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WORLD TRADE ORGANIZATION

DISPUTE SETTLEMENT BODY
27 September 1995

MINUTES OF MEETING

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Adoption of the Agenda

The representative of the European Communities requested that items 8 and 9 of the proposed Agenda concerning requests by Peru and Chile respectively for establishment of panels on trade description of scallops be removed from the Agenda of the present meeting since the time-periods for consultations stipulated in the DSU and for the inclusion of those items on the Agenda had not been respected. In the WTO, particularly in the DSB, Members attached great importance that all procedures and deadlines were respected. At the DSB meeting on 19 July 1995 there had been a breach in respecting these deadlines but this example should not be followed.

The representative of Peru expressed disappointment with the Communities' position since at the July meeting a similar request by Canada on the same matter had been accepted by the Communities. Peru was seriously concerned that a double standard was being applied to the detriment of a developing country; this undermined the credibility of the system. The Communities had received Peru's request for consultations on 18 July 1995[1] and the sixty day consultation period had expired on Saturday, 16 September 1995, without finding a mutually-satisfactory solution. At the present meeting, 11 days after the expiration of consultation period Peru's right to include this item on the agenda was contested. Thus a mere procedural aspect had precedence over a substantive rule, namely the right of every party that considered it was injured to request the establishment of a panel when the 60-day period consultations did not produce positive results. The Communities' objection to Peru's request meant that 71 days were not enough for the inclusion of a request for the establishment of a panel on the agenda. This resulted in a *de facto* extension of time-periods provided for in the DSU. Therefore, Peru insisted that its request remain on the Agenda and that the Communities reconsider their position.

The representative of Chile said the Communities did not take into account that consultations with Chile had already been initiated in June 1995, when the Communities had agreed to Chile's participation in consultations held with Canada on the same subject.[2] If the Communities had not considered that Chile met the "substantial trade interest" criterion provided for in Article 4.11 of the DSU it would not have recognized Chile's interest in joining these consultations. In such a case, Chile would have requested Article XXII:1 consultations. The purpose of Article 4.11 of the DSU was to facilitate practical application of the provisions of Article 9. The Communities' position deprived Article 4.11 of the DSU of any practical purpose and direct recourse had to be made under Article XXII:1. When Canada-EC consultations had been completed, Chile had requested further consultations to resolve this matter in accordance with the letter and spirit of Articles 3.7, 4.2 and 4.5 of the DSU. This request had been disregarded by the Communities thus discriminating against and impairing Chile's interests in deviation from the provisions of Article 4.10 of the DSU which stated that Members *"should give special attention to the particular problems and interests of developing country Members"*. Chile's consultations with the Communities had been completed and further consultations were unlikely to be productive. Now the merits of this case were being subordinated to procedural matters of secondary importance. There was no legal justification for postponing the establishment of a panel. This ran counter to the efficiency aimed at by the DSU in its letter and spirit since it was delaying the establishment of a panel on a matter on which a panel had already been established at Canada's request. This was a discrimination against Chile which was not being granted the same treatment as Canada and was not in conformity with the obligations of WTO Members towards a developing country. Chile would have no objections if new rules clarifying the procedural issues were to be established. Chile requested that the Agenda of the present meeting remain unchanged.

The representative of the United States recalled that at the meeting on 19 July the United States expressed its concern at the continuing differences of views on how to comply with the provisions of Article 4.7 of the DSU, and the requirements provided for in the Rules of Procedure of the DSB that documentation be circulated at least ten days in advance of a meeting. Steps should be taken to avoid this situation through careful scheduling of DSB meetings. There should be a common understanding on how the above-mentioned procedures should work together. The United States was willing to participate in consultations in an attempt to find a common understanding.

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[1]WT/DS12/1

[2]Request by Chile to be joined in consultations requested by Canada with the European Communities is contained in WT/DS7/2.

The representative of Argentina said that in his delegation's understanding any Member was entitled to inscribe an item on the agenda of a meeting and when that item was dealt with, any other Member could object and have a substantive discussion on it. If this interpretation was correct, the above-mentioned order of business should be respected.

The representative of Malaysia, speaking on behalf of ASEAN countries, shared the views expressed by Argentina.

The representative of Canada regretted the position taken by the European Communities. While Canada recognized the importance of the time-periods outlined in the DSU it believed that they should be observed in a manner that supported one of the fundamental principles of the DSU, namely the prompt settlement of disputes which was essential to the effective functioning of the WTO. Therefore, Canada believed that the Dispute Settlement rules should be applied in a practical manner. The purpose of the sixty-day period from a request for consultations to a request for the establishment of a panel and the purpose of the practice of circulating documents ten days prior to a meeting of the DSB was to ensure that the defending Member and other interested Members were aware of and prepared for such a request and discussion. In this case the Communities had been aware of the issue for a substantial period of time and all interested parties had had several opportunities to communicate with their capitals. Also, as had already been noted, a panel had already been established at the request of Canada on the same issue. Chile and Peru had participated in consultations on this matter and actively supported Canada's position since it had been first initiated in the GATT in 1993. Canada thought that a certain amount of common sense might be applied in making these types of decisions. Canada supported the United States' suggestion that the Chairman hold informal consultations on this matter. In Canada's view, without such consultations, the uncertainty with regard to how the system worked would persist.

The representative of Australia, New Zealand and Mexico supported the proposal for consultations on this matter and hoped that items 8 and 9 be considered at the present meeting. The representatives of Australia and New Zealand recalled that many Members were confronting a serious problem namely, the increased number of meetings. Therefore they urged that while following the rules laid down in the DSU, one should try to be pragmatic and flexible in order to avoid the unnecessary scheduling of meetings and thus further straining the capacity of many delegations to play the active role that they would like to have on these issues.

The representative of the European Communities said that his delegation's position did not reflect a lack of consideration or respect for Chile and Peru as developing countries and for their trading interests. The Communities wished to have with these countries, and with other partners, the best possible relations and to take into consideration their difficulties. The reference made to the position which had been taken when this same problem had been raised by Canada was correct. The Communities was wrong in not respecting the rules at that time but now it was determined to respect them. The Communities wished the WTO to be strong, and its rules to be respected. The matter at hand showed the need to clarify any ambiguity and the Communities was willing to clarify this at the present meeting. If before the adoption of the Agenda Members would be able to do so then the Agenda could be adopted as proposed and the Communities would accept the establishment of panels requested by Chile and Peru. Canada, New Zealand, the United States and others had recognized that there was a problem and that it needed to be solved. One could do this at the present meeting and in that case the Communities would accept the requests by Chile and Peru.

The representative of Chile said that in view of the lack of flexibility shown by the European Communities at the present meeting on procedural aspects it was willing to modify item 9 of the agenda of the present meeting but this should not constitute a precedent. She proposed that the sub-title of item 9 of the Agenda should read: "Request for a meeting of the DSB to consider the request by Chile for the establishment of a panel."

The representative of Peru supported the proposal for informal consultations on the matter at hand in order to find a precise, transparent, and balanced solution. He expressed the wish to participate in consultations to avoid, in future, situations similar to the one at the present meeting. He requested that the sub-title of item 8 of the Agenda should read: "Request for a meeting of the DSB to consider the request by Peru for the establishment of a panel."

The Dispute Settlement Body approved the Agenda contained in WT/DSB/W/11 with the above-mentioned amendments proposed by Peru and Chile and authorized its Chairman to undertake informal consultations on the question of time-periods in Article 4.7 of the DSU and the ten-day rule in the Rules of Procedure of the DSB.

1. Composition of Standing Appellate Body
   - Statement by the Chairman

The Chairman, in presenting a progress report on the issue of the appointment of the seven member Appellate Body said that, as he had reported previously, he and other members of the Selection Committee were giving their full attention to completing this important task. The Selection Committee remained fully committed to submitting a final recommendation consistent with all aspects of the guidelines for appointment to the Appellate Body both in the DSU and document WT/DSB/1. In the period since the last discussions of this issue on 19 July 1995, there had been time for further reflection and consultations. He believed that significant progress on resolving outstanding problems was now being made. While he was not yet in a position to submit a firm and final recommendation at the present meeting, he was much encouraged by the progress made since the DSB meeting on 19 July 1995 and believed that he would, in the near future, be in a position to submit a firm recommendation to the DSB. He intended to revert to this issue in the near future.

The Dispute Settlement Body took note of the statement.

2. Rules of Conduct
   - Progress Report

Mr. Armstrong (New Zealand), Chairman of the Informal Group on the Rules of Conduct, in presenting a progress report said that, in accordance with what had been agreed by the DSB at its meeting on 10 February 1995, he had last reported to the DSB on 19 July 1995 about progress in the open-ended informal consultations initiated in November 1994 on Rules of Conduct for DSU. Following that report, the open-ended group had met again and continued its extensive consultations prior to the summer break. A revised draft text of the Rules of Conduct had been circulated on 20 July 1995, and on 24 July 1995 a package of proposals had been put forward by the Chairman in order to resolve a small number of important outstanding issues in the text. The Chairman had stated that acceptance of this package would resolve the textual differences, and would mean that only the issue of the scope of the Rules in relation to the Textile Monitoring Body (TMB) would remain to be resolved. At the present meeting he was in a position to inform Members that subject to clarification of one sentence, the 20 July 1995 text as modified by the Chairman's package of proposals had now obtained general acceptance. This meant that the only outstanding issue concerned matters related to the TMB. On the latter point, his intention was to pursue contacts with delegations which had been participating in the consultations and to explore ways for a satisfactory solution to that issue. He had been very encouraged throughout the open-ended consultations by the hard work and constructive approaches which all delegations had brought to what had been lengthy and complex discussions. He therefore was hopeful that the one outstanding issue could be resolved in the same thorough but expeditious way. He would keep Members informed on this matter.

The Chairman thanked Mr. Armstrong for the progress report and congratulated him for his hard work in resolving many difficult issues. He hoped that the remaining issue could be resolved quickly.

The representatives of Australia, Argentina, Brazil, European Communities, Mexico, Norway, Thailand, United States, and Uruguay expressed gratitude and appreciation to Mr. Armstrong for the work that he had carried out on the Rules of Conduct. It was hoped that the last pending issue related to the Textile Monitoring Body (TMB) would be solved in a satisfactory manner as soon as possible. The representative of Thailand said that timely completion of drafting was important but that the substance of the Rules of Conduct should reflect the totality and all essential rules. The representative of Norway said that the problematic sentence of the draft text should be addressed first and then the question of the TMB should be dealt with in good faith. The representative of the United States said that, as indicated by Mr. Armstrong in his progress report, it was important to adopt Rules of Conduct so that the panelists and the members of the Appellate Body were aware of what was expected of them once they accepted the appointment to serve in the dispute settlement process. This view was shared by Norway. The Chairman reiterated the need to bring this issue to a successful conclusion at the same time as the question of the appointment of members of the Appellate Body.

The Dispute Settlement Body took note of the statements.

3. Indicative list of governmental and non-governmental panelists
   - Proposed nominations for approval by the DSB (WT/DSB/W/8)

The Chairman drew attention to document WT/DSB/W/8 containing names of candidates proposed for inclusion on the indicative list of governmental and non-governmental panelists. For practical reasons the information concerning qualifications of individual candidates indicated in the above-mentioned document had been separated into three main sectors namely, trade in goods, services and TRIPS. "Specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements"[3] were contained in the curricula vitae submitted to the Secretariat in a standardized form which could to be consulted in the Council Division. He recalled that Article 8:4 of the DSU provided for the establishment of a central indicative list of panelists. It stated that "that list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements". In accordance with the Decision on Certain Dispute Settlement Procedures for the GATS adopted by the Council for Trade in Services on 1 March 1995 and contained in document S/L/2, a roster of qualified governmental and non-governmental individuals should be established from which panelists might be selected. This roster, as indicated in document S/C/W/1, would form part of the central indicative list referred to in the DSU. This roster of names had not yet been drawn up, since it would be constituted on the basis of the information contained in document WT/DSB/W/8. With respect to TRIPS, he recalled that at its meeting on 24 May 1995 the TRIPS Council had not considered it necessary to establish a separate list of persons with experience of intellectual property matters. It had then been agreed that the central indicative list should include "persons with experience of intellectual property matters viewed from the trade or commercial perspective". He then proposed that the DSB approve the names contained in WT/DSB/W/8 thereby formally constituting the indicative list of governmental and non-governmental panelists.

The Dispute Settlement Body approved the names contained in WT/DSB/W/8.

[3]Article 8:4 of the DSU.

The Chairman reminded delegations that in accordance with Article 8:4 of the DSU "Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matters of the covered agreements, and those names shall be added to the list upon approval by the DSB." Therefore, at each regular DSB meeting any new names might be proposed by delegations for inclusion on the indicative list.

The representative of the United States said that his delegation supported the approval of the indicative list and requested that it be issued as an unrestricted document. This view was shared by Norway. The representative of the European Communities stated that he had no objections to the United States' proposal.

The Dispute Settlement Body agreed that the document WT/DSB/W/8 be issued as an unrestricted document.

4, 5, 6. Japan - Taxes on alcoholic beverages

- Request by the European Communities for the establishment of a panel (WT/DS8/5)
- Request by Canada for the establishment of a panel (WT/DS10/5)
- Request by the United States for the establishment of a panel (WT/DS11/2 and Corr.1)

The Chairman drew attention to the fact that requests for establishment of panels to examine Japan's taxes on alcoholic beverages had been received from the European Communities, Canada and the United States and were included on the Agenda of the present meeting as items 4, 5 and 6. He inquired whether the Dispute Settlement Body agreed to consider items 4, 5 and 6 together, since they pertained to the same matter.

The Dispute Settlement Body so agreed.

The Chairman drew attention to the communication from the European Communities contained in document WT/DS8/5.

The representative of the European Communities said that the Communities had been concerned about this matter for some time. In 1986 a dispute settlement procedure had been initiated[4] with well known results which confirmed the view expressed by the Communities.[5] Unfortunately, since that time it had waited for Japan to fully eliminate existing discrimination. For four years it had been constantly involved in contacts with Tokyo and the results had not been satisfactory. Therefore the Communities had initiated a new procedure in the WTO. Consultations on this matter had been held in July 1995 in an effort to reach a satisfactory solution but it had not been possible to settle these difficulties. It was for that reason that the Communities was now requesting the establishment of a panel with standard terms of reference in accordance with Article 7 of the DSU. The arguments and background of this matter were contained in document WT/DS8/5.

The Chairman drew attention to the communication from Canada contained in document WT/DS10/5.

[4] L/6031

[5] L/6216.

The representative of Canada said that her country considered that Japan's current liquor tax regime maintained different rates of taxation on various classes of distilled liquors which was inconsistent with Japan's obligations under Article III:1 and 2 of the GATT 1994. Under this system imported distilled spirits such as Canadian rye whisky were taxed at a higher rate than Japanese distilled spirits such as shochu. The application of differential rates of taxation protected domestic shochu production and discriminated against imported distilled spirits. This tax differential had a negative impact on Canada's ability to compete on the Japanese distilled spirits market, thereby nullifying and impairing the full benefit of competitive conditions accruing to Canada under the WTO. On 20 July 1995, Canada and Japan had held consultations in Geneva with a view to reaching a satisfactory solution to this matter. Unfortunately, the consultations had failed to settle the dispute and further consultations were not likely to resolve the matter. Canada, therefore, requested the establishment of a panel pursuant to Article XXIII of GATT 1994 and Articles 4 and 6 of the DSU with a view to ensuring that the Japanese tax law conformed with Japan's obligations under Article III:1 and 2 of the GATT 1994. This panel should have the standard terms of reference.

The Chairman drew attention to the communication from the United States contained in document WT/DS/11/2 and Corr.1.

The representative of the United States said that, as mentioned by the European Communities and Canada, Japan maintained a system of specific excise taxes on distilled spirits, which involved the application of several tax rates, and the lowest tax rate just happened to be applied to the Japanese distilled spirit shochu. This system discriminated against imported products in favour of the domestic product shochu. Japan's trading partners had, on a number of occasions, requested that this tax differential be removed. This problem remained notwithstanding a prior panel report on this matter and consultations which were held in July 1995. Consequently the United States requested the establishment of a panel and believed that this case was an appropriate one for the procedures foreseen in Article 9 of the DSU.

The representative of Japan said that as stated by the European Communities, Canada and the United States, Japan had held consultations under Article 4 of the DSU with the European Communities and Canada on 20 July 1995, and with the United States on 21 July 1995. On these and other occasions, Japan had provided the complaining parties with ample information, including relevant documents and statistics, concerning the basic philosophy behind the Japanese liquor tax system, the way in which alcoholic beverages were consumed in Japan etc. Japan believed that it had been able to demonstrate that its liquor tax system was in no way discriminatory in its purpose or effect vis-à-vis imported alcoholic beverages, nor was it protective in its purpose or effect in favour of domestic alcoholic beverages. In other words, the system was fully consistent with Article III of the GATT 1994. The fact that all the complaining parties had requested the establishment of a panel showed that in spite of all these good faith efforts on Japan's part, they remained to be convinced. He pointed out that some complainants did not make clear, on any occasion, the reasons for requesting the consultations, in particular why the Japanese liquor tax system was in violation of Article III:2 of the GATT 1994. Consequently, it was Japan's belief that the process of consultations which was to be carried out with a view to solving the dispute had not yet been exhausted. In this context, he drew the attention of the DSB to Article 4:1 and 4:5 of the DSU. The latter in particular stipulated, *inter alia*, that "in the course of consultations…Members should attempt to obtain satisfactory adjustment of the matter". This meant that consultations were not a mere formality. In light of the above, it was regrettable that the complaining parties had requested that a panel be established at the present meeting. In spite of this, Japan had decided not to raise any objections to the establishment of the panel requested by the European Communities, Canada, and the United States in order to uphold the spirit and the letter of the new dispute settlement procedures under the WTO. Since each request for the establishment of a panel related to the same matter Japan requested, with a view to making the procedures more efficient,

that a single panel covering the three cases be established pursuant to Article 9:1 of the DSU. Japan had no objection to the standard terms of reference.

The Chairman proposed that the Dispute Settlement Body take note of the statements and agree with the requests by the European Communities, Canada and the United States for the establishment of panels and the proposal by Japan to establish a single panel to deal with these complaints. This single panel should be established in accordance with Article 9.1 of the DSU and with standard terms of reference as provided for in Article 7 of the DSU which will cover the three complaints. It should be understood that this single panel as stipulated in Article 9.2 of the DSU "shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints, are in no way impaired."

The Dispute Settlement Body took note of the statements and agreed to the proposal by the Chairman.

The representative of Norway wished to reserve his country's third-party rights.

The Dispute Settlement Body took note of the statement.

7. European Communities - Duties on imports of cereals
   - Request by Canada for the establishment of a panel (WT/DS9/2)

The Chairman drew attention to the communication from Canada contained in document WT/DS9/2.

The representative of Canada said that her country considered that certain regulations of the European Communities which were intended to implement some of the European Communities' Uruguay Round concessions on the access of cereals including Council Regulation (EEC) No. 1766/92, ("EC Cereals Regulations") were: (i) inconsistent with Articles II and VII of the GATT 1994; (ii) inconsistent with Article 1 of the Agreement on Implementation of Article VII of the GATT 1994; and (iii) nullifying and impairing the benefits accruing to Canada pursuant to the WTO Agreement. Canada and the European Communities had held consultations in Geneva on 18 July 1995 with a view to reaching a satisfactory resolution of this matter. Unfortunately, the consultations failed to settle the dispute and further consultations were not likely to resolve the matter. Canada, therefore, requested the establishment of a panel. It also requested that the panel have standard terms of reference in accordance with Article 7 of the DSU.

The representative of the European Communities said that the Communities noted Canada's request for the establishment of a panel. However, since this request appeared as an item on the DSB's agenda for the first time and in accordance with Article 6 of the DSU, there was no need to establish a Panel at the present meeting. This request raised complex matters which had also implications for the interest of other trading parties and under those circumstances the Communities needed more time to study this matter further. Therefore, at the present meeting, the Communities were not in a position to agree to the establishment of a panel to examine this complaint.

The representative of the United States wished to register that his country was also concerned with the manner in which the Communities were implementing their tariff commitments on grains and was currently reviewing the results of consultations held with the Communities on this matter on 13 September 1993.

The representative of Canada said that her country was disappointed that the European Communities had not agreed with the establishment of a panel at the present meeting. It was Canada's

expectation that this item would be on the agenda of the next DSB meeting to be held on 11 October 1995.

The representative of Uruguay said that his country had a substantial trade interest in this matter, in particular with regard to rice, without prejudice to other products which could also be affected. Therefore, Uruguay wished to reserve its rights to participate in the dispute settlement process.

The representative of Australia said that his country wished to register its trade interest in this matter as a major exporter of cereals and rice and, of course, its wider interest in full implementation by the Communities of their WTO commitments under the Agriculture Agreement. Therefore, Australia wished to reserve its rights on this question.

The representative of Argentina pointed out that according to the latest available statistics Argentina had a 30 per cent share in the Communities' import market for corn. In addition to this trading interest, Argentina had a systemic interest in this matter.

The Dispute Settlement Body took note of the statements and agreed to revert to this matter at its next meeting.

8, 9. European Communities - Trade description of scallops
- Requests by Peru and Chile for a meeting of the DSB to consider their requests for the establishment of a panel

The representative of Peru said that his country wished to officially request that a meeting of the DSB be convened within the next fifteen days in order to consider a request by Peru for the establishment of a panel to examine the complaint in relation to trade description of scallops by the European Communities. Document WT/DS12/7, which was circulated for the present meeting, contained the request by Peru for the establishment of a panel. This document would also be relevant for the next meeting of the DSB.

The representative of Chile said that in view of the fact that the time-period for consultation on the trade description of scallops by the European Communities had expired and that the consultation had not brought a mutually-satisfactory solution, Chile requested that a DSB meeting be convened as soon as possible in order to consider the request for the establishment of a panel. Document WT/DS14/6 containing the above-mentioned request would be relevant for the next DSB meeting. Chile hoped that the panel would be established at that meeting and that no further delaying actions would be used that could affect Chile's interest.

The Chairman proposed that, in accordance with footnote 5 to Article 6 of the DSU, the next meeting of the DSB be held on 11 October 1995.

The Dispute Settlement Body agreed to meet again on 11 October 1995 to consider the requests by Peru and Chile for the establishment of panels.

10. Expiration of time-periods in the DSU
- Proposal by the Chairman (WT/DSB/W/10 and Add.1)

The Chairman recalled that at the DSB meeting on 19 July 1995, speaking under "Other Business", he had raised the question on how to deal with situations where a legal time-period under the provisions of the DSU expired on a holiday or on a WTO non-working day. Subsequently to that meeting a proposal on the expiration of time-periods in the DSU together with an illustrative list of DSU provisions to which this proposal might apply, was contained in WT/DSB/W/10 and Add.1, and

had been circulated to delegations for their consideration. He recalled that in accordance with this proposal, if a time-period expired on a WTO non-working day, any communication or action to be taken before the expiration of such a time-period would be accepted on the first subsequent WTO working day. Apart from the action which might be taken in accordance with the proposed procedures, the time-periods themselves and subsequent time-periods would not be affected. He added that as he had already indicated previously this procedure might be reviewed in the light of experience if necessary.

Since delegations had no objections to the above-mentioned proposal he proposed that the DSB agree to the practice concerning the expiration of time-periods contained in WT/DSB/W10 and Add.1.

The Dispute Settlement Body so agreed.

The representative of the European Communities said that the Communities had no difficulty to accept the above-mentioned proposal on the expiration of time-periods. However, for the sake of transparency it would be helpful to circulate a list containing all WTO non-working days.

The representative of the United States said that his delegation wished to join the consensus on the adoption of the above-mentioned proposal. However, he wished to express concern about the statement in WT/DSB/W/10/Add.1 implying that it was the responsibility of the Secretariat to determine when panel or Appellate Body reports were to be put on the DSB agenda. The United States believed that this was the responsibility of the parties to the dispute until the end of the time-period set out in the DSU. If the parties had not taken the initiative to request that that matter be put on the agenda of the scheduled meeting of the DSB before the 60th day, the Secretariat could consult with the parties concerned to ensure that the DSB could meet and discharge its reponsibility by that deadline.

The Chairman said that information concerning WTO non-working days will be made available to delegations by the Secretariat.

The Dispute Settlement Body took note of the statements.