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on 23 August 2001

Chairman: Mr. R. Farrell (New Zealand)

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1. United States – Countervailing measures concerning certain products from the European Communities

(a) Request for the establishment of a panel by the European Communities (WT/DS212/4)

1. The Chairman drew attention to the communication from the European Communities contained in document WT/DS212/4.

2. The representative of the European Communities said that the EC had tried, for several months, to solve the disputes with the United States with regard to a number of WTO-inconsistent trade measures imposed on EC steel products. Since no solution had been found, the EC had no alternative but to bring the matter before the DSB. The panel request under consideration related to 12 countervailing duty orders against pre-privatization subsidies. Most of them had been imposed on the basis of an old methodology, which the Appellate Body in the case on "United States – Leaded Bars"[1] had found to be WTO-incompatible and had ruled against the US presumption that privatized firms continued to benefit from subsidies obtained by the previous state-owned companies. Following the Appellate Body's ruling, the United States had abandoned its previous methodology and had developed a new one, which continued to be WTO-inconsistent and would lead, in most cases, to higher duties. The EC attached great importance to the removal of these measures, which were the consequence of a methodology based on an erroneous interpretation of WTO rules.

3. The representative of the United States said that her country was not in a position to consent to the establishment of a panel at the present meeting. The United States had a few comments with regard to the EC's request for a panel. First, as with most legal proceedings, the underlying facts identified by the EC were complicated. The United States was particularly concerned about the EC's mischaracterization of how the United States had taken into account the privatizations in these cases. The EC's panel request incorrectly suggested that the United States, in dealing with the privatization of a government-owned company, had failed to take into account the Appellate Body's decision in the case on "United States – Leaded Bars" and continued to allocate subsidies previously received by the government-owned company to the successor privatized company. The United States believed that this was not accurate because after the Appellate Body's decision in the case on "United States – Leaded Bars", it had adopted a new change-in-ownership methodology. Under its new methodology, the US Department of Commerce was required to undertake an inquiry when a question was raised about the continued existence of a benefit in view of a change in ownership. Thus, in the context of a privatization, i.e. a government-to-private sale, the Department of Commerce began its inquiry by first examining several criteria in order to determine whether the post-privatization entity was, for all intents and purposes, the same as the pre-privatization entity that had received the subsidy. If it was, then all of the elements for a subsidy, i.e. financial contribution, benefit and specificity, continued to exist and the remaining portion of the unamortized subsidy continued to be countervailable. If, however, the first step of the inquiry was to reveal that the post-privatization entity was not the same as the pre-privatization entity, then the US Department of Commerce would undertake a second inquiry to determine whether the post-privatization entity received a subsidy as a result of the change in ownership. The United States believed that this new methodology was consistent with the SCM Agreement, as interpreted by the Appellate Body in the case on "United States – Leaded Bars".

[1] United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (WT/DS138).

Moreover, the United States applied this new methodology to any outstanding countervailing duty order in which a review had been initiated.

4. In this regard, she wished to comment on how the EC dealt with privatizations. In its recently issued countervailing duty regulations, the EC did not include any regulation specifically addressing privatizations, nor did the EC address privatization in any of its countervailing duty investigations. The EC did, however, address privatizations in the guidelines for its State Aids Code, pursuant to which it internally regulated member State subsidization. The position taken in these guidelines was contrary to the EC's position advocated in this dispute. The EC's State Aid guidelines automatically treated all of the prior subsidies as passing though to the privatized company.

5. The United States noted that it was unable to discern from the EC's panel request the precise identity of the measures it purported to be challenging, and it wished to reserve its rights in this regard. More specifically, it was unclear whether the measures in question were the identified countervailing duty proceedings and Section 771(5)(F) of the Tariff Act of 1930, or the US Department of Commerce's methodology in the abstract. While the United States recognized that the EC had the right to request a panel, it was confident that should a panel be established, it would conclude that the United States had not breached any WTO rules.

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

2. United States – Countervailing duties on certain corrosion-resistant carbon steel flat products from Germany

(a) Request for the establishment of a panel by the European Communities (WT/DS213/3)

7. The Chairman drew attention to the communication from the European Communities contained in document WT/DS213/3.

8. The representative of the European Communities said that this case concerned a sunset review of corrosion-resistant steel from Germany (*de minimis* case). He recalled that following a sunset review, the US Department of Commerce had recommended continuation of countervailing duty measures in spite of the fact that the amount of 0.54 per cent of subsidies was below the current *de minimis* level. The EC was concerned that the measures were maintained while subsidization was below *de minimis* levels in sunset reviews, and no evidence had been produced to show that it would rise above that level. The EC considered that the decision of the US Department of Commerce was contrary to the US obligations under the WTO Agreement, and was therefore requesting the establishment of a panel to examine this matter.

9. The representative of the United States said that her country could not agree to the establishment of a panel at the present meeting. She noted that the EC was challenging two fundamental aspects of the US sunset regime: (i) automatic self-initiation by the US Department of Commerce of sunset reviews; and (ii) the *de minimis* standard applicable to sunset reviews. With respect to self-initiation, the United States disagreed with the EC that it had inappropriately shifted the burden of proof to exporters and eliminated the requisite threshold for initiation in sunset reviews required under Article 21.3 of the SCM Agreement. That Article distinguished between self-initiated reviews by authorities – in this case, the US Department of Commerce – and reviews initiated on the basis of a duly substantiated request made by or on behalf of the domestic industry. The EC was attempting to make the requirements for an industry-based review apply to self-initiated reviews. In so doing, the EC was attempting to rewrite Article 21.3 of the SCM Agreement.

10. With respect to the *de minimis* standard, the United States disagreed with the EC's contention that the appropriate standard in a sunset review of a countervailing duty order was the 1 per cent

de minimis threshold set forth in Article 11.9 of the SCM Agreement. Article 21.3 of the SCM Agreement, which explicitly addressed sunset reviews did not refer to a *de minimis* threshold. Moreover, the *de minimis* standard in Article 11.9 of the SCM Agreement by its terms, applied solely to investigations and thus, did not govern sunset reviews of countervailing duty orders. Also in this case, the EC was attempting to rewrite the SCM Agreement. The United States believed that in general, and as applied to the countervailing duty order in question on German steel, its sunset review regime was in full conformity with US obligations under the SCM Agreement and the WTO Agreement. The United States was confident that should a panel be established, it would find this to be so and urged the EC to reconsider its approach to this matter.

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

3. United States – Definitive safeguard measures on imports of steel wire rod and circular welded quality line pipe

(a) Request for the establishment of a panel by the European Communities (WT/DS214/4)

12. The Chairman drew attention to the communication from the European Communities contained in document WT/DS214/4.

13. The representative of the European Communities said that on 1 March 2000, the United States had introduced two safeguard measures in the form of a tariff quota: one concerning welded line pipe, which mainly affected German producers, and another concerning steel wire rod which affected exports from Germany and Italy. Both measures had been imposed for three years and one day. The EC considered that these measures violated several substantive requirements of the Agreement on Safeguards, and Article XIX of GATT 1994. Consultations on this matter had been held on 26 January 2001. This case concerned the maintenance of measures which had been taken inconsistently with several of the standards laid down in the Agreement on Safeguards and Article XIX of GATT 1994. As a result of these manifold violations, the objective that safeguard actions only addressed emergency situations was completely nullified. Therefore, the EC was requesting the establishment of a panel to examine this matter.

14. The representative of the United States expressed her country's disappointment that the EC had chosen to request a panel to examine these measures. After careful and exhaustive investigations the US International Trade Commission had concluded that imports of these products was causing or threatening to cause serious injury to US industries. In each case, the President had applied a remedy only to the extent necessary to redress the injury or threat of injury posed by the imports, and to facilitate the adjustment of the domestic industries. WTO rules specifically provided that governments could impose temporary import restrictions to prevent or remedy serious injury to a domestic industry due to increased imports and to facilitate industry adjustment. She underlined that that was what the United States had done.

15. She noted that in the panel request the EC alleged that the safeguard measures were inconsistent, "in particular, but not necessarily exclusively", with certain listed provisions of the Agreement on Safeguards and the GATT 1994. This phrase suggested that if a panel was established, the EC might allege violations of additional legal provisions not identified in its request. As the Appellate Body had noted, and as the EC had argued in the past, identifying the treaty provisions alleged to be violated was "always necessary" and constituted a "minimum prerequisite" to present the legal basis of the complaint. Accordingly, to the extent that the EC intended to challenge the US measures under legal provisions not identified in its panel request, its request was legally deficient as a matter of law. In any event, the United States was not prepared to consent to the establishment of a panel at the present meeting.

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

4. United States – Continued Dumping and Subsidy Offset Act of 2000

(a) Request for the establishment of a panel by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand (WT/DS217/5)

(b) Request for the establishment of a panel by Canada (WT/DS234/12)

(c) Request for the establishment of a panel by Mexico (WT/DS234/13)

17. The Chairman said that the three sub-items to which he had referred pertained to the same matter. He noted, however, that the first sub-item had already been considered by the DSB at its meeting on 24 July 2001. He therefore proposed that the DSB consider the first sub-item separately from the other two sub-items pertaining to the requests by Canada and Mexico, which would then be taken up together.

(a) Request for the establishment of a panel by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand (WT/DS217/5)

18. The Chairman drew attention to the joint communication from Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand contained in document WT/DS217/5.

19. The representative of Japan said that as had been stated at the 24 July DSB meeting, her country, together with other Members, considered that the Continued Dumping and Subsidy Offset Act of 2000, the so-called Byrd Amendment, was not in conformity with the US obligations under the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. Japan was disappointed that since the 24 July DSB meeting little progress had been made towards resolving the dispute. It was, therefore, again requesting that a panel be established to examine the conformity of the Byrd Amendment with the relevant provisions of the WTO Agreement. She noted that the reasons for the establishment of a panel, including references to the provisions of the WTO Agreement that the United States violated were contained in document WT/DS217/5. Japan supported the requests by Canada and Mexico, and said that it would not object to the establishment of a single panel pursuant to Article 9.1 of the DSU, since these requests concerned the same legislation, i.e. the Byrd Amendment.

20. The representative of Thailand reiterated his country's view that the Continued Dumping and Subsidy Offset Act of 2000 was inconsistent with the US obligations under the WTO Agreement. For this reason, his country had joined the other eight Members in submitting, for the second time, a request for the establishment of a panel to examine this matter. Thailand welcomed the panel requests submitted by Canada and Mexico at the present meeting. Since these requests related to the same matter, Thailand had no objection to the establishment of a single panel pursuant to Article 9.1 of the DSU.

21. The representative of Brazil said that his delegation supported the statements made by previous speakers. Brazil believed that the Byrd Amendment was fundamentally flawed in terms of its compatibility with the WTO Agreement and was contrary to the letter of the Agreement and the spirit that had guided the drafters. In view of serious systemic implications and the real threat of losses to exporters to the US market, Brazil joined other complainants in requesting a panel for the second time. Brazil had no objection to the establishment of a single panel to examine the requests by Mexico and Canada on the same matter.

22. The representative of Indonesia said that his country continued to be concerned that after the first consideration of the panel request at the 24 July DSB meeting, there had been no indication that the Byrd Amendment would be repealed. The United States believed that its new legislation was WTO-consistent because WTO rules were silent on this issue. The fact that nine countries had acted together and that two more countries had decided to follow this action was an indication that many Members, both developed and developing countries, were concerned about this matter, in particular those who were subject to US anti-dumping actions. Indonesia reiterated its concern about the inconsistency of this new US legislation with the WTO rules. In particular, Indonesia was concerned that the Byrd Amendment would provide incentives for the US domestic industry and other interested parties to file new anti-dumping and countervailing duty petitions. Since there was no indication on the part of the United States that it would revoke its law, Indonesia was requesting for the second time, the establishment of a panel to examine this mater. Like other complainants in this case, Indonesia supported the requests by Canada and Mexico for the establishment of a single panel pursuant to Article 9.1 of the DSU.

23. The representative of India said that his country was also requesting the DSB to establish a panel on the so-called Byrd Amendment. India had made its position clear on this matter at the 24 July DSB meeting that the Byrd Amendment was inconsistent with the US obligations under the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. Like other delegations, India had no objection to the establishment of a single panel to examine the complaint by nine countries together with the complaints by Canada and Mexico.

24. The representative of Chile said his country was concerned about this case since part of its exports were affected by anti-dumping and other measures currently under investigation by the US Department of Commerce. In Chile's view the Byrd Amendment was an additional trade remedy on top of anti-dumping duties, which was not provided for in either Article VI of GATT 1994 or the Anti-Dumping Agreement. Moreover, it served as an incentive to North American industries to file anti-dumping cases, most of which were unjustified. From a systemic point of view, the Amendment was another example that some Members interpreted and applied the anti-dumping rules in such a way that they became trade barriers. For these reasons, Chile, together with eight other Members, was requesting the establishment of a panel. Chile had no objection to a single panel being established to examine the complaint by nine countries together with the complaints by Canada and Mexico, pursuant to Article 9.1 of the DSU.

25. The representative of Korea said that his country wished to join other co-complainants in requesting, for the second time, the establishment of a panel to examine the US Continued Dumping and Subsidy Offset Act of 2000. The United States could not offset dumping and subsidization by redistributing duties to the petitioners. This was not allowed under the WTO rules. Furthermore, Korea was concerned about the harmful effect that such a measure could have on the multilateral trading system. Korea hoped that the establishment of a panel at the present meeting would lead to a timely ruling so that the security and predictability of the multilateral trading system would be preserved.

26. The representative of the European Communities said that the EC together with a number of other Members was requesting, for the second time, the establishment of a panel to examine the so-called Byrd Amendment. This joint action was unprecedented, and showed that this US legislation raised systemic concerns all around the world in both developed and developing countries. In the EC's view, it was clear that under WTO rules the United States was not allowed to offset dumping and subsidization by redistributing duties to the petitioners. By doing so, the United States not only offered double protection to its industry, but also provided a clear incentive for its domestic industry to file cases against companies exporting to the United States. This law had the potential to deeply affect all exports to the United States regardless of their origin. This was "the United States – rest of the world problem". This law should be condemned as soon as possible to avoid prejudice to all US

trading partners. By filing their request for the establishment of a panel for the second time, the co-complainants wished to send a clear signal to the United States that there was the need to repeal legislation that was contrary to the letter and the spirit of WTO law. The EC welcomed the request by Canada and Mexico that a single panel be established, since these panel requests were similar to those of the EC and other co-complainants. For these reasons and in view of the systemic nature of the issues raised by this case, the EC could agree to the establishment of a single panel pursuant to Article 9.1 of the DSU.

27. The representative of the United States said that, as had been stated previously, in her country's view the Byrd Amendment was fully consistent with its international obligations under the WTO and the United States intended to defend it vigorously before the panel. This law did not alter how the United States made anti-dumping or countervailing duty determinations, or the amount of duties assessed on dumped or subsidized imports, which were issues covered by the WTO Agreement. She noted that the WTO Agreement did not address what a country might do with anti-dumping and countervailing duties after they had been collected.

28. 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.

29. The representatives of Israel, Mexico, Norway and Hong Kong, China, reserved their third-party rights to participate in the Panel's proceedings.

(b) Request for the establishment of a panel by Canada (WT/DS234/12)

(c) Request for the establishment of a panel by Mexico (WT/DS234/13)

30. The Chairman recalled that, as he had indicated in his introductory statement, these two requests to which he had just referred would be considered together. First, he drew attention to the communication from Canada contained in document WT/DS234/12.

31. The representative of Canada said that on 21 May 2001, her country, together with Mexico, had requested consultations with the United States regarding the Continued Dumping and Subsidy Offset Act of 2000, the so-called Byrd Amendment. These consultations which had been held on 29 June 2001, had unfortunately failed to resolve this dispute. On various occasions, Canada had expressed its concern with regard to the negative systemic implications of this legislation. It was clear that WTO rules only permitted Members to take measures that offset dumping or subsidization. They did not allow Members to redistribute remedial duties in order to offer their industry double protection. Moreover, by creating a clear incentive for US industry to file and support cases against companies exporting to the United States, this legislation also exposed foreign imports to the threat of arbitrary dumping and countervailing investigations. It was Canada's position, shared by 10 other Members who were requesting a panel on the same matter that the Byrd Amendment violated the US obligations under the WTO Agreement. Canada was therefore requesting the establishment of a panel to resolve this dispute. It expected that all complaints relating to this matter would be examined by a single panel, in accordance with Article 9 of the DSU.

32. The Chairman drew attention to the communication from Mexico contained in document WT/DS234/13.

33. The representative of Mexico said that the US legislation known as the Byrd Amendment was of concern to both developed and developing countries. Mexico had raised its concern at a number of fora, including during its joint consultations with Canada on 29 June 2001. In particular, Mexico was concerned about the negative impact of this legislation, which required all anti-dumping and countervailing duties received to be reallocated to the "affected domestic producers". The reallocation

or "offsets" provided for under the Byrd Amendment constituted both an additional protection against dumping and subsidization which was not envisaged in either the GATT 1994, the Anti-Dumping Agreement or the SCM Agreement, and a specific subsidy causing "adverse effects" to Mexican interests. The Byrd Amendment also provided a strong incentive to US domestic producers to file or support petitions which resulted in the distorted and arbitrary application of the provisions of the Anti-Dumping Agreement and the SCM Agreement and obviated the possibility of securing price undertakings. Mexico shared the view of other Members that the Byrd Amendment was contrary to the United States' WTO obligations. For that reason, Mexico was requesting that a panel be established to examine and condemn this legislation. Mexico also hoped that, pursuant to Article 9 of the DSU, all the complaints brought before the DSB on this matter would be examined by a single panel.

34. The representative of the United States reiterated her country's view that the Byrd Amendment did not breach any WTO obligations. While recognizing that a panel had been established to examine the complaint on this matter submitted by nine countries, the United States could not agree at the present meeting to the establishment of a panel to examine the complaints by Mexico and Canada.

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

5. United States – Section 129(c)(1) of the Uruguay Round Agreements Act

(a) Request for the establishment of a panel by Canada (WT/DS221/4)

36. The Chairman recalled that the DSB had considered this matter at its meeting on 24 July 2001 and agreed to revert to it. He drew attention to the communication from Canada contained in document WT/DS221/4.

37. The representative of Canada said that her country was requesting the establishment of a panel for the second time. She recalled that the first request had been submitted at the 24 July DSB meeting, but unfortunately the United States had not agreed to the establishment of a panel at that meeting. She noted that Canada's claims were contained in its request for the establishment of a panel, which had been circulated on 13 July 2001 as document WT/DS221/4. As previously stated, in Canada's view, the US measure was unjustified and inconsistent with the United States' WTO obligations. Consequently, in accordance with the relevant provisions of the DSU, the GATT 1994, the SCM Agreement and the Anti-Dumping Agreement, Canada reaffirmed its request for the establishment of a panel.

38. The representative of the United States said that her country was disappointed that Canada had chosen to proceed with its panel request. In particular, the United States was concerned that by bringing this case, it appeared that Canada was seeking to alter well-established jurisprudence that decisions under the dispute settlement system applied only prospectively. The United States believed that Section 129(c)(1) was fully consistent with its obligations, and it would vigorously defend the provision before the panel.

39. 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.

40. The representatives of Chile, European Communities, India and Japan reserved their third-party rights to participate in the Panel's proceedings.

6. United States – Measures treating exports restraints as subsidies

(a) Report of the Panel (WT/DS194/R)

41. The Chairman recalled that at its meeting on 11 September 2000, the DSB had agreed to establish a panel to examine the complaint by Canada. The Report of the Panel contained in document WT/DS194/R had been circulated on 29 June 2001. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Panel Report had been circulated as an unrestricted document. The Panel Report was before the DSB for adoption at the request of Canada. In accordance with Article 16.4 of the DSU, the adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

42. The representative of Canada said that her country welcomed the Panel's finding that export restraints did not constitute a financial contribution under the definition of "subsidy" in Article 1 of the SCM Agreement and thus were not countervailable subsidies. In Canada's view, the Report was extremely helpful in clarifying and reaffirming key principles underlying the SCM Agreement. In particular, the Panel had correctly found that to meet the "entrusts or directs" requirement in sub-paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement, an explicit and affirmative action of delegation or command on the part of a government had to be demonstrated. The Panel's discussion of the negotiating history was also informative, in particular its consideration of the purpose of the financial contribution element of the definition of "subsidy". The Panel had confirmed that this definition was agreed to by all Members in order to ensure that not all government measures that conferred benefits could be considered subsidies under the SCM Agreement. In light of these and other reasoned findings, Canada was pleased to join in a consensus to adopt the Panel Report.

43. The representative of the United States said that her country had decidedly mixed feelings about the Panel Report. On the positive side, the portion of the Report that dealt with the actual measures in question constituted a workmanlike application of the well-established mandatory/discretionary doctrine, and a model for how to interpret US domestic law in the context of a WTO dispute. By rejecting Canada's persistent efforts to mischaracterize US law in general, and US administrative law in particular, the Panel had properly found that none of the so-called measures identified by Canada required that US authorities treated export restraints as subsidies. In particular, the Panel had correctly recognized that under applicable US administrative law principles, agency practice was not binding on the agency and, thus, could not be regarded as a mandatory measure for purposes of the United States' WTO obligations. Accordingly, the Panel had not made any recommendations regarding the US measures before it. While the United States was pleased with the result, this outcome should not have come as a surprise. On two prior occasions – the latest as recent as in 1999 – Canada had officially expressed its position in writing to the US Department of Commerce that the US countervailing duty law did not require commerce to treat export restraints as subsidies. If the Panel had limited its findings to the mandatory/discretionary issue and its examination of the actual US legal provisions at issue, the United States could have said that this was a solid Report, and would have had no qualms in supporting its adoption. Unfortunately, in a step that appeared to have no precedent in GATT or WTO jurisprudence, the Panel had not limited its analysis to the measures before it. The United States believed that Members would find this other portion of the Panel Report – and the remarkable judicial activism it represented – extremely disturbing.

44. Although the Panel's application of the mandatory/discretionary doctrine to the US legal provisions was dispositive of Canada's claims, the Panel nonetheless had decided to pursue an extraneous discussion on the issue of whether an export restraint could constitute a financial contribution – and, thus, a subsidy – under the SCM Agreement. In so doing, the Panel had made findings not with respect to the measure at issue, but with respect to a purely hypothetical and abstract category of measures not within the Panel's terms of reference. It was important to recognize that, notwithstanding the title of this dispute, this case involved neither an actual export restraint nor, as the

Panel had correctly concluded, a measure which treated an export restraint as a subsidy. In the absence of such a measure, the Panel had been precluded by its terms of reference from offering opinions on a hypothetical measure, which either treated an export restraint as a subsidy in a specific instance, or required this outcome. Under Articles 6 and 7 of the DSU, a panel was authorized to make legal findings only with respect to the actual measures before it. In this dispute, the Panel had disregarded this structure and had breached the fundamental constraint provided for in the DSU which limited the subject of dispute settlement to actual disputes, and which precluded the issuance of advisory opinions regarding measures that did not exist.

45. The Panel's justification for this extraordinary exercise was as follows. First, the Panel had stated that it was unaware of any GATT/WTO precedent requiring a panel to consider whether legislation was mandatory or discretionary before examining the substance of the GATT or the WTO provisions at issue (paragraph 8.11 of the Report). Second, the Panel had cited three panel precedents for the proposition that any controversy as to the requirements of GATT/WTO obligations should be determined first before applying the mandatory/discretionary doctrine. Finally, based on the prior two considerations, the Panel had claimed that "… identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved" (paragraph 8.12 of the Report). The United States believed that each element of the Panel's justification was severely flawed. The Panel had simply opined on an issue that was irrelevant to the resolution of the matter before it, and that was not implicated by the measure before it. The Panel's first rationale that there was no precedent that required a panel to consider the mandatory/discretionary issue first was wrong for several reasons. It was true that there had not, heretofore, been an attempt to obtain an advisory opinion through the mischaracterization of a measure as mandating an allegedly GATT/WTO-inconsistent outcome. Therefore, it was natural that there had been no panel precedent on this point. However, there had been numerous disputes involving the limits of the dispute settlement system, an examination of which indicated that the Panel had exceeded these limits. For example, it was well established that panels might not examine the measures that had not been the subject of consultations, or in the extreme case, not even in existence at the time of consultations. This stricture would be easily circumvented if panels were to follow the logic of the panel in this dispute, since it would only be necessary that the complaining party alleged the existence of a measure mandating a WTO-inconsistent action. Under the Panel's logic, the complaining party would then be entitled to a substantive finding on the measure alleged, even if the panel ultimately concluded that the actual measure did not mandate the action in question. In other words, the measure was mischaracterized.

46. In this regard, numerous panels had concluded that in order to determine whether a measure was WTO-consistent, it was first necessary to determine what the actual measure provided for. For example, in the case on "Australia – Salmon"[2] the Appellate Body's first order of business was to correct the panel's mischaracterization of the measure, only then it had proceeded with the substantive analysis. Also, the panel in the case on "United States – Certain Import Measures"[3], had first determined the actual characteristics of the measure – which, as in this case, had been very much in dispute – since this would inevitably determine the nature and results of its substantive analysis. The Panel in this case had chosen to put the analysis of what the measure actually provided last, after the legal analysis had been completed, based on an inaccurate description of the measure and a hypothetical fact pattern. In addition, the Appellate Body had reinforced the fact that a measure might be found inconsistent based only on its own characteristics. In the case on "United States – Certain Import Measures", the Appellate Body had reversed a finding that the measure in question was inconsistent because it related to a second measure, one not yet in existence at the time the first had been taken (paragraph 104 of the AB Report). The Appellate Body had earlier supported the Panel's finding that the measure under examination did not mandate the second measure, and thus the latter

[2] Australia – Measures Affecting Importation of Salmon (WT/DS18).
[3] United States – Import Measures on Certain Products from the European Communities (WT/DS165).

was not within the terms of reference of the Appellate Body Report (paragraph 76 of the AB Report). The Appellate Body had also overturned another finding relating to the second measure, stating that because the terms of reference had covered the first measure only, "… the Panel should have limited its reasoning to issues that were relevant and pertinent to [that measure]. By making statements on an issue that is only relevant to [the second measure], the Panel failed to follow the logic of, and thus had acted inconsistently with, its *own* finding on the measure at issue" (paragraph 89 of the AB Report). The Appellate Body had, therefore, declared those statements to be of no legal effect. The Panel's statements in the case before the DSB regarding export restraints likewise did not relate to its finding as to the actual measure at issue, and therefore had no legal effect.

47. Beyond this, there was ample precedent for the proposition that, "Given the explicit aim of dispute settlement that permeates the DSU … Article 3.2 of the DSU is [not] meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute" (AB Report on "United States – Wool Shirts", p.19)*.*[4] In the context of discussions on judicial economy, the Appellate Body had indicated that panels should address the minimum number of issues necessary to resolve a dispute. For example, in the case on "European Communities – Poultry"[5], the Appellate Body had made clear that the concept of judicial economy applied to the consideration of arguments and not just claims. If the Panel in this case had followed this line of precedent, it would have limited itself to the mandatory/discretionary issue, because the Panel's resolution of that issue was dispositive of the dispute. The dictate not to make law outside the context of resolving disputes was even more compelling in this case since the Panel had effectively offered opinions not related to the actual measure in question. Thus, it was incumbent upon the Panel to resolve in a responsible way what appeared to have been an issue of first impression. In this regard, it should be recalled that Canada had asked the Panel to declare as "mandatory" measures which it had previously conceded were "discretionary".

48. With regard to the Panel's second rationale she drew attention to three GATT panel reports which did not support the proposition for which the Panel had cited. In the portions of the reports cited by the Panel, there was no controversy as to the requirements of the GATT obligations at issue, and no analysis by the panels of the relevant GATT provisions. With respect to the cases on "Thailand – Cigarettes"[6] and "United States – Tobacco"[7], the panels had not made determinations regarding GATT obligations, but had merely summarized what the relevant provisions stated, and had then proceeded to apply the mandatory/discretionary doctrine. Also, in the third case on the "United States – Superfund"[8] there was no genuine controversy as to the precise nature of the obligation or the measure at issue. In two sentences, the Panel had drawn the unextraordinary conclusion that a penalty tax of 5 per cent, if added to a tax designed to be equivalent to a domestic tax, would exceed that domestic tax. Neither party had contested this conclusion, nor the existence of the 5 per cent tax. The only issue was whether the tax was mandatory. The case before the DSB was not comparable. Notwithstanding the fact that the term "export restraint" was not found in the SCM Agreement or in the US countervailing duty statute and regulations in over 20 pages of text, the Panel had engaged in an entirely novel analysis of whether an export restraint would constitute a financial contribution, based on a hypothetical definition of export restraint not found in the US statute or regulations, nor in their preparatory materials. Given that the US Statute and regulations, even when read in conjunction with those preparatory materials, did not mandate any particular treatment of such a hypothetical export restraint, and given the extensive US opposition to Canada's position on the substantive issue

[4] United States – Restrictions Affecting the Imports of Woven Wool Shirts and Blouses (WT/DS33).
[5] European Communities – Measures Affecting Importation of Certain Poultry Products (WT/DS69).
[6] Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (BISD 37S/200).
[7] United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco (BISD 41S/131).
[8] United States – Taxes on Petroleum and Certain Imported Substances (BISD 34S/136).

and to the Panel even reaching the substantive issue, this case bore absolutely no resemblance to the cases cited by the Panel.

49. She then referred to the Panel's final rationale that a discussion of the subsidy issue would facilitate the Panel's assessment of the mandatory/discretionary issue. If the purpose of dealing with the subsidy issue was truly designed to facilitate the Panel's assessment of the mandatory/discretionary issue one would expect that the portion of the Report dealing with the mandatory/discretionary issue would be replete with references to the portion of the Report dealing with the subsidy issue. However, that was not the case. In the mandatory/discretionary portion of the Report, i.e. the portion in which the actual measures before the Panel had been analyzed, there was only a single reference to the other portion of the Report in paragraph 8.101 and even that single reference was not necessary to the Panel's analysis. The Panel could have disposed of this case without addressing the subsidy issue, and the Panel's assertions to the contrary were simply incorrect. Therefore, at best, the Panel's extraneous discussion could only be characterized as *obiter dicta*. The critical aspect of the Report was that the Panel had not limited itself to the measure before it – the identified provision of US law – but instead it had examined a hypothetical measure. The Panel had acted as if this were either a complaint brought by the United States against a hypothetical Canadian export restraint, or a complaint by Canada against a hypothetical US countervailing duty proceeding involving a hypothetical product and a hypothetical export restraint. The Panel had even had trouble identifying what its hypothetical measure was. Because there had been no actual export restraint before it, it had had to construct one, and had chosen to identify its hypothetical export restraint by relying on the definition of the export restraint used by Canada. Thus, the Panel's explanation that it had examined the US measures in a particular substantive context was groundless. There was nothing substantive regarding the hypothetical situations about which the Panel had speculated. Given Canada's panel request, the Panel should have simply posed the following question: "Assuming for the purpose of argument that an export restraint can never be a subsidy, do the US measures require the United States to treat an export restraint as a subsidy, however defined?" That would have been a substantive context. Had the Panel taken this approach, there would have been no need to give an advisory opinion on the status of a measure not in existence and not before the Panel. If there were any doubt as to the unprecedented nature of the Panel Report, the United States wished to call Members' attention to the section of the Report containing conclusions and recommendations in paragraph 9.1. In that paragraph, the Panel had restated its conclusion that an export restraint, as defined in this dispute, could not constitute a financial contribution under the SCM Agreement. She noted that the United States had examined the conclusions and recommendations of every panel report, and in each case conclusions of panels had always been linked to one or more of the measures before the panel. This was the only report in which a panel had rendered a conclusion totally in the abstract. Thus, the Panel's protestations to the contrary notwithstanding, the Panel had not applied or clarified the SCM Agreement. Instead, it had provided an interpretation of the SCM Agreement, a function which Article IX:2 of the WTO Agreement reserved for the Ministerial Conference and the General Council.

50. The US concerns were not mere "legalisms". The United States believed that all Members, regardless of their views on the substantive subsidy issue, should be concerned about this Panel's usurpation of an authority reserved to Members. The dispute settlement system was generally regarded as a success and some referred to it as "the jewel in the WTO's crown". Indeed, since the WTO had been established in 1995, the dispute settlement procedures had been invoked 235 times. However, this very success had brought strains in terms of the resource burdens imposed on participants in the system. Moreover, the very success of the system had led to pressures on Members to explore the outermost boundaries of the system and the types of results that the system could generate. One such boundary had been crossed in this case, an extremely important one. That boundary was the well-established principle that the GATT, and now the WTO, dispute settlement system was designed to resolve disputes, not to generate advisory opinions on abstract, theoretical legal questions. By requiring that actual measures be identified in panel requests, and that legal

findings related to these actual measures, Articles 6 and 7 of the DSU prevented advisory opinions. If panels opined on the implications of measures merely described in a panel request, without regard to the accuracy of that description or the actual existence of the measure described, then this fundamental purpose of Articles 6 and 7 would be undermined, and the dispute settlement system would then be open for business to provide advisory opinions. Members disagreed on innumerable legal questions as indicated in the minutes of various WTO Committees. However, if every such abstract disagreement were presented for resolution by panels and the Appellate Body, the system would be overwhelmed. In addition, such a system would produce poor decisions. The reluctance of legal tribunals, both municipal and international, to provide abstract advisory opinions was founded in part on the handicaps that faced a jurist who tried to interpret and apply legal provisions based only on hypothetical situations, and in the absence of actual facts. Indeed, this might be why the Uruguay Round drafters had created a separate mechanism in the SCM Agreement that would allow Members to obtain a non-binding advisory opinion regarding the status of any measure as a subsidy. One could think that none of these dire scenarios could have ever come to pass because one would have to have a bona fide measure before a dispute settlement case could be commenced. Not so, it would have been an easy task for a Member seeking an advisory opinion to label some document or statement by another Member as a measure that it sought to challenge.

51. According to the Panel in this case, before a panel could provide that the purported measure was not a measure at all within the meaning of the DSU, or that the measure did not mandate behaviour alleged to be WTO-inconsistent, the panel first would have to opine on the relevant substantive obligations in order to provide a so-called substantive context for its analysis. One might think that no Member would bring such a frivolous case. Again, not so. The case under consideration constituted Exhibit 1 for the proposition that Members would seek to use the dispute settlement process to obtain advisory opinions. Again, on the very issue dealt with by this dispute, Canada had taken the position in 1999 that US law was discretionary regarding the treatment of export restraints, but only one year later had commenced a dispute under the WTO alleging that the same law had somehow become a mandatory measure. She reiterated that the United States had mixed views regarding the Report, even though the panel had found in favour of the United States, her country had given serious consideration to appealing the Panel's decision to render an advisory opinion. However, the United States ultimately had declined to do so for several reasons. First, the Panel's ruling on the subsidy issue was clearly *obiter dictum*. In other words, as previously noted, the Panel's consideration of the subsidy issue was unnecessary to the decision in this case, because the outcome would have been the same regardless of the status of export restraints under the SCM Agreement. Furthermore, the Panel had exceeded its mandate. Thus it was of no legal effect. In light of the fact that this portion of the Panel Report was *obiter dictum* and beyond the Panel's authority, the United States had ultimately concluded that no useful purpose would be served by asking the Appellate Body to reiterate what its jurisprudence to date had already established, namely, that the *obiter dictum* of panels was non-binding, without legal effect, and moot. In addition, the Panel's dictum was very narrow dictum, as the Panel had recognized that it was using a narrow definition of export restraint, and that its conclusions would not necessarily apply to actual real-world measures that might be encompassed by a different definition of the term (paragraphs 8.15-7.17; 8.76 of the Report). Moreover, the parties, including the EC as a third party, had agreed that this dispute concerned the issue of export restraints operating independently of other government measures, and not in tandem with another government measure. Finally, the United States was confident that future panels would decline to emulate this Panel's actions. The Panel's justifications were manifestly transparent and wrong. The United States believed that future panels would abide by the Appellate Body's repeated admonition that the function of panels in the dispute system was to resolve disputes, and not to make law. In light of the fact that the erroneous part of the Panel Report had no legal effect, the United States could support the adoption of the Report.

52. The representative of Canada said that her country did not share the view of the United States that the Panel's rulings on the subsidy issue had no legal effect.

53. The representative of the European Communities said that the EC welcomed the Panel's interpretation with regard to the notion of financial contribution. In this regard, the Panel had usefully clarified that an export restraint could not be considered as a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the Subsidies Agreement. The EC expected the United States to abide fully by this interpretation in the future.

54. The representative of India said that his country had participated as a third party in this dispute, and had argued before the Panel that the export restraint as defined in paragraph 8.17 of the Panel Report, could not be considered as export subsidy within the meaning of Article1.1 of the SCM Agreement. India noted with satisfaction that the Panel, after examining the relevant provisions of the SCM Agreement in the light of the customary rules of treaty interpretations as laid down by the Vienna Convention on the Law of Treaties, had concluded in paragraph 8.75 of the Report that the export restraint could not constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence did not constitute a financial contribution in the sense of Article1.1(a) of SCM Agreement. Thus the Panel had rejected the US argument. India reserved its position on all other issues, including the mandatory versus discretionary domestic law issue.

55. The DSB took note of the statements and adopted the Panel Report contained in WT/DS194/R.

7. Brazil – Export financing programme for aircraft – Second recourse by Canada to Article 21.5 of the DSU

(a) Report of the Panel (WT/DS46/RW/2)

56. The Chairman recalled that at its meeting on 16 February 2001, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Canada concerning Brazil's implementation of the DSB's recommendations in this case. The Report of the Panel contained in document WT/DS46/RW/2 had been circulated on 26 July 2001. 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 Panel Report was circulated as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Brazil. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

57. The representative of Brazil said that the sole question before the Panel in this case had been whether the revised PROEX programme was consistent with Brazil's obligations under the SCM Agreement. Brazil welcomed the Panel's conclusion that the PROEX programme was, in every respect, consistent with its obligations. This was an unequivocal result and Brazil hoped that this would put an end to this long-standing dispute. Unfortunately, in the matter of Canada's failure to comply with the DSB's rulings and recommendations with regard to Canada Account there were no satisfactory conclusions of the report circulated in May 2000. Since this matter was before another Panel, he did not wish to elaborate on it at the present meeting. The aircraft cases related to the issue of export credits. Developing countries faced particular difficulties in providing permitted export credits to their exporters. This was because certain rules favoured developed countries. Whether this was intentional was, for practical reasons, irrelevant, but the effect was real. Brazil had already brought this issue to the attention of the Subsidies Committee. It had also submitted a paper on export credits to the General Council in the context of the preparatory process for the next Ministerial Conference. Brazil was certain that, after the examination of these issues, Members would agree that the rules on export credits would have to be revised.

58. He then turned to a specific issue of this case which, although not affecting the general conclusion of the compatibility of the revised version of PROEX with the WTO rules, was of great

concern to Brazil. According to the Panel, the WTO had completely delegated the authority to make the export credit rules to the Organization for Economic Cooperation and Development (OECD). In the proceedings, Brazil had argued that the version of the OECD Arrangement that provided the "safe haven" was the version in effect in 1995 when the WTO Members had officially incorporated the Arrangement into item (k) of Annex I of the SCM Agreement. However, the Panel had concluded erroneously that the latest version of the OECD Arrangement, whenever it was amended, applied to all Members, even though they had had no voice in that amending process and had not even been notified of the amendments. Brazil did not agree with this reasoning and reserved its rights in this regard. This was not a hypothetical concern. In 1998, three years after the WTO had incorporated the Arrangement by reference, the OECD had amended it in ways that affected regional aircraft, the product of immediate concern to Brazil. Neither Brazil or the WTO had been advised of those changes. Although the lack of notification underscored the absurdity of the result reached by the Panel, this was more than a transparency issue. It was a matter of balance of rights and obligations under the WTO Agreement as well as that of equity and fairness. Brazil had not appealed this conclusion because the Panel had found that it was in conformity with those rules, even as amended. The Panel Report was about the compliance of PROEX with the Subsidies Agreement, and Brazil was happy with the results in this regard.

59. However, Brazil was concerned about rules that would give to a small group of Members the power to make rules for the entire WTO. He noted that the Panel had expressed the same concern. For example, in paragraph 5.86 of its Report, the Panel had stated the following: "… under our interpretation, the Participants to the OECD Arrangement could modify the 1998 OECD Arrangement, and thus effectively the scope of the safe haven in the second paragraph of item (k) without Members' consent." In paragraph 5.87 of the Report, the Panel had further noted that "… the Participants to the 1998 OECD Arrangement could conceivably abuse their de facto power to modify the scope of the safe haven in a way which benefits them but does not equally benefit the rest of the WTO membership." Finally, in note 86 to paragraph 5.89, the Panel had stated that: "If Participants were to abuse their power to modify the scope of the safe haven, the recourse of other Members would be to renegotiate the second paragraph of item (k)." These were remarkable statements for a Panel to make about its own findings. Brazil believed that the Panel had attempted to signal that, in its view, the SCM Agreement contained a serious flaw when it appeared to grant amending power to the OECD. Brazil urged Members to take note of these paragraphs. Few developing-country Members had the experience of competing against the export credit practices of developed countries in the non-agricultural sector. However, the rules of the game were tilted against them. This was not about special and differential treatment since, under the present situation, the current rules favoured Members with low cost of capital and sovereign risk. Whenever competition existed in areas where the financing costs were a dealmaker, developing countries were at a disadvantage, even if their product was better and cheaper. This was contrary to the *raison d'être* of this organization.

60. The representative of Canada said that her country was pleased with the compliance Panel Report, which confirmed the position that Canada had taken since the beginning of this four-year dispute, namely, that PROEX financing could only conform to WTO obligations if it met certain minimum conditions. During the compliance Panel's proceeding, Brazil had insisted that it could conform to its WTO obligations simply by limiting PROEX interest-rate buy-downs to the OECD's commercial interest reference rate (CIRR), and that it could offer up to 100 per cent financing coverage for an indefinite term and still be in conformity. The compliance Panel had found that Brazil could not do this. In order to comply, PROEX III financing would have to conform to all of the interest rates provisions of the OECD arrangement, including a limit of 85 per cent coverage and a 10 year financing term. According to the compliance Panel, the only other way for PROEX III not to be illegal would be if it did not confer a benefit. However, the Panel had also stated that the very logic of PROEX III would be undermined if Brazil were to limit the provision of PROEX III to cases where no benefit had been conferred, since the purpose of PROEX III was to offer better export credit terms on transactions than would otherwise be available. Canada considered that the Panel had erred

in its application of the mandatory/discretionary distinction when it had found that PROEX III was not *per se* illegal. Canada also considered that the Panel had erred in its interpretation and application of Article 1.1(b) of the SCM Agreement regarding the conferral of a benefit. However, that did not matter in the result. The practical result of the compliance Panel Report was that the only way for Brazil to offer PROEX III financing to purchasers of its regional aircraft was if it did so in conformity with all of the interest rates provisions of the OECD Arrangement. Canada expected Brazil to comply fully with this Panel Report. She noted that there were a number of recent Brazilian press articles quoting senior Brazilian officials to the effect that Brazil would not follow conditions based on the OECD Arrangement. Brazil had accepted its WTO obligations in good faith and Canada expected that Brazil would comply with them. This Panel Report marked the fifth time that Brazil had been asked to modify significantly its financing practices with respect to regional aircraft. Canada expected full and transparent compliance by Brazil. In the event that Brazil did not adhere to the conditions imposed on PROEX III, Canada would not hesitate to take the required action, including, if necessary, an additional compliance panel proceeding. With respect to Brazil's statement on Canada Account, she said that the rulings in that case had mainly dealt with TPC Programme which Canada had fully revamped to the extent of withdrawing funds already promised. In this respect, she noted that Brazil had not withdrawn any of the subsidies it had been committed to prior to the 19 November 1999. With regard to Canada Account, the only financing that Canada had offered was to match, as provided for in the SCM Agreement, Brazil's support that was not in compliance with the SCM Agreement.

61. The representative of the United States said that her country had followed this case with interest, and hoped that the decision would assist Canada and Brazil in finding ways to resolve their difference. At the present meeting, she wished to refer to two aspects of the Panel's decision relating to export credit practices and item (k) of the SCM Agreement's Illustrative List of Export Subsidies. First, in paragraph 5.61 of its Report, the Panel had stated that the ordinary meaning of the second paragraph of item (k) suggested that export credit practices that conformed with the interest rate provisions of the OECD Arrangement were export subsidies, but were nevertheless not prohibited. However, such practices were subsidies only if they conferred a benefit on the recipient. Depending on the terms available in the marketplace, that might not always be the case. Second, on a more substantive note, the Panel's conclusions on the interrelationship between item (k) and the matching provisions of the OECD Arrangement caused the United States great systemic concern. The Panel had concluded that item (k) safe harbour was not available to parties who matched export financing offers that derogated from the terms of the OECD Arrangement. The Panel's interpretation threatened to undercut the OECD Arrangement and the SCM Agreement disciplines on export subsidies. The ability of Members to match non-conforming offers created an incentive for other Members not to make non-conforming offers, lest they found themselves in a subsidy "race to the bottom". Interpreting the second paragraph of item (k) in a way that prohibited Members who were concerned about respecting their obligations under Article 3 of the SCM Agreement from matching non-conforming offers removed any such incentive. Conversely, an interpretation of the second paragraph of item (k) that would shield matching offers from the Article 3 prohibition, particularly when the initial non-conforming offers were not themselves shielded, would provide an especially strong incentive against making non-conforming offers in the first instance. The Panel's interpretation invited an increase in market distortive subsidy practices, an outcome which was directly contrary to the entire premise of the SCM Agreement.

62. The representative of the European Communities said that the EC was concerned about the interpretation given by the Panel in this case. The EC believed that laws that had specifically envisaged the granting of export contingent subsidies and had given Members the discretion to award them, were contrary to the SCM Agreement, since Article 3.2 explicitly prohibited the maintenance of such subsidies. Otherwise, the disciplines of the SCM Agreement could easily be circumvented, a result which did not correspond to the intention of the drafters of the Agreement.

63. The representative of Brazil said that he wished to respond to the statement made by Canada that it was for the fifth time that the Panel Report had asked Brazil to significantly modify its financing practices. He underlined that the Panel Report had determined that the PROEX programme was consistent with Brazil's obligations under the SCM Agreement.

64. The DSB took note of the statements and adopted the Panel Report contained in WT/DS46/RW/2.

8. United States – Anti-dumping measures on certain hot-rolled steel products from Japan

(a) Report of the Appellate Body (WT/DS184/AB/R) and Report of the Panel (WT/DS184/R)

65. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS184/7 transmitting the Appellate Body Report on "United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan", which had been circulated in document WT/DS184/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 document WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

66. The representative of Japan said that although a few claims made by his country had not prevailed in the proceedings of the Appellate Body, Japan was, in general, pleased with the ruling in this case. The Panel and the Appellate Body had now established a clear and significant precedent for the interpretation of provisions in relation to the facts available, determination of the ordinary course of trade, injury determination and the concept of domestic industry as a whole, as well as the "non-attribution" standard. In particular with regard to all the "all others" rate, the Appellate Body had reaffirmed the inconsistency of the US law, both in general, and as applied in this case. Japan hoped that the United States would rectify the inconsistency of its law as soon as possible and would redress the nullification and impairment of benefits resulting from the application of this law. Japan considered that the stringent standard recognized by the Appellate Body for the use of "facts available" data would serve as a significant reference point for the future administration of anti-dumping duties. With regard to causation, Japan welcomed the fact that the Appellate Body had clearly shown that in the application of Section 771(7)(c)(iv) of the US Law pertaining to the so-called captive production provision, the United States had to abide by the rules of balanced and objective assessment when considering the industry as a whole. Japan considered that the ruling on "non-attribution" was significant, in that the investigating authority could no longer simply choose to ignore the factors to its liking, but would now be required to clearly account for them in its reports. This established a significant precedent for the standard against which "non-attribution" of factors was to be conducted in future anti-dumping investigations. Japan urged the United States to bring, without delay, its measures, laws and regulations into conformity with the WTO Agreement.

67. The representative of the United States said that although her country was pleased that the Panel and the Appellate Body had rejected many of Japan's challenges regarding WTO-consistency of the US anti-dumping duty measures, this dispute nevertheless had given the United States reason for serious concern. With regard to matters specific to the dispute, she drew attention to the Panel's rejection of Japan's claim that the investigation had been conducted in a biased and unreasonable manner. In addition, the Panel and the Appellate Body had upheld the provisions of US law concerning the circumstances under which anti-dumping duties could be imposed at the preliminary stage of the investigation and the analysis of "captive production" provision. Her country was

satisfied with the Panel's determination that the causation analysis conducted by the United States relating to injury from subject imports was consistent with the requirements of the Anti-Dumping Agreement. The Appellate Body had, however, declined to reach the latter issue while rejecting the Panel's construction of the causation requirements under the Agreement.

68. In addressing its concerns, the United States first wished to raise its systemic concern. While the Appellate Body had properly rejected Japan's claim that the "captive production" provision of the US anti-dumping duty statute was facially inconsistent with the Anti-Dumping Agreement, the Appellate Body had gone on, however, to address an issue that Japan had not appealed. This issue concerned the question as to whether the application of the "captive production" provision in the hot-rolled steel anti-dumping investigation was consistent with the Anti-Dumping Agreement. By taking up an issue that no Member had brought to it for resolution, the Appellate Body had exceeded the bounds of its authority.

69. The second area of concern was the Appellate Body's discussion of the standard of review set out in Article 17.6 of the Anti-Dumping Agreement. Article 17.6(i) provided that a panel should not overturn the evaluation of a national authority, even though the panel itself might have reached a different conclusion, if the panel determined that the authorities' establishment of the facts was proper and its evaluation of those facts was unbiased and objective. Similarly, Article 17.6(ii) required that in instances in which a panel found that a relevant provision of the Agreement admitted to more than one permissible interpretation, the panel shall find the national authorities' measure to be in conformity with the Agreement if it rested upon one of those permissible interpretations. The United States was concerned that the Appellate Body's discussion of Article 17.6 had given entirely insufficient emphasis to the distinct nature of the review provided for in the Anti-Dumping Agreement. While the Appellate Body acknowledged in paragraph 59 of its Report that the second sentence of Article 17.6(ii) "presupposes" that application of the customary rules of treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties could give rise to at least two interpretations of some of the provisions of the Agreement, it then seemed to diminish the importance of this text. Furthermore, the Appellate Body had stated that Article 17.6 only departed from the general review provided for in Article 11 of the DSU by allowing a panel to find a measure in conformity when it rested upon one of the permissible interpretations. This distinction in the standard of review should not be minimized, and any suggestion that the rule provided for in Article 17.6 was not materially different from that generally provided for in the DSU ignored the identification of Article 17.6 as a "special or additional rule and procedure" in Article 1.2 of the DSU.

70. The specific and unique provisions in Article 17.6 had been deliberately included to provide a special standard of review in anti-dumping investigations, intended to prevent panels from second-guessing the factual and legal determinations made by national authorities, and were an important part of the balance of rights and obligations assumed by the Members in agreeing to the Anti-Dumping Agreement. They could not be minimized or eliminated by dispute settlement reports. In this connection, the Appellate Body had aptly observed in its report in the case on "Hormones"[9] that to adopt a standard of review that was not clearly rooted in the text of a specific Agreement may well amount to changing the finely drawn balance in the competencies conceded by Members and those jurisdictional competencies retained by Members for themselves. As stated by the Appellate Body, neither a panel or the Appellate Body was authorized to do that. Moreover, any such result, was proscribed by Article 3.2 of the DSU which provided that "… recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[9] European Communities – Measures Concerning Meat and Meat Products (Hormones); WT/DS26; WT/DS48.

71. The third area of serious concern for the United States was the causation analysis in anti-dumping investigations. Specifically, the requirement that injury due to other causes should not be improperly attributed to dumped imports. The United States noted that the Panel had found the causation analysis of the United States in the hot-rolled steel investigation to be WTO-consistent. It further noted that the Appellate Body had declined to make findings on whether that analysis was WTO-consistent, but not before rejecting the Panel's construction of Article 3.5 of the Agreement. The United States did not believe that the Appellate Body should have reversed the Panel's findings regarding the required showing of causation. The Panel had appropriately concluded that there was no requirement in the Agreement to isolate the injurious effects of factors other than dumped imports. The only requirement was to ensure that any injurious effects resulting from other causes not be attributed to dumped imports. In this respect, the Panel had appropriately followed the sound reasoning of the GATT panel report in the case on "Atlantic Salmon"[10], which had been adopted before the Anti-Dumping Agreement had come into force and therefore was part of the GATT acquis. As such, a legitimate expectation among Members concerning the interpretation of the causation requirement had been created, that this report reflected Members' understanding of that obligation at the time the United States had agreed to the Anti-Dumping Agreement.

72. Further, the United States had presented a detailed analysis to the Appellate Body as to why the causation analysis reflected in the "Wheat Gluten"[11] and "Lamb"[12] Appellate Body Reports involving the Safeguards Agreement were different from that in the Anti-Dumping Agreement. These were two separate Agreements, with different objects and purposes and with wholly different texts pertaining to the question of causation and the manner of establishment of a causal link between imports and injury. The Appellate Body had made no reference to these important differences and appeared to have disregarded the interpretative principle that the use of distinct language connoted an intended difference in meaning. Instead, the Appellate Body's findings seemed to depend solely on the similarity of the non-attribution texts in the two Agreements, failing both to acknowledge the distinct context for that language and to ascribe any meaning or importance to the detailed direction regarding causation found in the Anti-Dumping Agreement, but absent from the Safeguards Agreement. Considering the importance of this issue to Members' rights under the Anti- Dumping Agreement, the Appellate Body should have explained why no consideration had been due to paragraphs 3.2 and 3.4 of the Agreement in establishing the relevant causation analysis. The Appellate Body had seemingly construed the causation requirements of the Agreement to require what would in many circumstances be virtually impossible despite rules of treaty interpretation that instructed that treaty language should not be made a nullity. Thus, while acknowledging the difficulties of trying to separate and distinguish the injurious effects of different factors, which might be intertwined and produce a combined effect, the Appellate Body had then dispensed with such concerns, by saying that "this is what is envisaged by the non-attribution language". In the view of the United States, whether a particular analysis was feasible or not was very relevant to the manner in which the Agreement should be construed, particularly where the text was susceptible to an interpretation which made its provisions meaningful.

73. The fourth area of concern involved the US provision of law on the calculation of anti-dumping duties applied to companies that were not investigated, referred to as the "all others" provision. The United States elucidated that it did not wish to re-argue the case other than to say that the Anti-Dumping Agreement did not explicitly require that margins containing any amount of "facts available" be excluded from the "all others" calculation: it was silent as to the amount of "facts

[10] United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway (BISD 41S/Vol. I/229).

[11] United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (WT/DS166).

[12] United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (WT/DS177; WT/DS/178).

available" that triggered exclusion. Given that the Anti-Dumping Agreement was ambiguous on the degree of "facts available" which required exclusion, Article 17.6 required that permissible interpretations such as that of the United States be accepted. Further, the Appellate Body had resolved the ambiguity in a way that did not foster predictability in the calculation of the "all others" rate and that did not fully take into account the practical side of calculating an "all others" rate.

74. Further, the Appellate Body had been right to find that the Anti-Dumping Agreement permitted Members to base normal value on sales in the home market by the exporter's domestic affiliates, and not just on direct sales by the exporter. However, the United States believed that the Appellate Body was mistaken in upholding the Panel's findings with respect to various other aspects of how the United States calculated anti-dumping duties, including the use of "facts available" in this specific investigation, as well as the test applied to determine whether related party sales were at arm's length. The United States believed that the Panel and the Appellate Body were correct to reject the broad challenge to investigations under the US anti-dumping duty law. However, the United States had serious concerns about some of the findings in this case. The Anti-Dumping Agreement was a critical part of the balance of rights and obligations assumed by Members, and it was critical that dispute settlement findings maintain this balance.

75. The representative of the European Communities said that the EC welcomed the Appellate Body Report and expected the United States to implement the recommendations in a speedy and orderly manner. The Report represented a significant contribution to the interpretation of the Anti-Dumping Agreement, in particular with respect to the concept of "ordinary course of trade". However, it also raised a number of concerns. In particular, the EC expressed its concern about the reasoning in both the Panel and the Appellate Body Reports underlying the interpretation of Article 9.4 of the Anti-Dumping Agreement. As the EC had stated before the Appellate Body, such rationale lost sight of the object and purpose of Article 9.4, and might lead to an unacceptable and unreasonable result. Since almost every dumping margin calculation included at least small elements of non-adverse "facts available", the Appellate Body's interpretation of Article 9.4 could render that provision virtually inapplicable. An interpretation of Article 9.4 which had the consequence that it could never be applied in practice could not have been intended by the drafters of the agreement and was not desirable. In the EC's view, Article 9.4, when read in light of its object and purpose, did not prevent the inclusion in the "all others" rate of dumping margins based partially on "facts available", provided that such facts were used simply to fill gaps in the information supplied by a cooperative exporter, and the investigating authority had drawn no adverse inferences.

76. The representative of Hong Kong, China said that his delegation welcomed the findings of both the Appellate Body and the Panel, that the US "arm's length" test, which excluded certain low-priced home market sales from the calculation of normal value, was inconsistent with Article 2.1 of the Anti-Dumping Agreement. The Appellate Body had explicitly pointed out that while under Article 2.2.1 of the Anti-Dumping Agreement Members had discretion to determine how to ensure that normal value was not distorted through the inclusion of sales that were not "in the ordinary course of trade", that discretion was not without limits. In particular, the discretion might be exercised in an even-handed way that was fair to all parties affected by an anti-dumping investigation. The Appellate Body had found that the lack of even-handedness in the rules applied in this case to low-priced and high-priced sales might in itself have created prejudice to exporters. Hong Kong, China agreed with the findings of the Appellate Body and Panel. It hoped that investigating authorities would in the future exercise a greater degree of even-handedness in carrying out their investigations to ensure fair treatment to exporters.

77. With respect to Article 6.8 and Annex II of the Anti-Dumping Agreement – use of "facts available" – the Appellate Body had upheld the Panel's ruling that the United States had acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available in making its dumping margin determination in the subject case. Hong Kong, China

considered that the application by the Appellate Body and the Panel of these provisions that the facts of this case could be of interest in future cases. In particular, Hong Kong, China welcomed the findings that deadlines were not absolute and that investigating authorities should not be entitled to reject information as untimely if the information had been submitted within a reasonable period of time. Hong Kong, China noted that the Appellate Body had set forth six non-exclusive factors that investigating authorities should consider, in the context of a particular case, in assessing whether information had been submitted within a reasonable period of time. It hoped that these non-exclusive factors could serve as constructive guidance in the future.

78. Hong Kong, China welcomed the Appellate Body's statement that investigating authorities could not fault the interested parties concerned for a lack of cooperation if they had failed to take due account of genuine difficulties experienced by interested parties, and had made them known to the investigating authorities. The Appellate Body had underscored that cooperation was a two-way process involving joint effort of the investigating authorities and interested parties. This might have indicated that sympathetic consideration should be given to anti-dumping respondents who were often required to produce a substantial amount of complex information within a short period of time and to exhaust tremendous resources in order to meet the investigating authorities' requests.

79. With respect to Articles 3.1 and 3.4 of the Anti-Dumping Agreement's: i.e. the "captive production" provision. Although the Appellate Body had upheld the Panel's finding that the "captive production" provision was not inconsistent with the Anti-Dumping Agreement, it had reversed the Panel's findings and had concluded that the United States had acted inconsistently in its application of this provision to the subject investigation. In making its ruling, the Appellate Body had reaffirmed that Article 3.1 did not entitle investigating authorities to conduct a selective examination of one part of a domestic industry in the absence of a satisfactory explanation. Rather, where one part of an industry was the subject of separate examination, the other parts should also be examined in a like manner. Hong Kong, China hoped that this ruling could provide Members with clearer guidance on making an injury determination and establishing a causal relationship between dumped imports and injury in all future cases. With these observations, Hong Kong, China supported the adoption of the Reports.

80. The representative of India said that his country had not participated in this dispute. However, India observed with interest the outcome of this dispute and certain legal interpretations developed by both the Panel and the Appellate Body. In particular, India noted with appreciation the legal reasoning and findings of the Appellate Body on the use of "facts available" in this dispute. India agreed with the Appellate Body that the attitude and conduct of anti-dumping investigating authorities should be both reasonable and cooperative. The anti-dumping investigation was a cooperative process, "whereby the parties worked together towards a common goal" of obtaining necessary information. Even if parties cooperated to a high degree, the requisite information might not be obtained. The Appellate Body recognized that "This is because the fact of 'cooperating' is in itself not determinative of the end result of cooperation" (paragraph 99 of the AB Report). Therefore, if the exporters under investigation cooperated to the best of their ability and yet were unable to furnish the requisite information, the Appellate Body had admonished that the investigating authorities should not arrive at a "less favourable outcome". Further, India agreed with paragraph 101 of the AB Report that paragraph 2 of Annex II of the Anti-Dumping Agreement "requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities". It was true that this provision, as further stated by the Appellate Body, was "another detailed expression of the principle of good faith, which was, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements". This organic principle restrained investigating authorities from imposing unreasonable burdens on exporters.

81. As stated in the Appellate Body Report, investigating authorities were expected to take into account any genuine difficulties of the exporters in furnishing information. If they failed to do so, "they cannot fault … the interested parties concerned for a lack of cooperation" (paragraph 104 of the AB Report). India fully endorsed the Appellate Body's view in paragraphs 84 and 85 of the Report that the word "reasonable" in Article 6.8 and Annex II of the Anti-Dumping Agreement "implies a degree of flexibility that involves consideration of all the circumstances of a particular case". Accordingly, the expression "reasonable period" in these provisions should be "interpreted consistently with notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allowed for account to be taken of the particular circumstances of each case". In this connection, the Appellate Body had laid down six broad factors which the investigating authorities should take into consideration. These included the nature and quantity of the information, difficulties encountered by the exporter in obtaining the information, and verifiability and usability of the information submitted by the exporters. Over a period of time the US Department of Commerce had developed a practice on the use of "facts available" or "total facts available". Such practice, in the light of the Appellate Body rulings, was inconsistent with provisions of the Anti-Dumping Agreement. Therefore, India called upon the United States to amend its practice and give effect to the rulings of the Appellate Body not only in this particular case, but also in respect of all other anti-dumping cases.

82. The representative of Chile said that his country had participated as a third party in this case since it was concerned about the increasing use of anti-dumping action as disguised barriers to trade. In this respect Chile shared the Panel's view that an investigating authority which was objective and impartial would have reached very different conclusions to those by the US Department of Commerce and the US International Trade Commission. For example, regarding the calculation of the so-called "all others" rate, Chile agreed with the Panel's conclusions, endorsed by the Appellate Body, that all the margins determined on the basis of known facts should be excluded in the determination of the rates that applied to the others. In this way, exporters who did not request to participate in the investigation would be prejudiced due to any shortcomings or gaps in the information provided by the exporters under investigation. Chile considered that the interpretation in arbitrary use of the concept, in the normal course of trade, could artificially increase the normal value as it had been done by the US Department of Commerce in this case.

83. Chile drew attention to the conclusions reached by the Appellate Body regarding the real meaning and scope of Article 3.5 of the Anti-Dumping Agreement. This was an important precedent, joining other determinations on safeguards, as stated by the Appellate Body in paragraph 228 of its Report: "If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors." This conclusion was an important point of reference for other dumping investigations because other factors, in addition to imports, should play an important role in the investigation and determination of injury which should not be imputed to the imports. These findings added new parameters that future investigations should follow as well as any measures that should be adopted in anti-dumping cases.

84. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS184/AB/R and the Panel Report in WT/DS184/R, as modified by the Appellate Body Report.

9. European Communities – Anti-dumping duties on imports of cotton-type bed linen from India

(a) Statement by India

85. The representative of India, speaking under "Other Business," recalled that on 12 March 2001, the DSB had adopted the Appellate Body Report and the Panel Report, as modified

by the Appellate Body in the case on "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India" (WT/DS141). Pursuant to Article 21.3(b) of the DSU, on 26 April 2001, India and the EC had agreed that five months and two days should be a reasonable period of time for compliance by the EC of the DSB's recommendations. That period of time had ended on 14 August 2001. On the same day, the EC had brought into force its Regulation No. 1644/2001 of 7 August 2001 in an effort to implement the DSB's recommendations. The EC had proposed to reduce the anti-dumping duties and to suspend collection of those duties. These measures would be terminated automatically in six months time, provided that no interested party requested its review. However, his country was concerned that the EC had not fully implemented the DSB's rulings. First, India did not consider that the dumping margins had been reassessed in accordance with the DSB's rulings and the provisions of the Anti-Dumping Agreement. Second, the most important finding of the Panel, which the EC had not appealed, was that the EC had not examined all the injury factors listed in Article 3.4 of the Anti-Dumping Agreement. The Panel had pointed out that the data had not even been collected let alone evaluation of all these factors by the EC investigating authority. In India's view, the EC had not collected any new information during its recent review process. Therefore, the reassessed injury had not met the requirements of the Panel's findings and Articles 3.4 and 17.6(i) of the Anti-Dumping Agreement. Third, the failure of the EC in the original case to provide constructive remedies under Article 15 of the Anti-Dumping Agreement constituted a fatal error, which could not be repaired retroactively. Therefore, the reassessed duties and the suspension of their collection was not an appropriate way of implementing the DSB's rulings. In India's view, the only appropriate compliance in this case was to rescind the anti-dumping measure. Moreover, as these measures were contingent upon the attitude of the interested domestic industry, they were uncertain. This was an open-ended invitation to the EC domestic industry to request a review. It sent a wrong signal and undermined the security and predictability of the dispute settlement system. Therefore, India called upon the EC to repeal the anti-dumping measure and to comply with the DSB's rulings and its obligations under the Anti-Dumping Agreement. Consequently, India reserved its rights under the DSU.

86. The representative of the European Communities confirmed that the EC had taken the necessary steps to comply, with the DSB's recommendations and rulings, by the end of the reasonable period of time. The EC regretted that India did not share its view on the consistency of the measures taken and hoped that it would be able to discuss this matter further with India.

87. The DSB took note of the statements.