following reasons: (i) ACP suppliers would have access to quotas A and B at zero tariff and therefore Latin American countries would be deprived of the bound volume of 2,553 metric tonnes; (ii) Latin American suppliers would have no access to quota C which would be effectively reserved for ACP countries, since they would enjoy a tariff

preference of 275 Euros, which would have the effect of removing Latin American countries from the EC market; (iii) in order to reserve quota C for ACP suppliers, two licensing systems would be required: i.e. one for Latin America and the other for ACP countries. Guatemala believed that the proposal was inconsistent with the WTO Agreement. After its legitimate expectations had been frustrated for the past seven years, Guatemala was now within its rights to object to the EC's proposal. Guatemala believed that only the faithful and full implementation would meet the expectations of the complaining parties.

The representative of Honduras said that on the basis of the EC status report one could only conclude that the rights of the complaining parties would not be restored prior to the Third Ministerial Conference. It was the responsibility of the EC to comply with the DSB's recommendations, but in order to provide a constructive contribution, Latin American countries had submitted proposals that enjoyed a high degree of convergence among Latin America's producers and suggested WTO-consistent solutions in order to resolve the dispute. Honduras was therefore surprised that these efforts had been ignored. The proposal adopted by the Commission on 10 November 1999 would not bring the EC regime into conformity with the WTO rules. The proposal provided for a transitional tariff-rate quota system, but at the end of that period the EC regime would not be more open and transparent. On the contrary, in order to establish a tariff system it would be necessary to negotiate a new tariff under Article XXVIII, and Honduras was concerned that a new tariff level would be more restrictive for Latin American countries. The transitional phase appeared to be equally unfavourable since various quotas would be established subject to tariff levels that would divide the EC market in a WTO-inconsistent manner. The ACP suppliers, especially those highly competitive, would be guaranteed access to quotas A and B. Honduras could not have access to quota C which had been reserved for the ACP countries who would enjoy a tariff preference of 275 Euros. Honduras was concerned that, once again, the licensing system would be used as a means of manipulating access for discriminatory purposes. Although details of the licensing systems were not yet available, Honduras considered that granting of licences represented a way of seeking to perpetuate the discrimination that had been declared to be inconsistent with the WTO. With regard to quota C one licensing system would be established for bananas from Latin American countries and another for the ACP countries, which constituted discrimination under WTO rules. From the point of view of the producer countries such as Honduras, the licensing system which appeared to be designed in order to guarantee, or even increase, the level of access of the ACP countries was not WTO-consistent. He regretted that thus far all the proposals put forward by the EC sought to reproduce the effects of the current regime which was WTO-inconsistent. Those WTO-inconsistent proposals had been used by the EC so as to preserve its banana regime for as long as possible. The approach taken by the EC undermined the credibility of the dispute settlement system. Honduras, therefore, called upon the EC member States to act in such a manner so as to restore confidence in the effectiveness of the dispute settlement system.

The representative of Colombia said that her authorities were currently examining the EC's proposal. She asked the EC to clarify what it considered to be its binding commitment on the part of the 15 member States. She wished to know whether that meant a tariff-rate quota of 2.2 million tonnes at 75 Ecus/tonne or 2,553, 000 tonnes at 75 Ecus/tonne. She sought clarification as to how quotas A and B differed from quota C with regard to access and administration. She also wished to know the criteria for awarding import licences for the use of quotas A, B and C. Colombia was surprised that the details would be adopted at a later stage since clarity and predicability were necessary for exporters. If the EC was not in a position to provide answers at the present meeting, it could do so in writing.

The representative of Panama said that his delegation was disappointed with the approach taken by the EC. After extensive consultations, the EC had decided, once again, to ignore the proposals made by Latin American countries. The EC's proposal did not provide for a WTO-compatible solution and would not resolve the dispute. If implemented, the regime proposed by the

EC would substantially reduce Latin America's access to the EC market. The ACP producers, 65 per cent of which were just as efficient, if not more, as the producers of Latin America at the current bound tariff levels, would have full access to quotas A and B at zero tariff. Furthermore, bananas from Latin America would be excluded from quota C because of a prohibitive minimum preference. Panama was concerned about this outcome because of the nullification and impairment of the access rights included in the quantities bound by the EC. In addition, the proposal would extend, in a substantial and WTO-inconsistent manner, the preferences granted by the EC under the Lomé waiver. Details concerning administration of licences would still have to be worked out. However, it was already clear that some aspects thereof would be in contravention with the WTO Agreements. The EC had mentioned that a tariff quota system would be transitional and it was its intention to implement a tariff-only regime at a later stage, which would be more in line with the WTO principles. However, at the end of that transitional period, the minimum tariff level would be four times higher than the current bound level within the quota. Therefore, instead of preparing those countries who currently benefited from protection how to compete in an open market, after the transitional period those countries who were now being discriminated against would have to be prepared that their access would be further restricted. He regretted that it had not been possible to find a solution to this dispute before the Third Ministerial Conference. Panama urged that the EC take into account the proposals made by Latin American producers in order to end the discriminatory aspects of its banana regime.

The representative of Ecuador said that the EC's new proposal to modify its banana regime would not bring a satisfactory solution to the banana dispute. The EC's status report provided insufficient information and had only indicated that the EC was consulting with the interested parties in an attempt to find a solution to resolve the dispute. Ecuador had held consultations with the EC, the Commission and the EC member States. It had also had contacts with the other interested countries, the complaining parties in the Bananas III case and the signatories of the Framework Agreement. Ecuador had sought to bring about a positive convergence of views with the ACP countries and, in particular, it had informed the Commission of what it considered to be the minimum basis for the future banana regime. However, in its recent proposal, the Commission had ignored the views expressed by Ecuador and was seeking to establish a new regime that would not bring a solution to this dispute. Ecuador considered that under the new proposal market access conditions for Latin American bananas would deteriorate. The transitional regime was excessively long. Problems arising from the preference granted to the ACP countries would not be resolved and the only solution proposed by the EC was to further extend that preference. The EC was prejudging a decision of Members with regard to the waiver which was far beyond the level of preference allowed by the present waiver due to expire on 29 February 2000. Ecuador was not satisfied with the EC's proposal and for that reason it had included its Article 22.2 request under item 5 on the Agenda of the present meeting. Thus far the EC had not recognized that the definitive settlement of this dispute did not lie merely in seeking to accommodate legally a series of protectionist practices, but rather in finding an economically satisfactory solution for all the parties involved in the dispute. Ecuador wished to be informed of the EC response to the questions asked by Colombia at the present meeting.

The representative of Costa Rica said that the Commission had taken steps to modify its regime and had adopted a proposal referred to at the present meeting. Costa Rica could not agree with certain elements contained in the proposal and considered that they were not in line with the objective of achieving consistency with the WTO and EC's obligations. His country was concerned that the EC continued to separate the tariff quota of 2.2 million tonnes from 353,000 tonnes. This was not in line with the EC's commitments under the Uruguay Round in the area of agriculture. He noted that the third quota would be prohibitive. Costa Rica was prepared to hold bilateral consultations with the EC in order to find a solution to this dispute.

The representative of Mexico said that it was clear that the new regime continued to be inconsistent with the EC's WTO obligations. He urged the EC to further consider this matter and to

establish a regime that would be fully WTO-consistent. Mexico believed that it would be appropriate to establish a system based on tariffs only which would be WTO-consistent.

The representative of Jamaica said that his country supported the ongoing efforts of the EC to respect its obligations. Jamaica was satisfied that the EC was working towards making a WTO-compatible regime which would address the concerns of all interested parties. The EC had facilitated the participation of interested parties in the process of modifying its regime aimed at arriving at a result that would reflect that input. In particular, Jamaica welcomed the proposed tariff quota system and the EC's invitation to all interested parties to examine the proposal. The Caribbean banana producing countries were examining the proposal and would shortly provide their views thereon. Jamaica was confident that the EC would carefully consider all comments since this was the best means of achieving a broad based acceptance of a new regime.

The representative of Saint Lucia said that her delegation was disappointed with the positions of some countries that seemed to be more concerned with the interests of their companies than whether or not a compromise regime could be crafted to conform to WTO rules. While Saint Lucia appreciated the EC's determination to have the regime adjusted to conform to WTO rules, it considered these rules as part of the problem. The rules appear to be insensitive to the needs of developing countries, in particular the poorest and smallest Members. A globalizing world could not afford to marginalize any group of countries. LDCs and small developing countries which were dependent on a single or a narrow range of commodities were being affected by globalization. Average prices for their commodities in the 90s had dropped in real terms to 45 per cent of their value in the previous decade and were now 10 per cent lower than in 1932, the lowest point in the great depression. These countries which accounted for 0.5 per cent of world trade did not have the means to take advantage of trading opportunities but, at the same time, they were expected to open up their own markets to competition. The negative impact which trade liberalization had on the smallest and poorest countries contradicted the assertion of economic purists who argued that free trade was best, but for too many all that it produced was marginalization and deepening poverty. There was a great resistance to the idea of providing special and tangible mechanisms to enable small countries to compete effectively. Dominica, which was exporting in the region about 30,000 tonnes of bananas produced by small family-owned farms, competed with giant multinational plantations. The shipment of bananas in large customs vessels was expensive and accounted for a major share of the final cost. Dominica with its small volumes would therefore always face substantially higher cost than any other large producer with the consequent implications for its ability to compete. The situation in St. Lucia was not different. The WTO and its trade rules should not continue to favour only the more advanced and do nothing in support of the poorest and smallest economies. Saint Lucia hoped that all parties would seek a reasonable compromise in taking this dispute forward and settle it in a way that would take into account the needs of the poorest and most vulnerable countries.

The representative of the European Communities clarified that during the transitional period, three quotas would be available to all suppliers. The first would be the bound quota of 2.2 million tonnes at 75 Ecus/tonne, and the second would be an autonomous quota of 353,000 tonnes at the same tariff level. A third tariff quota of 850, 000 would also be available. A preference of 275 Ecus/tonne would be granted to ACP countries. That third quota would be characterized by a bidding procedure through which an abatement with respect to the out-of-quota bound tariff rate would be determined. This auctioning-striking price system would resolve both the level of the tariff and the distribution of licences requested as well as the available quantities. A key practical aspect of the transitional quota system was the management of the first two quotas. The preferred option of interested parties for distribution of licences was a historical system, but could only be implemented if there was agreement on a mechanism compatible with both WTO and EC law. Unless such an agreement materialised, the alternative would be an appropriate form of a "first-come first-served system" for the two quotas at 75 Ecus/tonne provided that the administrative problems could be overcome in such a way that the scheme was non-discriminatory.

The representative of Colombia said that the EC had indicated that without prejudice to further details, it believed that the consolidated tariff quota was 2.2 million tonnes at 75 Ecus/tonne. However, this was applicable only to 12 EC member States. As a result the EC's enlargement, the obligation should apply to 15 countries and could not be the same as for the 12 countries. Colombia hoped to receive more detailed responses from the EC to its questions.

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

(b) United States - Import prohibition of certain shrimp and shrimp products: Status report by the United States (WT/DS58/15/Add.3)

The Chairman drew attention to document WT/DS58/15/Add.3 which contained the status report by the United States on its progress in the implementation of the DSB recommendations with regard to its import prohibition of certain shrimp and shrimp products.

The representative of the United States said that in accordance with Article 21.6 of the DSU, his country had submitted in writing its fourth status report on the implementation of the findings and recommendations. As the United States had noted in its previous reports, the US Department of State had issued revisions to its guidelines implementing the Shrimp/Turtle law. In accordance with the DSB's recommendations and rulings, the revised guidelines were intended to: (i) introduce greater flexibility in considering the comparability of foreign conservation programmes and US programme; and (ii) elaborate a timetable and procedures for certification decisions. The United States had already provided details on its implementation efforts in its previous reports and statements made in the DSB. At the present meeting, he only wished to refer to certain new developments. A key element of the US implementation efforts had been to launch the negotiation of an agreement with the governments of the Indian Ocean region on the protection of sea turtles in that region. To that end, the United States had actively participated in a widely attended workshop on sea turtle conservation hosted by Australia in mid-October 1999. The symposium had concluded with a resolution agreeing to hold further consultations aimed at concluding a regional sea turtle conservation agreement. That resolution called for efforts to initiate negotiations within the first half of the year 2000. The United States welcomed this cooperative effort and would lend it its full support. The US implementation efforts included offers of technical assistance to any government upon request. The United States had invited a team of specialists from Thailand and the Southeast Asia Fisheries Development Center to visit the US National Marine Fisheries Laboratory for additional training in the use and maintenance of the turtle excluder devices (TEDs) and related gear modifications. The United States was also working to arrange a training/technology transfer seminar for Pakistan, tentatively scheduled to be held in early 2000. The United States continued to meet its implementation commitment and appreciated the constructive input received by the parties to the dispute throughout the process.

The representative of Malaysia reiterated his country's position that in order to give effect to the Appellate Body's decision adopted by the DSB, the US import prohibition had to be lifted immediately. Malaysia regretted that the United States was not making any effort to lift its import prohibition. By maintaining the import prohibition, the United States had adopted a unilateral trade restrictive approach in the assessment of the measures taken by the other harvesting nations for the conservation of sea turtles. By not lifting its import prohibition, the United States had ignored concerns raised by Members. Malaysia urged the United States to immediately lift its import prohibition in order to comply with the DSB's rulings and recommendations and to bring its measure into conformity with its GATT obligations. Malaysia reserved its right to revert to this matter at an appropriate time and forum.

The representative of Australia said that as indicated at previous DSB meetings, his country had outstanding market access concerns in relation to shrimp from Australia's Northern Prawn

Fishery. Australia also had systemic concerns with the unilateral trade restrictive approach reflected in the US import ban. Therefore, Australia would continue to monitor closely the United States' actions in relation to implementation in this dispute.

The representative of India said that, like Malaysia, his country continued to believe that the full and faithful implementation of the DSB's recommendations implied the complete lifting of the US import prohibition on shrimps. India hoped that the United States would fully comply with the DSB's recommendations.

The representative of the European Communities said that the EC, as a third-party in this case, supported the objective of eliminating the incidental mortality of sea turtles during shrimp fishing. The United States had indicated that its revised guidelines for the application of the Shrimp/Turtle law allowed it to take full account of the impact on sea turtles of the shrimp fishing methods used by other countries. The EC noted with satisfaction that, on the basis of the new guidelines, Australia had already resumed its exports. Given that Australian boats were not equipped with TEDs as required by the Shrimp/Turtle law, the United States appeared to eliminate the main element which the EC considered unacceptable, namely, unilateral imposition on other countries of methods for protection of sea turtles adopted by the US legislators. The EC considered that the authorization granted to Australia constituted a decisive step in the right direction. If the United States were to allow imports of shrimps from any country applying an effective method for the conservation of sea turtles which was transparent, rapid and took full account of local conditions, the EC would be satisfied with the implementing measures taken by the United States.

The representative of Ecuador said that, as a major supplier of shrimp and shrimp products to the US market, his country had participated in this dispute as a third-party. He noted that Ecuador did not use nets to harvest shrimps but other techniques and methods. Ecuador hoped that the United States would comply with its WTO obligations and would closely observe the implementation process. Ecuador urged the United States to revise its certification policy with regard to imports of shrimp, in particular from those countries that did not use nets and thus did not endanger sea turtle.

The representative of the United States recalled that the Appellate Body had found no inconsistency between the legislation of the United States and its WTO obligations. It had only found fault with certain aspects concerning the way the US law was administrated and the United States was taking steps to positively address these findings. The United States did not ignore the concerns raised by the complaining parties and encouraged them, including Malaysia, to take advantage of the opportunities provided by the revised guidelines as had successfully been done by Australia.

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

2. Canada - Measures affecting the importation of milk and the exportation of dairy products

(a) Implementation of the recommendations of the DSB

The Chairman recalled that in accordance with the DSU provisions, the DSB kept under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He also recalled that on 27 October 1999, the DSB had adopted the Appellate Body Report on "Canada - Measures Affecting the Importation of Milk and the

Exportation of Dairy Products" and the Panel Report, as modified by the Appellate Body Report. He invited Canada to inform the DSB of its intentions in respect of implementation of the DSB recommendations.

The representative of Canada said that, as stated at the previous DSB meeting, his country accepted the adoption of the Panel and the Appellate Body Reports. It was Canada's intention to fully implement the DSB's rulings in this case. His Government was currently in the process of drafting regulatory amendments in order to modify the administration of the tariff-rate quota for imports of fluent milk. Canada recognized that legislative changes would be required to implement the Panel's and the Appellate Body's decisions with respect to the export-subsidy practices. The industry representatives were currently meeting to develop necessary mechanisms in order to implement these decisions. On 16 November 1999, Canada had held consultations with the United States and New Zealand on a reasonable period of time for implementation. These consultations which had been helpful and constructive would continue to be carried out. Canada hoped that it would soon be in a position to report to the DSB on this matter.

The representative of the United States said that his country expected Canada to implement the DSB's recommendations promptly and considered that early implementation was particularly important. The disciplines contained in the Agreement on Agriculture were designed to achieve progressive reform in trade on agriculture. By significantly exceeding the level of its export subsidy reduction commitments on dairy products, Canada had dealt a setback to reform in this sector. The United States called on Canada to act expeditiously to make up lost ground by conforming promptly with its reduction schedule, including compliance with both the annual and aggregate limits on export subsidies. The United States looked forward to further discussions with Canada on a reasonable period of time for implementation, and welcomed Canada's initiative to start the implementation process.

The representative of New Zealand said that, as Canada had already indicated, further consultations would be required on a reasonable period of time to enable Canada to bring its measures into full conformity with the Reports in question.

The DSB took note of the statements and of the information provided by Canada regarding its intentions to implement the DSB recommendations.

3. Brazil - Export financing programme for aircraft

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

The Chairman said that the item had been inscribed on the Agenda of the present meeting at the request of Canada.

The representative of Canada said that on 18 November 1999, his delegation had informed the DSB Chairman in writing of Canada's actions taken in an effort to comply with the Panel and Appellate Body rulings in the case on "Canada – Measures Affecting the Export of Civilian Aircraft".[1] Under item 4 of the Agenda, Canada intended to make a statement outlining its implementing measures with regard to the above-mentioned case. For the sake of transparency, Canada requested that Brazil indicate the steps which it had taken to comply with the Panel and Appellate Body rulings in the case: "Brazil - Export Financing Programme for Aircraft"

[1] WT/DS70/8

The representative of Brazil said that later in the day, a letter would be sent to the Chairman of the DSB outlining the actions taken by Brazil in order to implement the DSB recommendations.[2] As stated in that letter: "At the DSB meeting of 20 August 1999, the Panel and Appellate Body reports regarding the case: Brazil-Export Financing Programme for Aircraft were adopted. Brazil was thereby required to bring the measures found to be inconsistent with its obligations under the Agreement on Subsidies and Countervailing Measures into conformity with that Agreement within 90 days. On 13 September, pursuant to Article 4.9 of the SCM Agreement and Article 21.3 of the DSU, Brazil informed the Dispute Settlement Body in writing of its intention to comply with the recommendations contained in the reports cited above. My authorities have now instructed me to inform you that Brazil has effectively implemented the DSB recommendations within the 90-day period established by the Panel and upheld by the Appellate Body. Equalisation payments under PROEX will be granted only to the extent that the net interest rate applicable to a transaction under that Programme is brought down to the appropriate international market "benchmark". All implementing legislation is fully compatible with Provisory Measure 1892-32, dated 22 October 1999, which establishes in Article 1: 'In financing operations linked to exports of national goods or services and employing resources from the Special Programme for Official Credit Operations, the National Treasury may contract, within the framework of PROEX - *Programa de Financiamento às Exportações* - financial obligations compatible with those negotiated in the international market'. The implementing regulation includes: (i) a Resolution by the National Monetary Council altering its own Resolution 2576, dated 17 December 1998, which establishes the criteria applicable to PROEX interest rate equalisation payments; and (ii) a Central Bank Circular Letter which establishes new maximum equalization percentages and revokes Circular Letter 2843, dated 25 March 1999. These regulations will be published at the official gazette in the next few days."

The representative of Canada said that his country was concerned and disappointed by Brazil's statement to the effect that "Brazil has effectively implemented the DSB recommendations within the 90-day period". At this stage, Canada was unable to reach any conclusions as to whether these amendments would bring Brazil into full conformity with its obligations under the SCM Agreement with respect to contracts concluded after 18 November 1999. Canada had hoped that the consultations would have allowed the parties to reach a mutually satisfactory conclusion on Brazil's implementation in this case. However, since that might not be the case, Canada would be prepared to consider its options in the near future. To this end, Canada wished to reserve its rights under Article 4.10 of the SCM Agreement and Article 22 of the DSU.

The representative of Brazil expressed his country's surprise about Canada's statement concerning contracts concluded after 18 November 1999. It was his understanding that Brazil's legislation did not make any distinction between contracts concluded prior to and after 18 November 1999. This was without prejudice to further discussions to be carried out by Brazil and Canada.

The DSB took note of the statements.

4. Canada - Measures affecting the export of civilian aircraft

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

The Chairman said that the item had been inscribed on the Agenda of the present meeting at the request of Brazil.

[2] Subsequently circulated as document WT/DS46/12.

The representative of Brazil recalled that the Panel and Appellate Body Reports on "Canada - Measures Affecting the Export of Civilian Aircraft" had been adopted by the DSB on 20 August 1999. Within 90 days from that date, Canada was required to bring the measures found to be inconsistent with its WTO obligations into conformity with the SCM Agreement. On 13 September 1999, pursuant to Article 21. 3 of the DSU, Canada had informed the DSB in writing (WT/DS70/7) of its intention to "implement fully and faithfully the Dispute Settlement Body's rulings with respect to its two programmes - the Canada Account and the Technology Partnerships Canada - that were found to constitute prohibited export subsidies." The 90-day-period for implementation had expired on 18 November 1999. In accordance with Article 21.6 of the DSU, Brazil had requested the inclusion of this item on the Agenda in order to request Canada to inform the DSB as to whether or not it had implemented the DSB's recommendations and, if so, what measures had been taken towards such implementation.

The representative of Canada said that in the interest of transparency, Canada wished to inform the DSB of its implementation of the DSB's recommendations and rulings in the case: "Canada - Measures Affecting the Export of Civil Aircraft". Both the Panel and the Appellate Body had found that certain measures, specifically the Canada Account debt financing and Technology Partnerships Canada (TPC) assistance to the Canadian regional aircraft industry, constituted export subsidies and were inconsistent with Canada's obligations under Articles 3.1 (a) and 3.2 of the SCM Agreement. The Panel had recommended that Canada withdraw these subsidies within 90 days of the adoption of the Reports by the DSB. The deadline for implementation was 18 November 1999. At the present meeting, he wished to inform Members that Canada had fully implemented the DSB's recommendations, as undertaken in its letter of 6 September 1999.[3]

With respect to Canada Account debt financing for the export of regional aircraft which had been found to be inconsistent with the SCM Agreement, no deliveries of regional aircraft after 18 November 1999 would benefit from Canada Account financing. In addition, the Minister for International Trade had adopted a policy guideline under which all future Canada Account transactions for all sectors, not only those involving regional aircraft, would have to comply with the OECD Arrangement on Guidelines for Officially Supported Export Credits. By this policy, the Minister had undertaken not to authorize any transaction under Canada Account unless it complied with the OECD Arrangement. No Canada Account transaction might proceed without such ministerial authorization. As a result, any delivery of regional aircraft after 18 November 1999, which benefited from Canada Account financing, would comply with this Arrangement.

With regard to TPC assistance to the Canadian regional aircraft industry which had also been found to be inconsistent with Canada's obligations under the SCM Agreement, Canada would not make any disbursements pursuant to any existing TPC contribution agreement for the Canadian regional aircraft industry, effective from 18 November 1999. In this respect, Canada had amended TPC's contribution agreements pertaining to the Canadian regional aircraft industry in order to terminate all obligations to disburse funds effective from 18 November 1999. As a result, some CND$16.4 million of funding pursuant to those agreements would not be disbursed. In addition, Canada had cancelled the conditional approval, given prior to the issuance of the Appellate Body Report, for two other regional aircraft industry projects. As with Canada Account, steps had been taken to restructure TPC in order to ensure that all future transactions, regardless of the sector involved, would be fully in compliance with the WTO Agreement. Canada had approved, effective from 18 November 1999, new terms and conditions as well as a new administrative framework for this programme. TPC's objectives, eligibility conditions, assessment criteria and repayment principles had all been revised. Accordingly, all applicants with outstanding files as of 18 November 1999 had been informed in writing that TPC would close their files. Companies were free to submit proposals under the restructured programme and a new investment application guide had been issued for that

[3] WT/DS70/7

purpose. Costs incurred prior to 18 November 1999 would not be considered eligible. Program administrators did not anticipate approving any projects under the restructured program until the new calendar year. Documents relating to Canada's implementation and the changes in the administration of both Canada Account and TPC were available upon request from the Permanent Mission of Canada.

The representative of Brazil noted the statement made by Canada and said that his authorities would examine the legislation adopted by Canada. Brazil was disappointed with certain points made by Canada at the present meeting. With regard to Canada Account, he recalled that one of the problems Brazil had faced during consultations and in the proceedings of the dispute, was the absolute lack of transparency of that programme. At the present meeting, Canada had indicated that it had adopted new policy guidelines and Brazil expected to have full access to such guidelines. Brazil was not reassured by Canada's assertion that operations under Canada Account would comply with the OECD Arrangement. He noted that the large number of provisions in that Arrangement allowed for derogations from its general rules. With regard to TPC, he recalled that, in paragraph 9.341 of its Report, the Panel had concluded that "…TPC assistance to the Canadian regional aircraft industry would not have been granted but for some expectation of export or export earning. "…The Panel had further determined that TPC payments were "… contingent… in fact… upon export performance." Consequently, compliance by Canada would require more than a mere reformulation of some of the TPC rules and regulations. At this stage, Brazil was not convinced that Canada had implemented the DSB's recommendations and wished to reserve its right under Article 22.6 of the DSU.

The DSB took note of the statements.

5. European Communities - Regime for the importation, sale and distribution of bananas

(a) Recourse to Article 22.2 of the DSU by Ecuador

The Chairman drew attention to the communication from Ecuador contained in document WT/DS27/52.

The representative of Ecuador said that for the past seven years the EC had maintained a banana import regime which was not consistent with its GATT and WTO obligations. During that period of time, the EC had discriminated against Ecuador, causing serious injury to trade in its principal export product. Under the GATT and then the WTO system it had been found several times that the EC's banana regime was in breach of several provisions of GATT and GATS. Three separate panel reports had confirmed that the EC's banana regime was discriminatory as well as the Appellate Body and two panel reports under Article 21.5 of the DSU. Finally withdrawal of concessions had been granted in the absence of implementation. Thus far, eleven months since the EC should have complied with the DSB's decision, the EC continued to maintain its WTO-inconsistent regime and had even unilaterally extended it until the first quarter of the year 2000 or beyond that. Ecuador had joined the WTO in 1996 and since then it had used up its resources in an effort to make the EC fulfil its obligations and commitments and to end the discrimination against its banana exports. In order to resolve this dispute, Ecuador had properly taken each of the procedural steps provided for in the DSU. Ecuador was the first Member to have recourse to Article 21.5 of the DSU. The Article 21.5 Panel had confirmed each of the claims made by Ecuador. On 6 May 1999, the DSB had adopted the conclusions and recommendations of that Panel. Several months had passed since then and the EC had not implemented those recommendations. Therefore, pursuant to Article 22.2 of the DSU and having regard to the content of paragraph 3(c) of that Article, Ecuador was requesting authorization from the DSB to suspend the application to the EC and its member States of concessions or other related obligations under GATT 1994, TRIPS and GATS and its annexes. Ecuador's aim through this suspension was effective withdrawal of concessions in order to match the level of nullification or

impairment of benefits accruing to Ecuador, amounting to US$ 450 million per year. In its request contained in document WT/DS27/52, Ecuador had fully justified its decision to withdraw concessions and obligations from the EC pursuant to Article 22.3. Ecuador had pointed out that, due to the enormous imbalance in the trade relations between Ecuador and the EC, the difference in the degree of economic development and the serious economic situation Ecuador was currently facing, placed severe constraints on its ability to exercise its rights under Article 22. Therefore, Ecuador was obliged to withdraw concessions in other sectors in order to significantly lessen the adverse economic impact as a result of the withdrawal of concessions. Ecuador should not bear such an impact since it was the EC that had failed to comply with its obligations and commitments to the detriment of Ecuador. For these reasons, Ecuador was requesting the suspension of concessions and other obligations under GATS and TRIPS, specifically in the following categories contained in Part II of the TRIPS: Section 1: Copyright and related rights; Article 14: Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations; Section 3: Geographical indications; Section 4: Industrial designs. Ecuador was also proposing to suspend concessions and obligations in the subsector of wholesale trade distribution services, contained in its Schedule of specific services commitments. In addition, Ecuador reserved the right to suspend tariff concessions or other obligations granted in the framework of GATT 1994 where they could be applied in a practicable and effective manner. The suspension of concessions or other obligations would apply to the following EC member States: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the United Kingdom. The request to suspend the above concessions or other obligations fully complied with the provisions of Article 22.4 of the DSU, since the economic impact of the suspension proposed by Ecuador was well below the economic value of the nullification and impairment of Ecuador's benefits. Consequently, the suspension proposed by Ecuador did not exceed the level that might be considered equivalent to the nullification or impairment.

The representative of the European Communities said that pursuant to Article 22.6 of the DSU, the EC wished to object to the level of suspension of concessions or other obligations requested by Ecuador in WT/DS27/52. The EC considered that the request by Ecuador did not correspond to the level of nullification and impairment of benefits suffered by Ecuador. In accordance with the provisions of Article 22.7 of the DSU, the EC was requesting that the matter be submitted to arbitration. Moreover, the EC considered that Ecuador had not complied with the provisions of Article 22.3 of the DSU. Therefore, the EC was further requesting that that matter be also submitted to arbitration.

The representative of Honduras recalled that in 1998 when the need for recourse to Article 21.5 of the DSU had been discussed, the EC had practically paralysed the work of the DSB. Developing countries had to face many difficulties in pursuing the procedure before the Panel and the additional effort to request an Article 21.5 Panel was a considerable burden for them. Despite having successfully upheld its claim for review under Article 21.5, Ecuador had not been able to have its rights restored. It was therefore clear that the EC had no desire to meet its WTO obligations. Ecuador's request under Article 22.2 should be examined in the context of the frustration experienced by a Member repeatedly confronted with the indifference of the party that was obliged to bring its regime into conformity. Honduras shared that frustration and considered that the effectiveness of the dispute settlement system depended on the possibility of implementing the DSB's recommendations. However, a coercive quality of the WTO system which did not exist under the GATT system continued to be defeated by the EC's delaying tactics. The measures provided for in Article 22 of the DSU would not be effective while there was no political will to apply faithfully the DSB's rulings and recommendations. The interest in the due application of what has been resolved in the bananas case had ceased to be a concern merely of the countries putting forward the complaint. The whole membership would benefit if the EC adopted the measures necessary to preserve the credibility of the system.

The representative of Guatemala said that her country noted the Article 21.5 request made by Ecuador. She recalled that on many occasions, Guatemala had condemned the tactics used by the EC in order to delay the implementation of the DSB's recommendations in the bananas case. This called into the question the functioning of the dispute settlement system which was one of the fundamental bases of the multilateral trading system. Ecuador's request was an example of how much time had been devoted to this case and the extent to which the dispute settlement system had been undermined. The time required under the procedures of Article 22 had some important consequences for developing countries. Guatemala once more wished to call upon the EC to bring its banana import regime into conformity with WTO rules in order to avoid adverse effects due to lack of compliance which continued to undermine WTO standards and practices. The approach of the EC taken in this case was not only harmful for the complaining parties but also put at risk the functioning of the dispute settlement mechanism.

The representative of Saint Lucia said that her delegation regretted the request by Ecuador at this early stage. The action taken by Ecuador was counterproductive because all the parties were trying to arrive at a compromise solution which would address all the concerns raised in this case. Saint Lucia respected the right of Ecuador to exercise its rights under the DSU and called for more flexibility on all parties to arrive at a compromise solution.

The representative of Panama said that his delegation supported the statements made by Honduras and Guatemala. Panama regretted that due to the continued failure of the EC, it was necessary to make further recourse to the dispute settlement rules and procedures.

The representative of Jamaica recognized that under the appropriate circumstances, Ecuador had the right to resort to WTO remedies to enforce the Panel's recommendations. Jamaica's view of the provisions of Article 22 with regard to compensation and suspension of concessions was that these were "temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements." Jamaica noted the statement made by the EC under Agenda item 1 and the communication from the EC dated 10 November 1999 which described the new proposal. In particular, Jamaica noted the indication by the EC that "certain important issues remain to be clarified before the Council takes its final decision. The Commission invites all the interested parties to examine the proposal designed to secure a satisfactory compromise. It will endeavour to continue consultations in order to reach this objective". Like Ecuador, Jamaica's economy was also dependent on exports and bananas were important for the exchange earnings. All banana producers were seeking a mutually acceptable resolution which would meet the WTO criteria. Therefore, in light of Ecuador's comments that "it did not rule out the possibility that progress may be made in the coming days in bilateral consultations on this subject", Jamaica encouraged all the relevant parties to intensify consultations with a view to reaching a broadly based acceptable solution which would take into account the interests of all parties.

The representative of Côte d'Ivoire said that her country was concerned with the matter before the DSB. Côte d'Ivoire hoped that it would be possible to find a satisfactory solution to this dispute.

The DSB took note of the statements and agreed that the matter be referred to arbitration in accordance with Article 22.6 of the DSU.

The representative of Malaysia noted Ecuador's request and said that his country had a systemic interest in this matter.

The DSB took note of the statement.

6. United States - Safeguard measure on imports of fresh, chilled or frozen lamb from New Zealand

(a) Request for the establishment of a panel by New Zealand (WT/DS177/4)

7. United States - Safeguard measure on imports of lamb meat from Australia

(a) Request for the establishment of a panel by Australia (WT/DS178/5 and Corr.1)

The Chairman proposed that the DSB take up items 6 and 7 together since they pertained to the same matter. He recalled that the DSB had considered these matters at its meeting in October and had agreed to revert to it. He drew attention to the communication from New Zealand contained in document WT/DS177/4.

The representative of New Zealand said that his country's request for a panel was before the DSB for the second time and therefore a panel would be established at the present meeting. As outlined in document WT/DS177/4, New Zealand considered that the safeguard measure imposed by the United States on imports of fresh, chilled and frozen lamb was in contravention with the WTO commitments of the United States arising from the Agreement on Safeguards and the GATT 1994. The safeguard measure introduced by the United States on lamb imports imposed a substantial tariff on all imports of lamb from New Zealand and a prohibitive tariff on all such imports above the prescribed quota level which had been set at 1998 trading levels. New Zealand considered that the safeguard measure was inconsistent with the obligations of the United States under Articles 2, 3, 4, 5 11 and 12 of the Agreement on Safeguards and Articles I, II, and XIX of GATT 1994. As indicated at the previous DSB meeting, the consultations which had been held on this issue had not resulted in a resolution of the dispute. Accordingly, New Zealand reiterated its request for the establishment of a panel to examine the measure in question with standard terms of reference as set out in Article 7 of the DSU. He noted that Australia's request for a panel (WT/DS178/5) related in part to the same matter as New Zealand's request. He further noted that the DSU provided that a single panel could be established to examine such complaints whenever feasible. Therefore, in accordance with Article 9.1 of the DSU, New Zealand would have no objection to having its complaint and that of Australia considered by the same panel, taking into account the rights of all Members concerned.

The Chairman drew attention to the communication from Australia contained in document WT/DS178/5 and Corr. 1.

The representative of Australia said that his country's request for the establishment of a panel had already been submitted at the previous DSB meeting. The request was set out in document WT/DS178/5 and Corr. 1. The corrigendum which had been circulated on 29 October 1999 corrected an error contained in WT/DS178/5 changing a reference from Article 6 to Article 8. He noted that the letters addressed to the United States and the DSB Chairman dated 14 October 1999, containing that request referred to Article 8. Since this was the second time that Australia's request was before the DSB, it was expected that a panel be established at the present meeting. Australia considered that a single panel should examine the complaints of both Australia and New Zealand.

The representative of the United States said that, as his delegation had noted at the previous DSB meeting, his country believed that its measure satisfied all the relevant provisions of the Agreement on Safeguards. Before implementing a remedy, the US had consulted extensively with New Zealand and Australia as substantial suppliers of lamb meat to the US market. Indeed, in a number of occasions the US had decided to alter some aspects of its measure based on reasonable concerns raised by Australia and New Zealand. Thus, the United States had made every effort with full participation of these two countries to ensure that its measure was designed and applied to adjust

the needs of the US domestic industry while simultaneously ensuring that the US trading partners continued to access its market. The United States was therefore disappointed that New Zealand and Australia had decided to pursue this dispute in light of the high level of consultation and cooperation that the United States had extended to all Members affected by the lamb meat safeguard. Nevertheless, the United States was prepared to defend its safeguard measure.

The DSB took note of the statements and agreed to establish a single panel pursuant to Article 9 of the DSU, with standard terms of reference.

The representatives of Australia, Canada, EC, Iceland, Japan and New Zealand reserved their third-party rights to participate in the Panel's proceedings.

The representative of Australia clarified that his country wished to reserve its third-party rights in relation to the complaint by New Zealand.

The Chairman noted that New Zealand had reserved its third-party rights in relation to the complaint by Australia.

The DSB took note of the statements.

8. Thailand - Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland

(a) Request for the establishment of a panel by Poland (WT/DS122/2)

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 Poland contained in document WT/DS122/2.

The representative of Poland said that his country was requesting the establishment of a panel for the second time. He recalled that the anti-dumping duties on the products in question had been in force for almost three years, including the period of application of the provisional duties. Due to a high level of duties, Poland's exports of the affected products to Thailand had ceased. Consultations which had been held in May 1998 had not resulted in a mutually satisfactory solution. In Poland's view, both injury and dumping had not been justified under the relevant WTO Agreements. Since no new developments had taken place to change Poland's position, his country was requesting the establishment of a panel with standard terms of reference.

The representative of Thailand reiterated that his country did not and could not agree with the position taken by Poland in its request for the establishment of a panel. Thailand was convinced that its measure was consistent with the WTO Agreement. His country also regretted that Poland had not responded to its suggestion made at the previous DSB meeting that the two parties carry out further consultations on this matter. Thailand strongly believed that there was sufficient ground to do so in light of the new facts and developments that had taken place since the consultations held in the beginning of 1998. Thailand urged Poland to consider this option instead of pursuing its request for the establishment of a panel.

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 the EC, Japan, and the United States reserved their third-party rights to participate in the Panel's proceedings.

9. United States - Anti-dumping measures on stainless steel plate in coils and stainless steel sheet and strip from Korea

(a) Request for the establishment of a panel by Korea (WT/DS179/2)

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 Korea contained in document WT/DS179/2.

The representative of Korea said that at the previous DSB meeting, Korea had requested the establishment of a panel to determine whether the US measure to levy definitive anti-dumping duties on stainless steel plate in coils and stainless steel sheet and strip in coils from Korea was consistent with the WTO rules. At that meeting, the United States had not agreed to the establishment of a panel. The US measures at issue included, *inter alia*, the US treatment of certain sales made to a bankrupt company, the calculation of two distinct exchange rate periods for export sales and currency conversion for certain normal value sales made in US dollars. Since no further progress had been made towards a solution Korea was requesting, for the second time, the establishment of a panel with standard terms of reference.

The representative of the United States said that at the previous DSB meeting, his delegation had stated the US position on the consistency of the determination made by the US Department of Commerce under GATT 1994 and the Anti-Dumping Agreement. At the present meeting, he did not wish to repeat the statements made at that meeting. He only wished to reiterate that the United States would vigorously defend the determination before the panel.

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 the EC and Japan reserved their third-party rights to participate in the Panel's proceedings.

10. Turkey - Restrictions on imports of textiles and clothing products

(a) Report of the Appellate Body (WT/DS34/AB/R) and Report of the Panel (WT/DS34/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS34/8 transmitting the Appellate Body Report on "Turkey - Restrictions on Imports of Textile and Clothing Products", which had been circulated in document WT/DS34/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1 both Reports had been circulated as unrestricted documents. He recalled that in accordance with Article 17.14 of the DSU:" An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their view on an Appellate Body report".

The representative of India said that the underlying issue in this dispute was relatively straightforward, namely, that the purpose of a customs union was to facilitate trade between the members establishing such a union, but not to raise barriers to imports from third countries. The Panel and the Appellate Body had ruled that Article XXIV did not justify Turkey's imposition of new restrictions on imports of textiles and clothing inconsistent with Articles XI and XIII of the GATT and Article 2.4 of the ATC. India supported the adoption of the Reports. During the Panel's

proceeding, Turkey had stated that it could not remove the restrictions without the consent of the EC because it was treaty-bound to pursue the same import policies as the EC. The Panel had rightly rejected this argument, pointing out that, according to the jurisprudence of the Appellate Body in the Bananas III case and Article 41 of the Vienna Convention on the Law of Treaties, Members could not validly conclude treaties among themselves that affected the rights of other Members under the WTO Agreement. Consequently, there were no legal or practical reasons that would prevent Turkey from implementing the rulings in this dispute without the consent of the EC. In paragraph 62 of its Report, the Appellate Body had explicitly noted that: "A system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities are required to be terminated under the provisions of the ATC". It was for Turkey to comply with the DSB's rulings and recommendations in this case. Once Turkey had done this, the EC could institute a system of certificates of origin in order to prevent transhipments to the EC via Turkey or could even consider advancing implementation of the ATC.

While the Appellate Body had satisfactorily resolved India's dispute with Turkey, a number of systemic issues had been raised in its Report to which he wished to draw Members' attention. The basic conclusion of the Panel was that Article XXIV could not be interpreted to allow Members forming a customs union to impose otherwise prohibited import restrictions. He expressed India's appreciation for the work of the Panel and its thorough manner in which it had come up with its incisive analysis of all the points raised by the parties to the dispute. The Panel had reached its conclusions on the basis of its thorough legal analysis, the results of which were summarised as follows: "…we consider that the wording of Article XXIV does not authorise a departure from the obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC...paragraphs 5 and 8 of Article XXIV provide parameters for the establishment and assessment of a customs union…These provisions do not, however, address any specific measures that may or may not be adopted on the formation of a customs union and importantly they do not authorise violations of Articles XI and XIII, and Article 2.4 of the ATC. Moreover, we note that paragraph 6 of Article XXIV provides for a specific procedure for the renegotiation of tariffs which are increased above their bindings upon formation of a customs union; no such provision exists for quantitative restrictions. To the Panel, if the introduction of WTO inconsistent quantitative restrictions were intended to be negotiable on the formation of a customs union, it would seem odd to us that an explicit procedure would exist for changes in GATT's preferred form of trade barrier (i.e. tariffs), while no procedure would be provided for negotiation of compensation connected with imposition of otherwise GATT inconsistent measures" (paragraphs 9.188 and 9.189).

The Appellate Body had, in part, reversed this finding of the Panel. It had concluded that Article XXIV could provide a justification for quantitative restrictions in situations in which the formation of a customs union would be prevented if such restrictions were not imposed. In paragraph 65 of its Report, the Appellate Body had emphasised that "…we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI...will *ever* be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified." The Appellate Body's legal basis for this conclusion were the terms in Article XXIV:5 to the effect that "the provisions of this Agreement shall not prevent…the formation of a customs union". Article XXIV, as a defence justifying quantitative restrictions introduced upon the formation of a customs union, was therefore, according to the Appellate Body, available to a Member which could demonstrate that the customs union fully met the requirements of Article XXIV:5 and 8, and that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. He regretted that the Appellate Body, while concluding that Article XXIV could justify quantitative restrictions, did not state under what circumstances that was possible. Furthermore, since there was no obligation under WTO law to maintain quantitative restrictions, it was therefore difficult to envisage circumstances in which Members forming a customs union could not meet their obligations under Articles XI and XXIV. The Appellate Body had not addressed the Panel's detailed demonstration that none of the recognised principles of interpretation

could possibly lead to the conclusion that Article XXIV:5 permitted to raise barriers *vis-à-vis* third countries' trade. In particular, the Appellate Body had not explained why Members forming a customs union that had to modify their tariff concession to form a common external tariff had to resort to Article XXVIII, while the same Members could introduce new quantitative restriction without the need to invoke procedures with regard to compensation for adversely affected third Members. It had also not explained why the drafters would have wanted to privilege quantitative restrictions over tariffs in the context of Article XXIV and how the drafters could have meant to confer a right to impose quantitative restrictions during formation of a customs union without defining the length of the period during which that right could be exercised. In accordance with Article 3.2 of the DSU, the purpose of the dispute settlement system was to clarify the provisions of the WTO Agreement in accordance with customary principles of the Vienna Convention. India believed that one might have legitimate doubts whether in this case that objective of the dispute settlement system had been attained.

Members forming a customs union had to meet two basic requirements under Article XXIV:8(a). In respect of their internal trade, they had to remove restrictive regulations in respect of "substantially all the trade", and in respect of their trade with third countries they had to apply "substantially the same duties and other regulations". The Panel, like the Appellate Body, had concluded that the difference in the obligations of the EC and Turkey under the ATC did not prevent them from concluding a customs union consistent with Article XXIV. The Panel had reached this conclusion on the basis of an extremely generous interpretation of the terms "substantially the same duties and regulations". The Panel had considered that the qualification "substantially" before the words "the same duties and regulations" had both quantitative and qualitative aspects and it was therefore sufficient for Members, parties to a customs union, to apply to third countries "comparable trade regulations having similar effects". The EC and Turkey could therefore pursue entirely different import policies in textiles and clothing sector and still claim to have constituted a customs union. At the interim review stage, India had raised objections against that interpretation. It had pointed out that that interpretation turned the explicit requirement to apply the "same" regulations into a requirement to apply "comparable" regulations. Since the Panel had concluded on this basis that the EC and Turkey did not have to impose the same restrictions in the area of textiles and clothing to meet the requirements of Article XXIV:8, the interpretation had effectively turned the requirement to apply "substantially the same regulations" into a requirement to apply "the same regulations on substantially all trade", thus negating the difference in the legal standards applicable to the internal and the external trade of a customs union. There was also no political need for the Panel's generous interpretation because a Member that did not wish to adopt the same external policies could form a free trade area or adopt an interim agreement leading to the formation of a customs union. Neither India nor Turkey had appealed from this finding of the Panel. The Appellate Body had nevertheless addressed the issue and had ruled that the flexibility provided by the word "substantially" was limited because this word qualified the word "the same". Therefore, something closely approximating "sameness" was required under Article XXIV:8(a)(ii). The Appellate Body had therefore concluded that: "comparable trade regulations having similar effects do not meet this standard. A higher degree of 'sameness' is required by the terms of subparagraph 8 (a)(ii)" (paragraph 50). This ruling suggested that the EC and Turkey could not pursue entirely different import policies for textiles and clothing and still meet the degree of "sameness" required by the terms of sub-paragraph 8 (a)(ii). In other words, the ruling suggested that the EC and Turkey had not yet completed the process of establishing a customs union. However, the Appellate Body did not examine this issue even though its conclusion that the EC and Turkey could have met its obligations under Article XXIV and maintain different textiles and clothing policies would have required it do so. In the situation at hand, the Appellate Body had reversed an interpretation without re-examining the conclusions that rested on this interpretation.

One of the legal issues that had never been explicitly resolved under the GATT 1947 was the question of whether the overall justification of balance-of-payments measures under Articles XII and XVIII:B and of regional trade agreements under Article XXIV could be examined by panels. The

argument of those that were opposed to a panel examination was that balance-of-payments measures and regional trade agreements raised broad policy issues of concern for the WTO membership and could not be appropriately addressed in a dispute settlement proceeding normally involving only two Members. Panels should therefore merely examine whether individual measures imposed for balance-of-payments reasons or in the framework of regional agreements were WTO-consistent. This view prevailed under the GATT 1947: no panel had examined on its own the balance-of-payments justification of import restrictions and all panels that had been requested to determine the legality of a regional trade agreement had refused to do so. Panels had however examined matters arising from the application of individual measures taken for balance-of-payments reasons or under Article XXIV. In India's view, this practice was reflected in the two GATT Understandings on Balance-of-Payments Provisions and on the Interpretation of Article XXIV, which gave Members the right to invoke the DSU only in respect of matters arising from the application of balance-of-payments measures or the provisions of Article XXIV. The Appellate Body did not share this view. He recalled that in the proceedings on "India - Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products" (WT/DS90/AB/R), the Appellate Body had ruled that panels had complete jurisdiction to review the justification of balance-of-payments restrictions because: "If panels refrained from reviewing the justification of the balance-of-payments restrictions, they would diminish the explicit procedural rights of Members under Article XXIII and footnote 1 to the *BOP Understanding*, as well as their substantive rights under Article XVIII: 11" (paragraph 102).

India believed that the competence of panels could not be determined exclusively on the basis of the provisions of the DSU and the rights of the complainant under Article XVIII. The provisions that created and defined the competence of the BOP Committee and the rights of the respondent under Article XVIII also had to be taken into account. The interpretative task of the Appellate Body was to determine the relationship between all these provisions. This task was in India's view not accomplished by the Appellate Body with an exclusive reference to the provisions defining the competence of panels and conferring rights to the complainant. For these reasons India was pleased to note that the Panel which had examined Turkey's restrictions had followed a more balanced approach. As had become customary under the GATT, that Panel had refrained from examining the overall consistency of the EC-Turkey Customs Union. Turkey had claimed in the Panel's proceedings that it was not the Panel's task to substitute itself for the CTRA and that the Panel could not rule on the legality of the measures forming the object of the complaint in the absence of agreed conclusions on the consistency of the Turkey-EC Agreements with Article XXIV. The Panel had responded to this argument as follows: "We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV that panels have jurisdiction to examine 'any matters arising from the application of those provisions of those provisions of Article XXIV'. For us this confirms that a panel can examine the WTO compatibility of one or several measures 'arising from' Article XXIV types of agreement...Thus we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members...on the occasion of the formation of a customs union. As to the...question of how far-reaching a panel's examination should be of the regional trade agreement underlying the chartered measure, we note that the...CTRA has been established, inter alia, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CTRA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole" (paragraphs 9.50 to 52).

India believed that the Panel's finding was legally correct, politically wise and respectful of the institutional structure set up under the WTO Agreement. However, even though neither India nor Turkey had appealed from the Panel's finding, the Appellate Body had effectively reversed it by declaring that, if a Member forming a customs union invoked Article XXIV as a justification for

quantitative restrictions, the panel was duty-bound to examine whether the customs union meets the requirements of Article XXIV. The Appellate Body had noted the Panel's finding on the jurisdiction of panels to assess the overall compatibility of a customs union with the requirements of Article XXIV and then stated: "We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994" (paragraph 60). In the Appellate Body proceedings on "India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products", India had referred to the report of the Panel on Turkey's restrictions and several GATT panel reports on Article XXIV as precedents supporting the view that the balance-of-payments justification of import restrictions should not be reviewed by panels. The Appellate Body had then dismissed these precedents as irrelevant on the ground that the question before it was limited to that of the jurisdiction of panels in respect of balance-of-payments measures. However, the Appellate Body had stated that its ruling on the jurisdiction of panels on balance-of-payments restrictions was also relevant for determining their jurisdiction on regional trade agreements. The Appellate Body reports on India's balance-of-payments measures and on Turkey's import restrictions raised the question of the proper institutional balance between the judicial and the political organs of the WTO in delicate policy areas. He urged Members to review the Reports before the DSB and those other Reports to which he had referred at the present meeting. He hoped that, at an appropriate time and through an appropriate mechanism, Members would address this fundamental issue with a view to finding meaningful solutions. He thanked the members of the Panel and the three Appellate Body members who had served on this case as well as the Secretariat for its work. He requested that the systemic concerns raised by India be fully recorded in the minutes of the meeting in accordance with Articles 16.3 and 17.14 of the DSU.

The representative of Turkey said that in accordance with Articles 16.4 and 17.14 of the DSU, the Panel and the Appellate Body Reports would be adopted at the present meeting, unless the DSB decided by consensus not to do so. Turkey accepted the adoption of the Reports before the DSB at the present meeting. However, it did not concur with the Panel's and the Appellate Body's recommendations, nor did it share some of the legal reasoning and position on certain fundamental issues related to the dispute at issue. The adoption procedure was without prejudice to the right of Members to express their views on the Panel and the Appellate Body Reports. In view of the importance of the Reports, he wished to state Turkey's position pursuant to Articles 16.3 and 17.14 of DSU. He wished to make some general observations on the contents of these Reports, and then highlight some concerns which were of crucial importance.

He expressed his country's gratitude to the Panel and the Appellate Body for their effort and contributions as well as the Secretariat for its work. The Reports of the Panel and the Appellate Body concerned Turkey's quantitative restrictions applied pursuant to Article XXIV of the GATT 1994. These measures had been in effect in accordance with Turkey's obligations under the Customs Union with the European Communities. Turkey believed that the Panel and the Appellate Body did not have a sound basis to arrive at the legalistic conclusion that the Turkey's Customs Union with the EC could not justify the maintenance of these measures. The Panel and the Appellate Body had been confronted with a number of ambiguous systemic issues. These systemic issues had been the subject of the ongoing discussions in the Committee on Regional Trade Agreements. The Committee had been mandated to review some concepts of Article XXIV of GATT 1994, including those related to customs unions. Second, the Customs Union between Turkey and the European Communities had been under examination by the Committee. Therefore, in Turkey's view, it was untimely for this case to be brought to the DSB. It would have been more appropriate to await the completion of the examination of the Turkey-EC Customs Union. On 26 July 1999, Turkey had notified the DSB of its intention to appeal certain issues covered in the Panel Report and legal interpretations developed by the Panel. Turkey had appealed the Panel's finding that Article XXIV of GATT 1994 did not allow, upon the formation of its Customs Union with the EC, the introduction of quantitative restrictions on

certain textile and clothing products from India. Turkey regretted that the Appellate Body, while subscribing to some of his country's arguments and disagreeing with the Panel's findings on some important systemic issues, had nevertheless upheld the Panel's recommendations.

At the present meeting, he wished to refer to some important issues covered by the Panel and Appellate Body Reports. In paragraph 9.208 of its Report, the Panel had stated that the provisions of paragraphs 5 and 8 of Article XXIV did not authorize any violation of the WTO provisions other than the MFN obligations. In addition, the Panel had concluded in paragraph 9.188 that it considered the wording of Article XXIV did not authorize a departure from the obligations contained in Article XI and XIII of GATT 1994 and Article 2.4 of the ATC. These conclusions of the Panel would have had very important implications had they not been reversed by the Appellate Body. In its submission to the Appellate Body, Turkey had emphasized that the Panel had erred in its legal interpretations and findings by presuming the existence of a conflict between Article XXIV of the GATT 1994 on the one hand, and Articles XI and XIII of GATT 1994 and Article 2.4 of the ATC on the other.

Turkey had argued before the Appellate Body that the Panel had ignored the proper relationship between Article XXIV and the general obligations under the GATT 1994. In Turkey's view, the Panel had not properly interpreted the ordinary meaning of the text of Article XXIV, and in particular, the chapeau of paragraph 5 of that Article. Turkey had further argued that the ordinary meaning of the chapeau of paragraph 5 demonstrated that Article XXIV conferred on Members a right to enter into a Customs Union and to derogate, under certain conditions, from their obligations. Turkey had submitted that the chapeau clearly states that "No GATT provisions shall prevent the formation of a Customs Union as long as certain conditions set out in subparagraph 5(a) are satisfied". Turkey had further maintained that the Panel had ignored the chapeau, and as a result, had reached the erroneous conclusion that Article XXIV:5(a) did not authorize the use of quantitative restrictions, upon the formation of the Customs Union.

In paragraph 43 of its Report, the Appellate Body had acknowledged that the Panel had referred to the chapeau of paragraph 5 of Article XXIV only in a passing and perfunctory way. The Appellate Body had underlined that that chapeau was not central to the Panel's analysis. However, in the Appellate Body's determination, the chapeau of paragraph 5 of Article XXIV was the key provision for resolving the issue. In paragraphs 45 and 58 of its Report, the Appellate Body had stated that on the basis of this analysis of the text and the context of the chapeau, the provisions of the GATT 1994 shall not prevent the formation of a Customs Union, and the provisions of the GATT 1994 shall not make impossible the formation of a Customs Union. Thus the Appellate Body had concluded that the chapeau made it clear that Article XXIV might under certain conditions justify the adoption of a measure which was inconsistent with certain other GATT provisions. As a result of this finding, the Appellate Body had concluded in section VI, paragraph 65 of its report that it made no finding on the issue whether quantitative restrictions found to be inconsistent with Article XI and XIII of GATT 1994 in this dispute, would not be justified in other cases. Subsequently, the Appellate Body underlined that it made no finding on any other issue that might arise under Article XXIV.

Thus far, Turkey shared the basic analysis and interpretations of the Appellate Body with respect to the provisions of Article XXIV. However, the Appellate Body in paragraph 58, had set a condition for a WTO-inconsistent measure to be applied. Under that condition, the party had to demonstrate that the formation of that Customs Union would be prevented if it were not allowed to introduce the measure at issue. In this context, the Appellate Body, in paragraph 62, upholding the Panel's recommendations, had concluded that in order to prevent any possible diversion of trade there were alternative solutions to quantitative restrictions applied by Turkey. The Panel in paragraph 9.190 of its Report had outlined that these alternatives included increased tariffs, rules of origin, early phase-out and tariffication. The Appellate Body, while acknowledging these alternatives, had emphasized the utilisation of rules of origin.

In light of the recommendations on alternative solutions by the Panel and the Appellate Body Turkey was inclined to state that neither the Panel nor the Appellate Body had fully appraised in-depth some of the essential aspects of its Customs Union with the EC. It appeared that the Panel and the Appellate Body had failed to take into account the essential role of free circulation of goods in a customs union. The functioning of a customs union had been treated in the same way as a free trade area agreement. During the Panel and Appellate Body proceedings, Turkey had submitted that there was no alternative solution to the imposition of quantitative limits which could be applied without impairing the principle of free circulation of these products between Turkey and European Communities. The completion of the Customs Union has led to the adoption by Turkey of the EC Common Customs Tariff (CCT) which had a much lower incidence of tariff levels than Turkey's previous tariff. Before the completion of the Customs Union the average Turkish tariff had been 18 per cent. After the Customs Union, it was reduced to the level of the CCT, namely 3.9 per cent as of January 1999. In other words, Turkey greatly liberalized its foreign trade regime and substantially improved market access opportunities for third countries. In light of the above situation the alternative solutions as recommended by the Panel and the Appellate Body regarding increased tariffs and tariffication created potential problems. Turkey had adopted the EC Common Customs Tariff in order to prevent a diversion of trade between the parties. Assuming that Turkey increased its tariff rates, would the EC also raise their tariff rates by identical percentages against third countries? This represented a situation which was neither feasible nor was it desirable from the point of view of third countries' exports to the EC. There would also be problems with the use of rules of origin as an alternative measure. How would Turkey suspend free circulation of goods on textile and clothing products with the EC, but still maintain the Customs Union? This was a difficult situation considering that 40 per cent of Turkey's exports to the EC were made up of textile and clothing products. Since the entry into force of the Turkey-EC Customs Union on 1 January 1996, textile and clothing products from third countries had been circulating freely between Turkey and the EC. The maintenance by Turkey of a different import regime for such products from the EC would only be possible if free circulation were suspended and origin rules accompanied by border checks were reintroduced. Turkey did not believe that this practice would serve the commercial interests of India, because Indian products imported into Turkey would be deprived of the possibility of freely circulating on the territory of the Turkey-EC Customs Union even after they had been used as inputs by Turkish industry. Such a situation would inevitably make Indian products less attractive to Turkish importers, particularly for the Turkish clothing industry. In addition, this practice would not be consistent with the concept of a customs union where the parties followed a common commercial policy towards third countries and the problem of traffic diversion did not arise. Rules of origin were only required in free trade areas because the different trade policies maintained by the parties towards third countries might lead to traffic diversion problems. Turkey regretted that neither the Panel nor the Appellate Body had taken this basic fact into consideration.

The implications of the Appellate Body and the Panel reports were currently under careful examination by his authorities. Turkey would inform the DSB of its intention in respect of the implementation of the DSB's recommendations and rulings at a regular DSB meeting to be scheduled within the time period stipulated in Article 21.3 of the DSU. However, if a regular DSB meeting would not be held within the required period because of special circumstances of the month of December, Turkey would inform the DSB of its intentions in regard of implementation before 18 December 1999 by letter transmitted to the Chairman for circulation of DSB members. There was no doubt that the process for implementation would be difficult and would require decisions to be taken together with the EC. The strong inclination of Turkey was to become engaged together with the EC at some point in constructive discussions with India towards an alternative solution. Turkey was fully cognizant of its WTO obligations and was conscious of its legal obligations and commitments within the framework of the Customs Union with the EC.

He also wished to refer to another important issue, namely, the need to recognize the right of co-defendant status for the members of a customs union. At the 13 February 1998 DSB meeting,

Turkey had stated that the quantitative restrictions on the importation of certain textile products from India had been introduced in accordance with the provisions of the Customs Union between Turkey and EC. It had further stated that pursuant to Article XXIV:8 of GATT 1994, the Customs Union encompassed one legal entity and both partners were bound by its decisions. Accordingly, Turkey had underlined at that meeting that the quantitative restrictions resulted from Turkey's obligation under the Customs Union and constituted the joint responsibility of Turkey and the EC. Turkey had further stated that the request by India for the establishment of a panel was incorrectly addressed to Turkey alone and had insisted that the EC along with Turkey should also be given the opportunity to present its case. In addition, Turkey had drawn to the attention of Members that if the DSB's decision should be against it, it would fail to see how Turkey alone could make the necessary changes in the Customs Union and to convince its partner in the Customs Union that the decisions taken by the Panel without the full participation of the EC would also be binding for the EC. India, in response to Turkey's argument had stated that the restrictions had been imposed and notified to India by Turkey, therefore, Turkey was the only party to this dispute and, consequently, India had opted not to allow the EC to defend their interests with regard to the Customs Union in which it was jointly responsible for decisions. That point was related to an important systemic issue. Turkey recognized that under the current DSU provisions, India had exercised its right to deny the EC from participating as co-defendant in the Panel proceedings on the basis that Article 3.3 of the DSU granted the right to the complainant to identify the Member. India could have chosen to consent to EC's participation in the Panel proceedings but had chosen not to do so. Pursuant to the DSU provisions, India had exercised its right as it saw fit to its interests. However, in light of the Appellate Body's recommendations, the need for the necessary provisions in this respect had become even more pronounced. In Turkey's view it was essential that DSU provisions be amended to provide an opportunity to the members of a Customs Union to defend their case jointly in a trade dispute provided that the dispute was the result of a joint decision of the parties to that Customs Union. To that effect, Turkey had introduced a proposal in the course of the DSU Review to enable all parties to a Customs Union to fully participate in the Panel proceedings related to a dispute in connection with a common trade policy of the Customs Union. During the DSU Review, Turkey's proposal had been discussed and reviewed in three separate meetings and had received favorable response from Members. However due to the objections of a few Members, no amendment had yet been worked out. At the request of the former DSB Chairman, his delegation had contacted other delegations and had written twice to them. He regretted that Turkey had been informed by one delegation that it would agree to its proposal provided that the identification of the defending party would be left to the discretion of the complainant which was no different from the present situation. No responses had been received from other delegations. Turkey believed that this was a very opportune occasion to bring once more this particularly important issue to the attention of Members, and urged Members to reconsider their position. It was obvious that the DSB's recommendations which concerned a member of the Customs Union might need joint action by all members of the Union to be put into effect. It was therefore essential to secure the opportunity for co-defense of all members of a Customs Union. This was necessary not only from the point of view of facilitating the implementation of DSB recommendations, but it would also represent a more equitable approach.

The representative of Hong Kong, China said that his delegation had participated as a third party in both the Panel and the Appellate Body proceedings. Hong Kong, China, like India, was also subjected to the discriminatory quantitative restrictions imposed by Turkey on textile and clothing imports. His delegation also had systemic concerns on the interpretation of Article XXIV, a key GATT provision in this dispute. The legal reasoning of both the Panel and the Appellate Body made it clear that their findings would apply, *mutatis mutandis*, to Turkey's regime of discriminatory quantitative restrictions on imports of textile and clothing products from other Members in addition to India. Hong Kong, China therefore considered that it should be axiomatic that, when Turkey implemented the DSB's rulings, it should bring the whole of its textiles and clothing regime into conformity with GATT 1994 and the Agreement on Textiles and Clothing. His delegation looked forward to an early, complete and faithful implementation by Turkey. The Panel and the Appellate

Body Reports raised many important issues. In particular, he wished to draw attention to the Appellate Body's reference to its own ruling on India's Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (WT/DS90/AB/R), which answered the question of the jurisdiction of panels with respect to the assessment of the overall compatibility of a customs union with Article XXIV. It was also important to note the *obiter dicta* of the Appellate Body that a party claiming Article XXIV as a defense would be required to establish, *inter alia*, that the customs union in question fully met the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. The burden of proof would be on the party invoking Article XXIV as a defense. Hong Kong, China also welcomed the Appellate Body's clarification of the relation between paragraph 4 and the chapeau of paragraph 5 of Article XXIV. It was clear that the chapeau could not be interpreted correctly without constant reference to the purpose of a customs union set out in paragraph 4, which was "to facilitate trade" between the constituent territories and "not to raise barriers to the trade" with third members. Hong Kong, China believed that set a key benchmark which all the regional trade agreements should live up to in ensuring their complementarity with the multilateral trading system. The Panel and the Appellate Body Reports provided important guidance to the clarification of some of the provisions of Article XXIV. His delegation hoped that that would spur further discussions and work in the WTO. Nevertheless, the Appellate Body acknowledged in its report that it made no finding on many other issues that might arise under Article XXIV and that their resolution had to await another day. Hong Kong, China was committed to the clarification of existing rules and decisions governing regional trade agreements in the new round of multilateral trade negotiations. Hong Kong, China supported the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report. It urged Turkey to bring its measures which were found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC into conformity with its obligations under these Agreements and to rescind all the discriminatory quantitative restrictions on imports of textiles and clothing as soon as possible.

The representative of Australia said that his country had a continued interest in the issues raised in this case and would closely analyse the legal findings of the Panel and the Appellate Body in relation to the operation of regional trade agreements.

The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS34/AB/R and the Panel Report in WT/DS34/R as modified by the Appellate Body Report.

11. Term of appointment of Appellate Body members

(a) Proposal by India (WT/DSB/W/117)

The Chairman drew attention to the proposal by India contained in document WT/DSB/W/117.

The representative of India drew attention to document WT/DSB/W/117, dated 8 November 1999, which contained India's proposal on term of appointment of Appellate Body members. He recalled that on 3 November 1999, the DSB had agreed to reappoint two members of the Appellate Body for a second four-year term on the basis that these two members had expressed their willingness and interest in being reappointed. At that time, India had stated that it was not good for the system if the Appellate Body members had to express their interest and willingness to be reappointed. Members did not have direct contacts with Appellate Body members and India believed that this was appropriate. Members knew the Appellate Body through its hearings and its reports. Therefore, India believed that it was not appropriate for the Members to decide on the extension of terms of Appellate Body members who adjudicated in their respective cases since this was not in line with their independent functions. Appellate Body members should not be at the indulgence of Members for a second term extension. In light of these elements, India had stated on 3 November

1999 that it would prefer a non-renewable single term for Appellate Body members. On the basis of comments made by some Members, India had put forward a proposal. He recognized that many Members would not be in a position to examine India's proposal in-depth due to the preparatory process for the Third Ministerial Conference. He noted that the proposal would only apply with regard to future appointments and for that reason India had accepted the decision taken by the DSB on 3 November 1999. India believed the proposal deserved serious consideration from the point of view of the system, the interest of the WTO and the long-term interest of its Members. He therefore requested that Members give serious consideration to India's proposal and provide comments thereon. India considered it appropriate to consult on this matter after the Ministerial Conference.

The representative of the European Communities noted India's proposal on terms of appointment of Appellate Body members. The EC would be carefully examining the implications of this proposal. Its preliminary assessment was that the current system provided sufficient flexibility, worked well and did not jeopardise the integrity and the independence required of Appellate Body members. Nevertheless, the EC was prepared to give further consideration to this proposal.

The representative of Hong Kong, China said that India's proposal had some merits. However, such proposal was not without substantial implications for the operation of the dispute settlement mechanism and in particular of the Appellate Body proceedings. His delegation supported India's proposal that Members should look into this matter in a detailed manner after the Ministerial Conference. His delegation was prepared to participate in any future discussions on this important matter.

The representative of Canada said that, like other countries, Canada was of the view that such an important proposal would require very careful examination. Canada's initial view was that it would be hesitant to limit Appellate Body members to a single term. Where considerable experience and expertise had been built up by an individual Appellate Body member, it was clearly in the interest of the WTO to reappoint such a person to a second term. Canada would not wish to foreclose such an option by accepting the notion of a single fixed-term. Canada saw no evidence that the possibility of reappointment had in any way impaired the independence of serving Appellate Body members. Nevertheless, she wished to emphasize that this was Canada's initial and certainly not determinative view on this issue. Her delegation was ready to examine this proposal with an open mind and would participate actively in any further discussions relating to it in the months ahead.

The representative of Norway said that his delegation would carefully examine India's proposal. As an initial reaction, Norway supported the views and opinions expressed in India's proposal. Norway was ready to participate in any further discussions on this matter. However, it was inclined to consider this issue in the context of other institutional issues which could be subject to review in the future, such as the question of a standing panel, the composition of the Appellate Body and other issues. Norway would participate in any consultations on this matter to be held after the Ministerial Conference.

The representative of Mexico said that his delegation understood the reasoning behind India's proposal and shared a number of India's concerns. For that reason, Mexico was ready to begin in-depth consultations as proposed by India in order to examine its proposal. Mexico supported a non-renewable six-year mandate of Appellate Body members.

The representative of Japan said that India' s proposal raised very important points. With regard to impartiality or independence of Appellate Body members, Japan did not see any problem with the current system. Japan believed that this issue had to be examined in a balanced manner taking into account other aspects of the overall Appellate Body system. In Japan's view it was premature to draw conclusions on India's proposal at this stage.

The representative of Switzerland said that her country was currently examining India's proposal. It was her delegation's understanding that the objective of India's proposal was to preserve the dignity and the independence of Appellate Body members. Nonetheless, Switzerland believed that it would not be appropriate to remove the flexibility of being able to give a second mandate to persons who had proved to be competent and efficient in the discharge of their duties. These comments were only preliminary and Switzerland was ready to participate in any consultations on this matter.

The representative of the United States said that his country was giving careful consideration to India's proposal. The United States agreed with India that this issue should be further discussed and that it was premature to decide on this matter at this point in time.

The Chairman said that delegations were of the view that India's proposal should be examined in the course of informal consultations to be held after the Ministerial Conference. He proposed to revert to this matter at a future DSB meeting.

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

12. Indonesia – Certain measures affecting the automobile industry

(a) Statement by the European Communities

The representative of the European Communities, speaking under "Other Business", wished to refer to the new policy package on automobile industry adopted by Indonesia in the case: "Indonesia – Certain Measures Affecting the Automobile Industry". The EC had examined the new measures, particularly Article 23 of Regulation 59/1999 which administrated the conditions of application of the luxury tax. In the EC's view, the luxury tax might be applied so as to afford an advantage to certain vehicles produced domestically against imports. The EC believed that the new tax arrangements would provide an advantage to multiple-purpose-vehicles which were mostly produced in Indonesia against four wheel drive system cars for which there was no local production. The EC reserved its rights to revert to this issue at a later stage.

The DSB took note of the statement.