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on 16 May 2001

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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

(b) Japan – Measures affecting agricultural products: Status report by Japan

(c) Turkey – Restrictions on imports of textile and clothing products: Status report by Turkey

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of a reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is

resolved". He proposed that the three sub-items to which he had just referred 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.18)

2. The Chairman drew attention to document WT/DS27/51/Add.18 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.

3. The representative of the European Communities said that for a considerable period of time, the EC had tried to square a circle in order to reconcile different interests involved in the banana dispute. The EC had listened carefully to all arguments raised by the parties concerned both in consultations and in the DSB. The efforts undertaken in this regard had been successful and a solution had now been found which had received broad support of the parties concerned. He noted that the first-come, first-served system previously proposed by the EC, which was WTO-consistent, had not received such support. The EC had worked hard with a view to achieving a consensus-based solution and had found the agreement on such a solution in mid-April with the United States and on 30 April with Ecuador. This solution provided that a tariff-only system would be put into place from 1 January 2006, which would be preceded by a system of tariff-rate quota allocation based on historical performance with a sufficient percentage reserved for non-traditional importers. It seemed that this solution had met different and often conflicting concerns of all interested parties. He further noted that as from 1 January 2002, quota B would be increased by 100,000 tonnes of bananas and quota C would be reserved for ACP countries, subject to a waiver, which he hoped would be granted with the support of all Members. Since the texts of the US/EC and Ecuador/EC Understandings were available to Members, he did not wish to provide details on the tariff-rate quota management during the transition period. However, he would be ready to respond to any questions that delegations might raise at the present meeting.

4. The representative of the United States said that her country welcomed the prospects of finally resolving this long-standing dispute. As the EC was proceeding with implementing its regulations in accordance with the Understandings, the United States hoped that the Commission would continue its policy of consulting with interested parties.

5. The representative of Ecuador said that the information provided by the EC at the present meeting constituted further clarification concerning the Understanding reached between the EC and Ecuador. His country would follow closely the implementation of both Understandings reached by the EC in this case.

6. The representative of Colombia said that his country welcomed the progress made in the banana dispute. The allocation of tariff-rate quotas on the basis of historical licensing was a positive solution since it implied that the first-come, first-served system was no longer under consideration. Colombia believed that finding a solution to this matter was necessary for both the countries with trade interests in the product as well as the WTO. Colombia hoped that future developments would enable it to know details of the new regime at various stages of implementation. He recalled that Latin American countries had tried to find a solution to this dispute in order to reconcile different interests, but no agreement had been reached. Colombia recognized the efforts made by the EC and the United States to resolve this matter. However, Colombia attached great importance to its right to country-quota allocation and recalled that under the Uruguay Round Agreement the EC was bound to respect its obligations in this regard.

7. The representative of Jamaica said that her country shared the view that the recent Understandings reached among the EC, the United States and Ecuador represented progress in the

negotiations towards a new banana import regime, and would hopefully bring all parties closer to a conclusion to this long-running dispute. She recalled that Jamaica had always stated that the most effective means to ensure access to the EC market was through an appropriate tariff quota allocated on the basis of past trade and that such access would assure viable returns to all banana growers. However, Jamaica was unable to comment further on what had been agreed, as it had understood that decisions were being taken which could threaten Jamaica's continued access to the EC market and could therefore call into question the value of the recent agreement to small suppliers such as Jamaica.

8. The representative of Panama said that the Understandings reached by the EC represented a step forward as compared to the first-come, first-served system and demonstrated that it had been possible to reach agreement on the basis of historical licensing. Panama would follow closely any developments in this area, including the manner in which the implementing regulations would be drawn-up in order to put into place this very broadly outlined system so as to ensure that the interests of those countries, which needed the greatest amount of protection, were taken into account.

9. The representative of Honduras said that in previous DSB meetings, his country had stated that the banana dispute could only be resolved through constructive dialogue. Honduras, therefore, welcomed the readiness for dialogue shown by the United States and the EC. It considered that the Understandings were a step in the right direction as well as an acceptable way of resolving this complex dispute which threatened to undermine the credibility of the dispute settlement system. In principle, Honduras supported the Understandings, but had concerns as to whether the agreements set out in those Understandings would be implemented in good faith, as its interests as a banana-producing country would remain vulnerable until the last agreed conditions had been implemented. He stressed that before approving the waiver required to implement the Understandings, the parties should give assurances that they would take the necessary measures to safeguard his country's interest. Honduras was ready for dialogue and supported, in principle, the Understandings subject to good faith implementation.

10. The representative of Guatemala said that the status report submitted by the EC at the present meeting was a positive sign that the DSB's recommendations would be finally implemented. The first steps towards implementing the Understanding reached by the EC and United States had just been taken, but the end to the banana dispute was still subject to compliance in good faith by the parties. Although Guatemala believed that the Understanding was in its best interests it regretted that it had taken so much time for it to be reached. In the meantime, the production and marketing of an important agricultural product for Guatemala's economy had been severely affected and significant losses had been endured. Guatemala remained vigilant as to the political will of the parties to the Understanding to comply, in particular in view of the complexity of different steps designed to put the Understanding into effect and the proposed timetable. Guatemala would pay particular attention to the waiver which required to be approved within the framework of this Understanding, and would not approve any waiver which did not comply with the rules or which adversely affected Guatemala's rights. Guatemala urged the parties to the Understanding to comply promptly and to the letter, bearing in mind the damage that had been caused both to the system and to the economic interests of countries such as Guatemala, who only wished to go beyond this dispute and to pursue its efforts to build prosperity based on fair access for its products to international markets.

11. The representative of Costa Rica said that, as indicated in a recent statement by Ministers of the Latin American banana-exporting countries, his country supported the Understanding between the EC and the United States. Costa Rica believed that the Understanding provided the basis for implementing an import licence distribution system based on past trade. Costa Rica welcomed the increase in the volume of quota A since this would enable the more efficient developing countries to realize their export potential in the EC's market to a greater extent. However, Costa Rica regretted that its right to country-quota allocation had not yet been resolved and underlined that the EC had to respect its obligation in this regard. Costa Rica was concerned that the EC applied different standards

with regard to compliance with its international obligations under different agreements with two groups of countries. The EC sought to comply with the Appellate Body's recommendations with regard to Article XIII of the GATT 1994 in a different way for two groups of countries. Thus, with regard to its obligations towards the ACP countries, the EC had now announced its intention to request a waiver in order to allocate an exclusive quota for those countries. However, under the 1994 Framework Agreement on Bananas, the EC was required to allocate specific quotas to Colombia and Costa Rica. The EC had to meet its obligations regarding the need for four substantial suppliers to agree on quota allocation. Costa Rica regretted that the Understanding between the United States and the EC was aimed at solving the dispute for one group of countries towards which it had specific international obligations. Thus, Costa Rica urged the EC to continue its dialogue in order to settle the dispute with all interested parties.

12. The representative of Mexico said that his country's preference was a system which would provide equal access to the EC's market and, thus, a tariff-only system with an adequate tariff level represented the best solution. Once a tariff-only system was put in place it would then be possible to assess its merits.

13. The representative of Saint Lucia said that her country welcomed the Understandings reached among the main parties as they had ended a long period of uncertainty that was very costly to farmers and the economy as a whole. This had brought less divisiveness and bitterness which often characterized disputes. Now it was the time to mend fences and to concentrate on pursuing shared interests. Furthermore, Saint Lucia welcomed the Understanding because it preserved the EC market as a major market where viable returns could still be obtained by producers. The Understanding did not give all that was needed but at least it provided the countries with a measure of security. Saint Lucia expected that in concluding its administrative procedures, the EC would seek to ensure that even the most vulnerable suppliers, such as Saint Lucia, would continue to enjoy market security.

14. The representative of the European Communities said that his delegation had noted the comments made at the present meeting, which would be taken into account in the process of implementation.

15. The Chairman said that the discussion on this subject was encouraging and noted that the item would be removed from the agenda once full implementation had taken place.

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

(b) Japan – Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.14)

17. The Chairman drew attention to document WT/DS76/11/Add.14 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations with regard to measures affecting agricultural products.

18. The representative of Japan said that, as he had informed the DSB at the 5 April 2001 meeting, Japan had completed technical discussions with the United States with respect to its new quarantine methodologies concerning apples and other fruits. Japan was now in the process of carrying out necessary domestic procedures such as amending relevant Ministry Ordinances in order to implement the new quarantine methodologies. Japan hoped that it would shortly be in a position to notify the DSB of a mutually satisfactory solution to be agreed with the United States.

19. The representative of the United States said that, as had been noted previously, her country appreciated the extensive consultations undertaken by Japan during the preparation of its

implementation plans and was pleased that the technical discussions on these plans had now been completed. As the United States had stated at previous DSB meetings, all that now remained was for Japan to complete the administrative steps necessary to put its plans in place. The United States was disappointed that this had yet to occur, and that Japan had not yet completed its implementation. It was of even greater concern that Japan had yet to provide guidance on the date by which it would complete its administrative process. The best plans were of limited value if they were left on the drawing board. Japan had to act to put its new procedures into effect in order to end this dispute. However, until it did, the DSB would be unable to accept that Japan had implemented the recommendations and rulings in this case. The United States hoped that Japan's expectation that the parties would be notifying the DSB of a mutually satisfactory solution in the near future would be fulfilled, following prompt action by Japan to complete its implementation.

20. The representative of Australia said that his country wished to register its continuing interest in this matter and, given the continued delay in coming to a final conclusion, wished to take this opportunity to raise the following questions: (i) what progress had Japan made towards formal notification of the final outcomes of the dispute given this appeared to be taking longer than might have been anticipated under WTO time-frames?; (ii) what actions had been taken in Japan, i.e. by domestic authorities, to accommodate the final outcomes in terms of any regulatory changes?; and (iii) when might all the actions result in a final conclusion to this issue?

21. The representative of the European Communities said that like the United States and Australia, the EC was concerned about Japan's continued delay in implementing the DSB's recommendations. The EC urged Japan to proceed as rapidly as possible in order to implement the DSB's recommendations and expected that such implementation would be applied on an equal footing to other countries.

22. The representative of Japan said that his country was doing its best to speed up the necessary domestic procedures. Japan was in the process of providing internal explanations to those concerned with the new methodology, and wished to complete its domestic procedure as soon as practicable and hoped that the countries concerned would continue to be cooperative and constructive. He assured delegations that he would convey to his authorities in Tokyo the comments made at the present meeting.

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

(c) Turkey – Restrictions on imports of textile and clothing products: Status report by Turkey (WT/DS34/Add.7)

24. The Chairman drew attention to document WT/DS34/12/Add.7 which contained the status report by Turkey on its progress in the implementation of the DSB's recommendations with regard to its restrictions on imports of textile and clothing products.

25. The representative of Turkey said that, as explained in the status report, contacts contniued between capitals with a view to reaching a mutually acceptable solution as soon as possible.

26. The representative of India said that although a reasonable period of time for Turkey's implementation in this case had expired on 19 February 2001, his country had shown considerable flexibility. Thus on 8 March 2001 agreement had been reached to hold consultations within the next 30 days aimed at compliance by Turkey with the DSB's recommendations and rulings and at preserving India’s rights under Articles 21 and 22 of the DSU during and beyond the consultation period. At its meeting on 20 March 2001, the DSB had taken note of this bilateral agreement. Pursuant to that agreement, an Indian team had visited Ankara and had held consultations with

Turkey's authorities on 22 and 23 March 2001. Thereafter, consultations had continued through diplomatic channels. In those consultations, India had urged Turkey to fully comply with the DSB's recommendations and had indicated that, pending full compliance, Turkey could offer, as a temporary measure, a credible and meaningful compensation package in conformity with Article 22.1 of the DSU. India had made considerable efforts in this regard, but the progress achieved thus far had not been entirely satisfactory. While India continued its efforts in this regard, the matter could not be prolonged unduly, in particular since the reasonable period of time had already expired on 19 February 2001. Therefore, if a mutually acceptable solution could not be agreed within the next few days, India might be left with no alternative but to exercise its rights under the bilateral agreement of 8 March 2001 and the DSU provisions.

27. The representative of Turkey said that, thus far, he had not received additional instructions from his authorities. He was aware that proposals had been exchanged and according to the latest information, Turkey had submitted a counter-proposal to India and was now awaiting a response.

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

2. Egypt – Definitive anti-dumping measures on steel rebar from Turkey

(a) Request for the establishment of a panel by Turkey (WT/DS211/2 and Corr.1)

29. The Chairman drew attention to the communication from Turkey contained in document WT/DS211/2 and Corr.1.

30. The representative of Turkey said that detailed information concerning this case was contained in document WT/DS211/2 and Corr. 1. On the basis of this information his country was requesting the establishment of a panel to examine this matter.

31. The representative of Egypt said that his delegation had noted the statement made by Turkey. However, at the present meeting, his country was not in a position to accept the establishment of a panel.

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

3. Peru – Taxes on cigarettes

(a) Request for the establishment of a panel by Chile (WT/DS227/2)

33. The Chairman drew attention to the communication from Chile contained in document WT/DS227/2.

34. The representative of Chile said that on 1 March 2001, his country had requested consultations with Peru on the tax legislation applied to cigarettes, which violated Peru's national treatment obligations with respect to taxation as set forth, *inter alia*, in Article III:2 of the GATT 1994. To determine the tax rate on cigarettes, Peru's legislation made the following distinctions: (i) between cigarettes made of dark tobacco and cigarettes made of bright tobacco, setting a lower tax for the former; and (ii) between standard cigarettes made of bright tobacco and premium cigarettes made of bright tobacco. The question was how to distinguish one from the other. Such distinction was made on the basis of whether the brand of cigarettes was marketed in three or more countries. Under this scheme, the brands that were best known internationally, which were those imported by Peru, including those produced in Chile, were taxed at a rate twice as high as that applied to cigarettes which were not marketed in more than three countries, and which happened to be

those produced by the Peruvian industry. In many cases, imported cigarettes and those produced locally were similar in quality and price. This discriminatory treatment was a restriction on imports, since the imported brands were normally sold in more than three markets. It was also a restriction on foreign investment, since it was a disincentive to set up factories in Peru to produce international brand cigarettes, which were taxed twice as heavily as cigarettes marketed locally – brands which were firmly rooted in the Peruvian market - making it difficult for new brands to enter. Finally, it was a disincentive to Peruvian exports, since the sale of the brands on more than three markets would mean that they would be taxed twice. Thus, local industry exports went to the free zones, which were not considered as markets for the purposes of determining the applicable tax.

35. Over the past few months, different authorities had recognized the discriminatory nature of this tax scheme. For example, an investigation conducted in December 2000 by the Technical Secretariat of the Free Competition Commission of Peru's National Institute for the Defence of Competition and Protection of Intellectual Property had concluded that the system was distorting competition between imported and domestic products, providing the single local producer with protection in addition to the tariff protection. Furthermore, in press releases at the beginning of the year, the National Supervisor of the Peruvian Tax Administration had recognized that the tax in question had distorted the price system for cigarettes and had established differences between domestic production and imports. Finally, only two weeks ago, the General Secretariat of the Andean Community, in response to a complaint from one of its member countries, had concluded an investigation in Peru and had found that the discriminatory treatment with respect to taxes on cigarettes was contrary to the national treatment obligation in the Cartagena Agreement – which was similar to the WTO obligations – and had given the Peruvian Government a 10-day period to put an end to this violation. During the consultations held in Lima on 20 April 2001, the authorities of both countries had explained their positions, but unfortunately no agreement had been reached. This dispute had been going on for almost two years, and all available bilateral possibilities had now been exhausted. Consequently, Chile had no other option but to request the establishment of a panel to examine this matter and to conclude that the Selective Consumption Tax Law, modified by Supreme Decree 158-99-EF of 25 September 1999, was inconsistent with WTO rules, in particular but not exclusively, to Article III:2 of the GATT 1994, and to recommend the abrogation of the said tax scheme. Without prejudice to the above, Chile was ready to continue its discussions with the Peruvian authorities in an effort to finding a mutually acceptable solution. In seeking such a solution, Chile would spare no efforts.

36. The representative of Peru said that on 20 April 2001 her country had held a meeting with the Chilean authorities concerning Peru's tax system for cigarettes. During that meeting a positive exchange of information had taken place with regard to the aspects of Supreme Decree 158-99-EF which were of particular concern to Chile. Given the constructive spirit which characterized that meeting, it would have been desirable to continue the discussions at a bilateral level with a view to clarifying the present situation properly and finding a mutually satisfactory solution. As Peru's competent authorities had explained at that meeting, Decree No. 158-99-EF was neither discriminatory nor intended to protect its domestic industry. Peru wished to affirm its commitment to the multilateral trading system and its firm resolve to respect the WTO Agreements. Peru also wished to reiterate its willingness to continue to seek a mutually acceptable solution. However, should Chile decide to pursue its request for the establishment of a panel, Peru would defend its legislation within the framework of the DSU. In light of the above, Peru was not in a position to accept the establishment of a panel at the present meeting.

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

4. United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia

(a) Report of the Appellate Body (WT/DS177/AB/R-WT/DS178/AB/R) and Report of the Panel (WT/DS177/R-WT/DS178/R)

38. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS177/9-WT/DS178/10 transmitting the Appellate Body Report on "United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia", which had been circulated in document WT/DS177/AB/R-WT/DS178/AB/R in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Reports of the Appellate Body and of the Panel had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

39. The representative of Australia said that his country welcomed the adoption of the Reports and thanked the Panel and the Appellate Body, as well as the Secretariat, for their work. The comprehensive nature of the findings made by the Panel and the Appellate Body had confirmed Australia's view that the United States' measure was inconsistent with its obligations under Article XIX of GATT 1994 and the Agreement on Safeguards. The Panel and the Appellate Body had found that the United States had applied an overly broad definition of domestic industry by including growers and feeders of live lambs as part of the domestic industry of lamb meat producers. In addition, the United States' conclusions of threat of serious injury had been flawed because the data it had collected were not sufficiently representative of the industry. The United States had also been found to have acted inconsistently by failing to demonstrate that the increase in imports was a result of "unforeseen developments" as required by Article XIX of GATT 1994. The Appellate Body had upheld Australia's claim that the United States had failed to demonstrate that the domestic industry was in fact threatened with serious injury. The Appellate Body had also ruled that the US International Trade Commission, in making its determination, had failed to apply the required causation standard set out in Article 4 of the Safeguards Agreement. Taken together, these findings had confirmed that imports were not in fact threatening to cause serious injury to the United States domestic industry. The findings clearly indicated that the United States had failed to establish any justifiable basis for the application of safeguard measures. Indeed, given the extent and nature of the fundamental inconsistencies in the US approach in this case, there was clearly no legal basis or justification for the safeguard measures applied by the United States in this instance. He recalled that the US safeguard measure had been in place since July 1999. In line with Article 21.1 of the DSU, Australia called on the United States to comply promptly with the DSB's rulings and recommendation. It was Australia's view that the only way in which the United States could implement the Panel and the Appellate Body findings was to remove the safeguard measure without delay. Early withdrawal of the measure would be appropriate and desirable and an important demonstration of the United States' commitment to meeting its WTO obligations. Australia looked forward to receiving early advice from the United States of its intentions in respect of implementation, as provided for in Article 21.3 of the DSU. Australia stood ready to engage in constructive discussions with the United States with the objective of ensuring prompt implementation.

40. The representative of New Zealand said that his country welcomed the adoption of the Reports. The Panel and Appellate Body had ruled comprehensively that the safeguard measure imposed by the United States in 1999 was inconsistent with Article XIX of GATT 1994 and the Agreement on Safeguards. New Zealand therefore expected prompt compliance by the United States

with this finding and the early removal of the safeguard measure on lamb meat. The WTO placed important disciplines on the use of safeguard measures. Before any safeguard measure was to be imposed, four essential elements had to be demonstrated. First, the increase in imports had to be a result of unforeseen developments. In the case at hand, the Appellate Body had upheld the Panel's finding that the United States had failed to demonstrate the existence of unforeseen developments. Second, it had to be demonstrated that there was a domestic industry that was suffering or was threatened with serious injury. The Appellate Body in this case had upheld the Panel's finding that the United States had defined "domestic industry" too broadly by including the growers and feeders of live lambs, and not just the producers of lamb meat. Third, it had to be demonstrated that the industry in question had to suffer or be threatened with serious injury. On this issue the Appellate Body had agreed with New Zealand that the Panel had erred in applying the required standard of review and had found, moreover, that the United States had not adequately explained the determination that there existed a threat of serious injury. In addition, the Appellate Body had confirmed the Panel's finding that the data relied upon by the United States were not sufficiently representative to allow for an objective assessment of the state of the domestic industry. The fourth essential element was causation, namely, it had to be shown that increased imports had caused the threat of serious injury. As the Appellate Body had clarified in the case on "United States - Wheat Gluten Safeguard" (WT/DS166), this required, as an initial step, that injury caused by other factors was "not attributed" to imports. The Appellate Body in this case had found that the United States had not done this. The required causal link between increased imports and serious injury could therefore not be established. These were the four factors that had to be demonstrated prior to the imposition of a safeguard measure. Failure to satisfy any one of these essential requirements would render a safeguard measure inconsistent with WTO rules. The failure of the United States to satisfy any of these requirements at all in the present case clearly demonstrated that the safeguard measure it imposed on lamb meat had no legal basis under WTO rules. New Zealand called on the United States to respect the comprehensive nature of the Appellate Body's ruling in the present case, and to remove the safeguard measure as soon as possible. New Zealand considered this to be the only viable way in which the United States could faithfully implement the DSB's recommendations and rulings. New Zealand therefore expected the United States to take, without delay, the domestic steps necessary for it to remove the safeguard measure. In this regard, New Zealand looked forward to information from the United States of its intentions regarding implementation.

41. The representative of the United States said that her country was disappointed with the Panel and the Appellate Body Reports, and disagreed with their conclusions. The United States remained of the view that its safeguard measure on lamb meat satisfied its obligations under the Safeguards Agreement and Article XIX of the GATT 1994. The United States did not wish to re-argue the case at the present meeting. However, there were several aspects of the analysis in the Appellate Body's report that the United States was compelled to comment upon, and at least some of these should cause other Members concern from a systemic viewpoint.

42. The first aspect of the report related to the Appellate Body's finding that the United States had violated Article XIX of the GATT 1994 by failing to demonstrate and to make express findings relating to the existence of unforeseen developments as a matter of fact. The Appellate Body's findings on this issue were simply not supported by the plain text of Article XIX. In fact, the Appellate Body's findings on this issue verged on an interpretation of a WTO agreement, even though such interpretations could be made only by Members under the procedures provided in Article IX:2 of the Marrakesh Agreement. The Appellate Body had made three findings on this issue: (i) that the Member taking safeguard action had to demonstrate unforeseen developments as a matter of fact; (ii) that this demonstration had to be made before a safeguard measure was imposed; and (iii) that the demonstration had to appear in the report of the competent authority. None of these findings was based on the text of Article XIX. As the Appellate Body had admitted, "Article XIX provided no guidance on this issue". Instead, the Appellate Body had based its findings on "instructive guidance" that it drew from its own findings in earlier safeguard cases. The Appellate Body's approach was

erroneous and most unfortunate. The Appellate Body had taken a phrase from one of its earlier reports, that unforeseen developments were circumstances that "must be demonstrated as a matter of fact", and used this phrase in a different context to create an entirely new obligation that was not in the text of the agreement. The lack of guidance on this issue in Article XIX demonstrated that Members had not consented to be bound by any particular approach, and it was not the role of the Appellate Body to use its own prior decisions to create obligations that did not appear in the text. The Appellate Body's approach on this issue was inconsistent with its continued emphasis on relying on the actual language of an agreement and its criticism of panels that had tried to build on that text to create new obligations not found in the text. First, there was no reference to "demonstrating" anything in Article XIX. The Appellate Body's use of this term was unjustified. Furthermore, the Appellate Body's approach appeared to reverse the normal burden of proof in dispute settlement proceedings. Under the normal procedure, a Member challenging a safeguard measure would have the burden to show that there were no unforeseen developments. The Appellate Body had ignored this, and instead it had required that the Member maintaining a safeguard measure bear the burden of demonstrating that there were unforeseen developments. This was a new obligation, not found in the WTO Agreements. Second, the Appellate Body had then built further on its own flawed foundation to find that this "demonstration" had to be made prior to taking a safeguard measure. Again, there was nothing in Article XIX about making such a demonstration, let alone the timing for it. Third, the Appellate Body went on in yet another layer of new obligation to find that the "demonstration" had to be made by a Member's competent authorities, and in their published report, and not by any other official of the Member or in any other manner. However, Article XIX made reference neither to competent authorities nor to published reports, two concepts that originate in the Safeguards Agreement, not in Article XIX. There was simply no textual basis for the Appellate Body's conclusion that Article XIX required the competent authorities to make any finding on unforeseen developments in their report. The Appellate Body had supported its interpretation by claiming that any other approach would leave the means for complying with Article XIX "vague and uncertain". This was simply not true. Like most requirements in the WTO Agreements, a Member challenging a measure had to prove that a measure failed to meet the requirement. The United States appreciated that the Appellate Body was trying to bring clarity to the requirements for applying safeguard measures consistently with Article XIX. In the end, however, it was outside the mandate of the Appellate Body to elaborate on the text to satisfy the Appellate Body's own sense of what was "clear" or "certain". That was a task left solely up to Members. Article 3.2 of the DSU was quite clear on this point and had to be respected. Finally, the United States noted that the Appellate Body had made a legal finding on the relationship between the unforeseen developments requirement in Article XIX and the publication requirement in Article 3.1 of the Safeguards Agreement. As the Appellate Body noted, however, neither Australia nor New Zealand had claimed that the United States had acted inconsistently with Article 3.1 with respect to unforeseen developments. Accordingly, the Appellate Body had no mandate to consider this issue, and its finding was therefore moot and of no legal effect.

43. With regard to the issue of causation, the United States was pleased that the Appellate Body had again rejected the Panel's conclusion that imports alone, or by themselves, had to be sufficient to cause serious injury or threat. There was no basis for the Panel's approach in the terms of the Safeguards Agreement. The United States was also pleased to note the Appellate Body's clarification that its three-step "logical process" for reviewing compliance with Article 4.2(b) was not a legal test mandated by the text of the Agreement on Safeguards and that it was not necessary for a competent authority to reach a separate finding or reasoned conclusions on each such a step. The United States regretted that the Appellate Body had not similarly recognized the distinctions between its own statements on the issue of unforeseen developments and the actual terms of Article XIX. Finally, the United States was pleased to note that the Appellate Body had restated its finding from the case on "United States – Wheat Gluten Safeguard" that a competent authority which attributed injury caused by imports also, by implication, attributed the injury caused by other relevant factors. The United States wished to emphasize that the foregoing statement accurately reflected the nature of the obligations set forth in Article 4.2(b) of the Agreement on Safeguards. However, the Appellate

Body's suggestion in the case on "United States – Wheat Gluten Safegard" that a competent authority was compelled to demonstrate affirmatively that any injury caused by other factors was not improperly attributed to imports lacked any textual basis. Turning to the remainder of the Appellate Body's causation discussion, it was evident that some had read the Appellate Body's report as detracting from its earlier findings in the case on "United States – Wheat Gluten Safeguard". In the view of the United States, the touchstone for evaluating this issue remained the Appellate Body's unambiguous finding that it was not necessary under the terms of the Safeguards Agreement to demonstrate that imports alone, or by themselves, or *per se*, were causing a degree of injury that was "serious".

44. The United States was also concerned about certain aspects of the Appellate Body's discussion of the appropriate standard of review in safeguards cases. In paragraph 106 of its Report, the Appellate Body had reiterated that panels were not entitled to conduct *de novo* reviews or to substitute their conclusions for those of the competent authorities. This statement reflected the difference in the role of competent authorities, which was to evaluate the relevant facts and to reach reasoned conclusions on the basis of those facts, and of panels, which was to assess how the competent authorities had conducted this exercise. However, the Appellate Body had then stated that a panel had to "critically examine" the competent authority's explanation "in light of the facts before the panel". The United States assumed that the Appellate Body did not mean to suggest that the "facts before the panel" could include facts that had not been presented to the competent authority, since considering new facts was the very essence of a *de novo* review. The Appellate Body had then gone a step further, stating that a panel had to find that an explanation was not reasoned or adequate if there was an alternative explanation of the facts that was plausible, and if the competent authority's explanation did not seem adequate in light of that alternative explanation. Presumably, the Appellate Body did not mean to suggest that a Member might submit new interpretations of the facts in dispute settlement, interpretations that the competent authority had never been given an opportunity to address, and that the Panel might fault the competent authority for not addressing those interpretations in its published report. Competent authorities could not reasonably be expected to address in their reports not only all factual arguments that the interested parties raise, but also all conceivable arguments that could possibly be raised, and the Safeguards Agreement could not reasonably be read to require them to do so. Finally, it was entirely plausible that an objective analysis of the facts might support two equally plausible conclusions. In such a situation, a panel had to affirm the conclusion of the competent authority. There was no basis in the text of the Safeguards Agreement or the DSU to conclude in such a situation that the complaining Member's interpretation was correct.

45. On the issue of the domestic industry, the United States was troubled that the Appellate Body had given absolutely no weight to the factually based assessment by the competent authority that growers and feeders of live lambs were also producers of lamb meat when viewed within the particular structure and operational character of the US lamb meat industry. Instead, by narrowly construing which entities could qualify as producers of the like product, the Appellate Body had likely placed the remedy afforded by the Safeguards Agreement beyond the reach of many producers, in this and other cases, who were undeniably injured by a significant increase in imports. In conclusion, the United States had serious concerns about some of the Appellate Body's findings and the possible implications of some of those findings. Article XIX has long been an essential component of the GATT because it had allowed the CONTRACTING PARTIES, whether developed or developing countries - and now Members - to make tariff concessions with the confidence that they could take temporary action to assist their industries in the event that those concessions had lead to import surges that seriously injure or threaten to injure their domestic industries. If this avenue had not existed, or was unduly limited, Members would make fewer concessions in the first place, and would be more likely to respond to injury caused by increased imports by permanently modifying or withdrawing concessions under Article XXVIII of the GATT. Both Article XIX and the Safeguards Agreement were critical parts of the overall balance of rights and obligations under the WTO Agreements, and it

did not serve the interests of the WTO membership to interpret their provisions in a way that undermined this important purpose.

46. The representative of Japan said that his country had participated as a third party in this case and wished to comment on the Appellate Body's decision on the issue of causation and in particular on the non-attribution issue. Japan recognized that the Appellate Body had found that the US International Trade Commission had not met the requirement of the second sentence of Article 4.2(b) of the Safeguard Agreement since its examination had not included a separation of the effects of the other causal factors from those of increased imports. In doing so, the Appellate Body had not mentioned the standards under which the competent authorities should determine whether there was a genuine and substantial relationship between increased imports and serious injury, or a threat thereof, if such increased imports and other causal factors were examined separately. If as stated in the Appellate Body Report, it was not required that increased imports alone be capable of causing or threatening to cause serious injury, then the standard for determining the existence of a genuine and substantial relationship should be clarified in the near future.

47. The representative of the European Communities said that the EC considered that the Appellate Body had confirmed that the United States had adopted a safeguard measure which violated the US obligations under the GATT 1994 and the Agreement on Safeguards. This was unfortunately not the first time. The EC was concerned by the growing recourse by the United States to WTO-incompatible protectionist safeguard measures. The EC expected that the United States would draw the appropriate conclusions from this Report with regard to other safeguards measures based on the same approach. The EC was encouraged by certain aspects of the Appellate Body Report and in particular that on the issue of causality the Appellate Body had clarified that increased imports had to be the single and decisive factor in bringing about injury. Moreover, it had confirmed that application of the US statutory substantial cause test was not sufficient for proper causality determination and the EC was content with these findings of the Appellate Body.

48. The representative of Hong Kong, China said that although Hong Kong, China was not a user of safeguard measures, it maintained a long-standing systemic interest on trade remedies such as safeguards. He noted that the number of safeguard cases had been on the rise continuously since the Agreement on Safeguards had come into effect in 1995. In order to guard against any possible abuses, it was important to ensure that relevant rules on safeguards were strictly followed. Against this background, his delegation wished to make a few observations on the Appellate Body's rulings in this case. First, the Appellate Body's ruling on the requirement of Article XIX:1(a) of GATT 1994 had once again reaffirmed that the provisions of Article XIX of GATT 1994 and the Agreement on Safeguards had to be read as "an inseparable package of rights and disciplines". It followed that any safeguard measure imposed after the entry into force of the WTO Agreement had to comply with the provisions of both the Agreement on Safeguards and Article XIX of GATT 1994. The Appellate Body has also reaffirmed that the existence of "unforeseen developments", as stipulated in Article XIX:1(a) of GATT 1994, was a prerequisite that had to be demonstrated before the application of any safeguard measure. Moreover, the demonstration of this had to feature in the report of the competent authorities, as required under Article 3.1 of the Agreement on Safeguards. This ruling helped clarify the procedural requirements under the Agreement.

49. However, Hong Kong, China was concerned about the Appellate Body's findings on Article 4.2(b) of the Safeguards Agreement concerning the establishment of causal link between increased imports and serious injury or threat thereof. The Appellate Body had drawn direct reference from another case, namely, "United States – Wheat Gluten Safeguard" and had reversed the Panel's interpretation of the causation requirements in the Agreement on Safeguards. It had concluded that "the Agreement on Safeguards does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury" (paragraph 170). Having reversed the

Panel's general interpretative analysis of "causation", the Appellate Body had emphasized that the "final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury" (paragraph 179) and that "the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors" (paragraph 180). The Appellate Body had explained why it considered that in its report, the US International Trade Commission had not explained the process by which it had separated the injurious effects of the different causal factors. However, it was far from clear how safeguards authorities should attribute injuries to various factors including increased imports. It is also unclear what would constitute a "genuine and substantial relationship of cause and effect" in the final determination. In the view of Hong Kong, China further clarifications of these aspects would be helpful in preventing safeguard authorities from manoeuvring or even abusing the grey area in Article 4.2(b). Hong Kong, China had raised a similar concern at the DSB meeting on 19 January 2001 in the context of the case on "United States - Wheat Gluten Safeguard". He wished to reiterate these concerns at the present meeting and hoped that the Appellate Body would fully take into account the systemic implications of its ruling on Article 4.2(b) of the Agreement on Safeguards in its future rulings.

50. The representative of the Philippines said that the Appellate Body had determined that the safeguard measure in question was based on the determination of serious injury caused to industry other than the relevant domestic industry. However, it had not determined as to whether or not live lambs were products directly competitive to lamb meat for purposes of the definition of domestic industry under Article 4.1(c) of the Agreement on Safeguards.

51. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS177/AB/R-WT/DS178/AB/R and the Panel Report in WT/DS177/R-WT/DS178/R, as modified by the Appellate Body Report.

5. Statement by Argentina concerning the request by the EC for arbitration under Article 21.3(c) of the DSU in the case on "Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather"

52. The representative of Argentina, speaking under "Other Business", said that his delegation wished to refer to the EC's request for arbitration under Article 21.3(c) of the DSU to determine a reasonable period of time for implementation in the case on "Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather" (WT/DS155/6). Argentina considered that the DSB's recommendations and rulings concerning Article X:3(a) of the GATT 1994 had already been implemented. It was thus Argentina's understanding that such arbitration would only be carried out with regard to the DSB's recommendations on Article III:2 of the GATT 1994. At the 12 March 2001 DSB meeting, Argentina had stated that its intention was to request a reasonable period of time for implementation with regard to the tax advances in question. Furthermore, Argentina had stated that its implementation with regard to the question of involvement of the tanning industry in export operations was underway. Likewise, at the consultations with the EC in Brussels, Argentina had reported that Customs authorities had put a new clearance form into effect from 26 March 2001. Argentina recognized the right of the EC to request arbitration and, as announced at the 12 March DSB meeting, it would invoke the provisions of Article 21.2 of the DSU – developing country status – in relation both to the appointment of one or more arbitrators, if necessary, and to the substantive aspects of the dispute.

53. The DSB took note of the statement.