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Dispute Settlement Body
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MINUTES OF THE MEETING

Held in the Centre William Rappard
on 10 January 2001

Chairman: Mr. S. Harbinson (Hong Kong, China)

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1. Korea – Measures affecting imports of fresh, chilled and frozen beef

(a) Report of the Appellate Body (WT/DS161/AB/R – WT/DS169/AB/R) and Report of the Panel (WT/DS161/R – WT/DS169/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS161/10 – WT/DS169/10 transmitting the Appellate Body Report on "Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef", which had been circulated in document WT/DS161/AB/R – WT/DS169/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in 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".

2. The representative of Australia said that his country welcomed the adoption of the Reports, and thanked the Panel, the Appellate Body and the Secretariat for their work. Australia was pleased that a large range of measures which had discriminated against Australian beef in the Korean market would have to be eliminated or brought into WTO conformity. There were two distinct elements to implementation: (i) the measures identified in Korea's schedule, which had benefited from a seven-year transitional period expiring on 1 January 2001; and (ii) the dual retail system and certain requirements and practices of Korean beef regulatory authorities. In regard to the measures benefiting from the seven-year transitional period, Australia was assessing the regulatory changes recently published by Korea and requested early confirmation from Korea that it had repealed all relevant

regulations relating to: (i) the price mark-up applied to imports through the Simultaneous Buy and Sell (SBS) system; (ii) the limitations on participation in the SBS system; (iii) the requirement that beef imported through the Livestock Products Marketing Organization (LPMO) be distributed only on the wholesale market, the LPMO's minimum wholesale price; and (iv) the discretionary licensing system.

3. In regard to the other measures found to be inconsistent with the WTO rules, Australia was satisfied that the Panel and the Appellate Body had recognized the discriminatory effect of dual retailing of imported beef. Australia had some reservations about the Appellate Body's reasoning that the formal separation of imported and domestic products at the retail level might not necessarily give rise to an inconsistency with Article III of GATT 1994. However, this reasoning could not in any way provide scope for Korea to exclude imported beef from outlets in which domestic beef was sold to the Korean consumer. Australia also welcomed the findings in regard to certain requirements and practices of Korean regulatory bodies. In regard to domestic support levels, Australia noted that the Appellate Body had upheld the Panel's findings that Korea's domestic support for beef in 1997 and 1998 was incorrectly calculated. The reasoning behind the findings should assist all Members in the calculation of agricultural support and in undertaking the review of the implementation of commitments under Article 18 of the Agreement on Agriculture. He noted that the Panel and the Appellate Body Reports served to clarify the key elements of calculating the level of domestic support subject to reduction commitments. For example, the calculation of domestic support should be based on the production eligible to receive the applied administered price and not the actual quantity purchased. Australia believed that such an approach would ensure that the Aggregate Measurement of Support (AMS) on individual products would more accurately reflect the economic impact of support mechanisms. The Reports had also clarified that, in circumstances where a product was not part of the base for the AMS calculation, the current AMS should be calculated in accordance with Annex 3 of the Agreement on Agriculture. The use of Annex 3 as the guiding methodology should lead to a more consistent approach by Members to the calculation of domestic support. Australia looked forward to receiving advice from Korea within the next 30 days of its intentions in respect of implementation, as provided for in Article 21.3 of the DSU. Australia stood ready to engage in constructive discussions with Korea on prompt implementation.

4. The representative of the United States expressed his country's satisfaction that the Panel and the Appellate Body Reports were before the DSB for adoption. The Reports showed that both the Panel and the Appellate Body had considered the issues with care and precision. He then thanked the Panel, the Appellate Body and the Secretariat for their hard work and fine product. The United States supported the adoption of the Reports, which had concluded that the restrictions imposed by Korea on imported beef were inconsistent with its WTO obligations. For more than 30 years, Korea had maintained restrictions on the importation, distribution and sale of imported beef. These constraints had prevented the United States and other countries from fully participating in a rapidly expanding market for livestock products. The timing of the Panel and the Appellate Body Reports coincided fortuitously with the termination of Korea's quota on beef on 31 December 2000. The prospect for complete liberalization of the market for beef, thus, now existed if Korea implemented the recommendations of the Panel and the Appellate Body and dismantled its remaining barriers to trade. The United States commended Korea for already initiating this process. Effective from 1 January 2001, Korea had modified its regulations regarding the handling of imported beef to begin to eliminate the various limitations on the channels for importing beef. The United States was encouraged by Korea's action and anticipated that similar steps soon would be undertaken to remove all other restrictions including the requirement that imported beef be sold in separate stores.

5. The findings of the Panel and the Appellate Body had put to rest any notion that a separate and distinct distribution system for imported and domestic products, established and maintained through compulsory government action, could be consistent with a Member's WTO obligations. In Korea the separate system for the retail sale of imported beef excluded imported beef from

approximately 90 per cent of the stores selling beef. The Reports were also important because they reinforced the principle that the burden of demonstrating the applicability of the general exceptions contained in Article XX(d) of GATT 1994 rested on the Member invoking the provision. Korea had claimed that its dual retail store regime was necessary to combat any fraud involving the mislabelling of imported beef. Both the Panel and the Appellate Body had concluded that given the existence of alternative WTO-consistent measures to address this problem, Korea could not demonstrate that its use of a WTO-inconsistent measure was necessary. The United States fully endorsed the result reached by the Panel and the Appellate Body on this question.

6. However, the United States had to express its disagreement with *dicta* in the Appellate Body Report appearing to give legitimacy to the view that, in some circumstances, Members would be called upon to rank various WTO-inconsistent measures on a hierarchical basis according to their relative degree of offensiveness. As it had stated in previous cases, the United States failed to see any textual support for a construction of the word "necessary" that would give rise to the inference of a complex analysis requiring a Member invoking either Article XX(b) or (d) to establish the total range of measures available to it and then rank them according to their relative degree of inconsistency with the provisions of GATT 1994.

7. The Reports were also significant as they were the first to address the domestic support provisions of the Agreement on Agriculture and therefore constituted a milestone in the WTO on this very important topic. The Appellate Body and the Panel had confirmed that the provisions of the Agreement on Agriculture, and particularly Annex 3 to that Agreement, set forth very specific mandatory requirements regarding the calculation of the current total aggregate measurement of support. Members were not free to depart from the methodologies prescribed therein and, therefore, could not substitute alternative calculations to suit their own internal purposes. If they were able to do so, the disciplines on domestic support would be greatly eroded with each Member applying different and potentially inconsistent methodologies. The Panel and Appellate Body Reports had correctly given full effect to the Members' intent that the Agreement on Agriculture bring discipline to domestic subsidies by requiring that the methodology set forth in the Agreement for the computation of domestic support be applied uniformly. By doing so, the Agreement's objective of minimizing the resulting economic distortions in trade in agricultural products was also advanced. The Reports in this dispute represented an apt point of departure for continued reform in this area.

8. The United States noted that while the Appellate Body had been unable to sustain the Panel's finding that Korea's level of domestic support in 1997 and 1998 was inconsistent with its obligations, this had resulted from the absence of a single piece of data necessary to complete that determination. The Appellate Body had been emphatic that its inability to reach a conclusion on this point did not constitute a finding that Korea had complied with its obligations during those years. Because the permissible level of domestic support declined annually throughout the implementation period, it appeared that if it were to maintain domestic support at the same levels as prevailed in previous years or added to that earlier level, Korea would breach its AMS. The United States expected that Korea would be alert to this fact in fashioning domestic support for its agricultural sector. His delegation noted that Korea would, pursuant to Article 21.3 of the DSU, state its intentions with respect to implementation within the next 30 days. The United States was prepared to engage in constructive discussions with Korea on prompt implementation.

9. The representative of Canada said that his country had participated as a third party in this dispute since it had long been concerned about certain measures maintained by Korea regarding the importation and treatment of imported beef. Canada was pleased with the findings of the Panel and the Appellate Body with respect to a number of measures found to be inconsistent with Korea's WTO obligations. Korea was Canada's fourth largest export market for beef. Given this strong commercial interest, Canada called on Korea to bring its measures into conformity with its WTO obligations expeditiously and, in particular, to end the dual retail system for beef as soon as possible. A rapid

implementation would be beneficial to stakeholders of both countries. Canada looked forward to Korea's regular reports on its implementation of the DSB's recommendations.

10. The representative of New Zealand said that his country had participated as a third party in this dispute, which, in its view, raised significant systemic issues in regard to both the correct interpretation of obligations under GATT 1994, and under the Agreement on Agriculture. New Zealand welcomed the ruling of the Panel and the Appellate Body that Korea's dual retail system for the marketing and distribution of beef was inconsistent with the WTO rules. New Zealand also welcomed the ruling of the Panel, which was unchallenged on appeal, that Korea had discriminated against imports of grass fed beef in favour of grain fed beef. This was an important issue for New Zealand, as a major exporter of grass fed beef. New Zealand was also pleased that the Appellate Body had upheld the view of the complainants and New Zealand that Korea had incorrectly calculated its domestic support to beef in 1997 and 1998. In doing so, the Appellate Body had usefully clarified the rules relating to the calculation of domestic market price support to agriculture.

11. It was of particular note that the Appellate Body had upheld the view that in the absence of data and methodology in the supporting tables to agriculture schedules, the provisions of Annex 3 of the Agreement on Agriculture were to apply. And it was the amount of production declared eligible to receive the applied administered price, rather than actual purchases, which was to be used to calculate market price support. The Panel's conclusion that Korea had incorrectly used a fixed external reference price for beef which related to the wrong stage of processing was also an important finding. While it regretted that no information was made available by Korea which would have allowed the Appellate Body to complete the analysis to determine whether Korea had exceeded its domestic support commitments, New Zealand nevertheless considered that the Appellate Body Report had contributed to ensuring that the provisions of the Agreement on Agriculture relating to domestic support were properly applied by Members in the future. New Zealand urged Korea to correctly recalculate its domestic support for agriculture consistent with the provisions of the Agreement on Agriculture, and to ensure that its total domestic support did not exceed its commitments. New Zealand looked forward to Korea's prompt compliance with the Panel's and the Appellate Body's rulings.

12. The representative of Korea said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work. In light of the significant issues raised in this case, Korea wished to make a few comments on the Panel's and the Appellate Body's findings and rulings. First, Korea welcomed the Appellate Body's ruling that the Panel had erred in identifying the AMS commitment levels of Korea as the figures without brackets. At the same time, Korea fully supported the Appellate Body's finding that the figures within brackets in Korea's Schedule constituted Korea's AMS commitment levels. This ruling of the Appellate Body was fully in line with the rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties. Second, as an issue of principle, Korea was concerned about the Appellate Body's reasoning that, in calculating current AMS for beef, Korea could not consider the constituent data and methodologies used to calculate the Base Total AMS, because the specific product in question was not included in its calculation. In Korea's view, a comparison of Current Total AMS with AMS commitment levels could be meaningful and fair only when calculated on the basis of comparable methodologies and data. No meaningful assessment could be made, if part of a Member's Current Total AMS was calculated using data periods and methodologies different from those employed to establish its commitment levels. For this reason, Korea believed that the constituent data and methodologies used in calculating the Base Total AMS should also be taken into account in calculating Current AMS for beef, irrespective of that product's inclusion in the calculation of the Base Total AMS.

13. Finally, he wished to draw attention to the issue of Korea's dual retail system, which involved analysis of Korea's obligations under Article III:4 and Article XX(d) of GATT 1994. Korea welcomed many clarifications that the Appellate Body had brought to the interpretation of these key

provisions of GATT 1994. In particular, Korea was encouraged by the Appellate Body's clarification that the Panel had erred in its general interpretation that "any regulatory distinction that was based exclusively on criteria relating to the nationality or the origin of the products was incompatible with Article III". The Panel's interpretation, if left alone, would have resulted in unduly distorting Members' obligations under Article III. On the other hand, Korea was disappointed by the fact that the Appellate Body had not fully addressed Korea's arguments with respect to the distinction between *de jure* and de facto violations under Article III:4 of GATT 1994, the Panel's failure to substantiate its findings with necessary facts and the unfounded "consistency" test brought into the analysis of Article XX(d) requirements. Despite these reservations, Korea accepted the Panel and Appellate Body Reports, and joined in the consensus for their adoption. Pursuant to Article 21.3 of the DSU, Korea would inform the DSB of its intentions with respect to implementation within the next 30 days.

14. The representative of the European Communities said that his delegation did not wish to comment on the result or the substance of this case. However, it wished to note its disagreement with regard to the treatment of Korea as a developing country for the purposes of the Agreement on Agriculture. The EC noted with surprise that Korea had been treated as a developing country for the purposes of the Agreement on Agriculture. Although this issue did not seem to have been in dispute, the EC was compelled to underline its disagreement with Korea's self-characterization as a developing country. Korea's economic strength and its position as a major trading partner could not justify developing country status under any of the WTO Agreements.

15. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS161/AB/R – WT/DS169/AB/R and the Panel Report in WT/DS161/R – WT/DS169/R, as modified by the Appellate Body Report.

2. United States – Import measures on certain products from the European Communities

(a) Report of the Appellate Body (WT/DS165/AB/R) and Report of the Panel (WT/DS165/R and Add.1)

16. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS165/12 transmitting the Appellate Body Report on "United States – Import Measures on Certain Products from the European Communities", which was circulated in document WT/DS165/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in 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".

17. The representative of the European Communities said that his delegation wished to thank the Panel and the Appellate Body for their work. The EC was pleased that both the Panel and the Appellate Body had found that the sanctions imposed by the United States on 3 March 1999 were in breach of its international obligations under the GATT 1994 and the DSU. In particular, both the Panel and the Appellate Body Reports had clearly condemned the US unilateral sanctions imposed as a result of the application of Section 301 of the Trade Act of 1974. One of the pillars of the multilateral trading system was the prohibition of any unilateral action, and that meant the clear and unconditional rejection of the US inclination, on the basis of its domestic legislation, to resort to unilateral trade sanctions by self-adjudication. No Member might be judge and jury in a trade dispute that was under the purview of the WTO dispute settlement system. He believed that this message needed to be recalled vigorously. This was an issue of importance for the entire Membership, and

was not limited to a particular case, as it was demonstrated by the broad participation of other Members as third parties to those proceedings. The EC was also pleased to note that the Appellate Body had not let the Panel's findings on the role played by the Arbitrator under the Article 22.6 procedure stand even though it would have preferred the Appellate Body to draw the necessary conclusions regarding the relationship between the provisions of Articles 21 and 22 of the DSU. The Appellate Body Report had also confirmed that improvements to the DSU remained to be made by Members. As it had stated at previous occasions in the General Council, the EC was committed to work constructively on this point in the framework of a comprehensive exercise.

18. The representative of the United States said that the Panel had correctly found and the Appellate Body had correctly affirmed that the measure at issue in this dispute was no longer in effect. Moreover, as the Appellate Body had made clear, the central issue in this dispute, "sequencing" was a matter for Members to decide. He recalled that on 3 March 1999, the United States had changed bonding requirements on products from some EC member States following the announcement of the Arbitrator in the Bananas case that it could not finish its work by that date, as provided for in the DSU. The EC had responded the following day by initiating dispute settlement proceedings culminating in the Reports before the DSB at the present meeting. The dispute had as one focus the question of whether a change in bonding requirements, intended to preserve the ability of a Member to suspend concessions upon receipt of the DSB's authorization, was inconsistent with the WTO rules. The Panel had found that it was, and the United States had not appealed that issue.

19. Beyond the question of bonding requirements, however, the EC had sought to make this dispute a vehicle for questions already litigated in the Bananas case, and to undo the legitimacy of the work of another WTO adjudicatory body and of the DSB itself. In other words, the EC had sought findings on the question of "sequencing", and on the legal basis for the work of the Arbitrator pursuant to Article 22.6 of the DSU in the Bananas case, and of the DSB's authorization to suspend concessions which had followed. In so doing, the EC had sought from the Panel and the Appellate Body that which many Members had recently criticized, namely advisory opinions on, and interpretations of, the WTO provisions unnecessary to resolve a dispute, in areas in which it was the responsibility of Members, and not panels, to act.

20. The United States was pleased that the Appellate Body had recognized that the legal questions at issue did not relate to sequencing, and that it was not necessary for the Panel to reach this question. With regard to the suggestion that the Appellate Body had reversed the Panel's conclusion on Article 22.6 of the DSU, he noted that in the appeal it was the United States that had taken the position that the question of sequencing was not an issue in this dispute. The Appellate Body had agreed with the US position. The United States was most assuredly not suggesting that sequencing was required, nor was the Appellate Body. There was therefore no basis to conclude that the Appellate Body had reversed the Panel's substantive conclusion that sequencing was not required by the DSU: i.e. the DSU did not require Members to go through Article 21.5 proceedings before invoking Article 22 of the DSU. The Appellate Body had simply agreed with the United States that the Panel had not needed to reach the issue to resolve this dispute. The Panel had only addressed this issue in the first place because the EC had insisted that it did so. The EC had insisted that justice demanded that the Panel make a finding on this issue and the Panel had agreed to accommodate the EC's demand. The EC had then found itself dissatisfied with the Panel's conclusion. It was the US view that the Panel was correct in concluding that the DSU did not require separate panels to address compliance and the level of suspension. The Panel's reasoning on this issue was unassailable, and should be followed by any panels called upon in the future to address this question. The United States, however, appreciated that even though the DSU did not require sequencing, many Members would prefer this. As the Appellate Body had indicated, only Members could amend or interpret the DSU provisions. The United States remained ready to discuss with Members their proposals on this subject.

21. The changed bonding requirements of 3 March 1999 had been removed by 19 April 1999. Thus, as already noted, the measure in question was no longer in effect. In addition, contrary to the EC's statement, and as the Appellate Body had clearly noted in its Report, the measure in question did not involve Section 301 of the Trade Act of 1974. The United States, having put this litigation behind it, looked forward to working with the EC and other Members on the procedural and substantive issues underlying this dispute.

22. The representative of Japan, speaking also on behalf of Chile and Colombia, said that his country had participated as a third party to this dispute. Chile, Colombia and Japan shared the same systemic interest in the matter and had co-sponsored the proposal to amend certain provisions of the DSU.[1] The countries in question supported the adoption of the Reports and, in particular, they considered it appropriate that the Appellate Body had drawn a clear conclusion that the Panel had erred in stating that the WTO-consistency could be determined by the Arbitrators appointed under Article 22.6 of the DSU, thus deciding that this had no legal effect. Furthermore, the countries in question noted the statement made by the Appellate Body in paragraph 92 of its Report regarding the sequence between Articles 21.5 and 22 of the DSU. The Appellate Body had stated that "determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO". This statement underscored the position of the countries in question that the issue of sequencing between Articles 21.5 and 22 of the DSU was the most important systemic problem of the current DSU provisions, and that it should be urgently resolved by Members. Chile, Colombia and Japan, together with other Members, had been actively engaged in efforts aiming at improving and clarifying the DSU, and had tabled a proposal with a number of other co-sponsors. In their view, the time was ripe for Members to make further efforts and to revitalize discussions on the sequence between Articles 21.5 and 22 of the DSU. An early agreement on this issue would strengthen the multilateral character of the DSU and would be of benefit to all Members.

23. The representative of Ecuador said that his country welcomed the Appellate Body Report in this case. Ecuador had participated in this dispute as a third party motivated by two specific concerns. First, to monitor attentively the impact of this case on the Banana dispute in which Ecuador had a substantial trade interest. Second, to defend its systemic interest in the application of the necessary sequence between Articles 21 and 22 of the DSU. With regard to the Banana dispute, although the Appellate Body had not dealt specifically with that subject, the decision it had taken confirmed that the EC was not right in its claim against the sanctions imposed by the United States. The Panel Report, as upheld by the Appellate Body Report on this point, had ensured that the EC, in bringing its complaint before the DSB, could not escape the consequences of its failure to overhaul its banana import regime in a WTO-consistent manner. Therefore, Ecuador was not surprised that, insofar as this case was related to the Banana dispute, the EC and its member States had once again lost the case. Concerning its systemic interest with regard to the application of Articles 21 and 22 of the DSU, Ecuador had expressed its views in two ways: first, in its written submission to the Appellate Body, and second, in co-sponsoring a proposal for amendment of the DSU.

24. In its written submission to the Appellate Body, Ecuador had agreed with the Panel's statement in its Report (paragraph 6.135) that "no WTO violation can justify a unilateral retaliatory measure by another Member". Ecuador therefore maintained that, if a situation arose in which two or more Members disagreed as to whether a WTO violation had occurred, the only remedy available was to initiate a dispute settlement process and indispensably obtain the DSB's determination that such a WTO violation had occurred. The possibility of a conflict between the time-limits prescribed by Article 21.5 and those laid down in Article 22 of the DSU could not be an excuse for unilateral action, nor could it provide grounds for the loss of any Member's fundamental rights such as the right to suspend concessions. For this reason, good faith interpretation of the DSU created an obligation for

[1] WT/GC/W/410 and Add.1/Add.2/Add.3.

parties to a dispute that were materially affected by the sequence between Articles 21 and 22 of the DSU to adopt ad hoc procedures so as to avoid conflicts of legal interpretation. However, such ad hoc procedures were inadequate, as the Banana dispute had shown. Therefore, Ecuador, together with other Members, had co-sponsored a proposal to amend the DSU in order to clarify the provisions relating to the sequence between the finding concerning compliance and the procedures for the withdrawal of concessions, without unduly prolonging the process.

25. When Ecuador had decided to co-sponsor the proposal to amend the DSU, it had done so with the further aim of confirming that Members had the sole responsibility for enacting or interpreting the WTO Agreements and that this could not be left to the authority of the Appellate Body. Ecuador was pleased that the Appellate Body had recognized this point in paragraph 92 of its Report. Similarly, Ecuador had decided to co-sponsor the proposed amendment despite suggestions that it was inappropriate to propose the amendment when the Appellate Body had not yet ruled on the dispute in question. In Ecuador's view, Members had to make it clear that the right to propose improvements to the provisions of the WTO Agreements could not be contingent upon a bilateral dispute, no matter how important that dispute was or how powerful were the Members involved. Since now the Appellate Body had delivered a ruling recognizing Members' exclusive right to amend and interpret WTO Agreements, Ecuador hoped that more Members would view the proposed amendment to the DSU as positive.

26. The representative of Jamaica said that her country had participated as a third party in this dispute, and whilst it did not agree with all the conclusions of the Appellate Body, in particular with the finding that the 19 April 1999 action was distinct from the 3 March measure, it welcomed the upheld finding of the Panel that the US action of 3 March 1999 was inconsistent with the DSU provisions. This finding cemented the view shared by many Members, including Jamaica, that the dispute settlement system had preeminence in the resolution of disputes among Members. Jamaica noted with interest the definitive statement by the Appellate Body in paragraph 92 of its Report on the boundaries of responsibility for the Appellate Body and panels with regard to amendments of the DSU or interpreting the WTO Agreements. Jamaica hoped that this confirmation by the Appellate Body of the exclusive jurisdiction of Members would provide the necessary fuel for Members to revive the DSU review and to carry it through to a positive conclusion.

27. The representative of the European Communities said that, in response to Ecuador's statement, he wished to underline that the case in question was not about whether the EC would comply with its obligations in the Bananas case. The EC had first wished to bring its banana regime into compliance with all its international obligations. Indeed, following the recent discussions on the future of the EC's banana import regime at the 19 December 2000 meeting of the European Council, this process would be finalized shortly. This case was about unilateral recourse by the United States to trade sanctions in clear violation of its WTO obligations.

28. The representative of Canada said that his country wished to comment on the Appellate Body's remarks concerning the mandate of the arbitrators appointed under Article 22.6 of the DSU. In this regard, the Appellate Body had concluded that the Panel had erred in stating that the WTO consistency of an implementing measure could be determined by arbitrators appointed under Article 22.6 of the DSU. The Appellate Body had further stated that the relationship between Articles 21.5 and 22 of the DSU was an issue for Members to resolve. He noted that Canada was one of the co-sponsors of the proposal presented in the General Council at its meeting on 10 October 2000 to amend the DSU to address, among others, the sequencing issue. Canada hoped that intensive discussions on the proposal could now proceed as quickly as possible. Some Members had suggested, in other fora, that it was not strictly necessary to amend the DSU since disputing parties were able to deal with the sequencing problem through ad hoc agreements. To-date, such ad hoc sequencing agreements had proved to be very useful in filling in the gaps in the DSU. Yet these agreements required the consent of both parties. Therefore, it was not difficult to envisage a scenario in the future

where the parties could not reach an agreement on the appropriate procedural steps to manage a dispute on implementation. In such a case, the inadequacies of the current DSU provisions would once again become only too evident. Therefore, Canada looked forward to discussions with other Members on the DSU amendment proposal over the coming months with a view to reaching a permanent and durable solution to this problem.

29. The representative of Norway said that her country noted that the Appellate Body in its Report had found that "the Panel erred by stating that the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB can be determined by the Arbitrators appointed under Article 22.6 of the DSU" (paragraph 128(b)) and had thus concluded that the Panel's statement on this issue had no legal effect. In doing so, the Appellate Body had recognized the systemic importance of this issue, and had further stated that it was up to Members to amend or interpret the DSU provisions. The case before the DSB at the present meeting showed that there was a need to renew efforts to reinvigorate the process aimed at improving the DSU provisions. As one of the co-sponsors of the proposal to amend certain provisions of the DSU, which had been submitted to the General Council on 10 October 2000, Norway urged Members to engage in a constructive dialogue with a view to providing greater clarity on the question of sequencing. To this effect, Norway looked forward to future consultations to be carried out by the Chairman of the General Council on the above-mentioned proposal. She reiterated that Norway was prepared to participate actively in discussions on any other issues to be proposed by Members pursuant to Article X of the WTO Agreement.

30. The representative of Switzerland said that with respect to the issue of the relationship between Articles 21.5 and 22.6 of the DSU, her country was not convinced by the Panel's reading of the DSU provisions. The DSU stated clearly that countries were not entitled to resort to Article 22 of the DSU and request authorization for suspension of concessions or other obligations before the Article 21.5 procedure was completed. The Panel had not taken into account that Article 21.5 and 22.6 procedures were separate, served different purposes and were governed by different procedural requirements. If an arbitration procedure under Article 22.6 could be used to determine the WTO consistency of implementing measures, Article 21.5 would lose its relevance and effect. Therefore, the Article 21.5 procedure could not be disregarded. However, past dispute settlement cases showed that the terms of Articles 21.5 and 22 could be interpreted differently. To avoid any legal uncertainty in the future, the relationship between these two provisions should be clarified by Members as soon as possible. She recalled that 11 countries, including Switzerland, had presented a proposal in the General Council to amend the DSU, including the provisions of Articles 21 and 22. Switzerland hoped that it would soon be possible to adopt this amendment. In view of the ongoing discussions on this issue, Switzerland welcomed the fact that the Appellate Body had acted with restraint and had not intervened in this debate. Since a discussion to modify the DSU was ongoing, the WTO judicial organs should exercise restraint and should not anticipate this debate.

31. The representative of Hong Kong, China said that his delegation believed that the most significant systemic issue raised by the EC in its appeal was that the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB could not be determined by arbitrators appointed under Article 22.6 of the DSU. Hong Kong, China fully agreed with the EC in this respect. The Panel, however, had come to a different conclusion as indicated in paragraphs 6.117 to 6.126 of its Report. Hong Kong, China believed that the Panel's analysis was seriously flawed for several reasons. First, unlike a panel report pursuant to Article 21.5 of the DSU, an Arbitrator's decision could not be appealed. The wording of Article 22.7 of the DSU was categorical: "the parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration". This was not the case for Article 21.5 panel reports. As the recent aircraft dispute between Brazil and Canada had demonstrated, Article 21.5 panel reports could be and had been appealed. If the Panel's reading was correct, complaining parties would be given every incentive to use Article 22.6 arbitration process to determine the WTO compatibility as this would

deprive the defending party of its the right to appeal. Such a reading was counter to the principle of effective treaty interpretation since Article 21.5 of the DSU would be reduced to redundancy.

32. Second, different time-limits were envisaged under both processes. The time-limit set for Arbitrators, which was 60 days, was more favourable from the point of view of complaining parties than that set for Article 21.5 panel, which was 90 days. Once again the Panel's reading was counter to effective treaty interpretation. Third, the function of Arbitrators was fundamentally different from that of panelists under Article 21.5 panel. Article 22.7 of the DSU set out clearly the boundary for Arbitrators. Hong Kong, China strongly disagreed with the Panel's liberal interpretation of the Arbitrator's authority under the first sentence of Article 22.6 of the DSU. This sentence was more for a simple quantification exercise and nothing more.

33. Finally, Members should bear in mind that paragraphs 6 and 7 of Article 22 of the DSU were preceded by paragraph 2 of Article 22, which made it clear that paragraph 6 of Article 22 would only come into play "if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance". In other words, the Panel's reading had mistakenly reversed the order of those procedures. Therefore, Hong Kong, China noted with satisfaction that the Appellate Body had ruled that the statements made by the Panel in paragraphs 6.121 to 6.126 of its Report had no legal effect. As the Appellate Body had stated, it was certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only Members had the authority to amend the DSU or to adopt such interpretations. Hong Kong, China welcomed the Appellate Body's statement in this regard, especially in light of the recent developments in the context of the Asbestos case.

34. The representative of Korea said that his country also wished to comment on the conclusions of the Panel and the Appellate Body which involved some important systemic issues. First, Korea welcomed the fact that the Panel and the Appellate Body had reconfirmed that multilateralism was a fundamental principle of the WTO dispute settlement mechanism. The Panel and the Appellate Body had stated that "the obligation to use the multilateral dispute settlement mechanism to obtain any determination of WTO compatibility is a fundamental obligation that finds application throughout the DSU". This fundamental principle should be constantly heeded to in the dispute settlement process. Second, with regard to the relationship between Articles 21.5 and 22 of the DSU, Korea noted that the Appellate Body had recognized that this relationship should not be determined by panels or the Appellate Body, but by Members. As one of the co-sponsors of the proposal for the DSU amendment, which had been referred to by the Appellate Body, Korea hoped that discussions on the proposal would be expedited in order to provide the dispute settlement system with further clarity and strength.

35. The representative of New Zealand said that his country fully concurred with the statement made by Canada, and the similar sentiments expressed by other Members, which had underlined the importance of showing the necessary resolve and leadership to finding a lasting solution to the Article 21.5 and 22 dilemma. In this connection, New Zealand believed that the proposal jointly tabled in the General Council on 10 October 2000 by a number of Members, including New Zealand, provided an excellent basis for further discussions.

36. The representative of Argentina said that the Reports before the DSB at the present meeting dealt with important systemic issues. First, Argentina welcomed the fact that a retaliatory measure adopted prior to the granting of DSB's authorization to suspend concessions or other obligations was found by both the Panel and the Appellate Body to be inconsistent with Articles 21.5, 23.2(c), 3.7 and 22.6 of the DSU based on the reaffirmation of the principle that a multilateral determination of non-compliance of an implementing measure with the DSU's rulings and recommendations had to be made prior to the adoption by the complaining party of a measure to suspend concessions or other obligations. However, Argentina also wished to point out that it did not agree with the Panel's

interpretation, contained in paragraphs 6.121 to 6.126 of its Report to the effect that "the arbitration process pursuant to Article 22 may constitute a proper WTO dispute settlement procedure to perform the WTO assessment mandated by the first sentence of Article 21.5 of the DSU". The Panel had explained this finding as being justified by the fact that the Article 22.6 arbitration was intended to determine whether "the level of such suspension is equivalent to the level of nullification", thus giving it the authority to assess whether the implementing measure had nullified or impaired benefits. He emphasized that the Appellate Body had not ruled on this systemic question when it had provided its view that the measure adopted on 19 April 1999, subsequent to the granting of the DSB's authorization, was legally different from the 3 March 1999 measure. Argentina did not share the Panel's view. Such an interpretation was incompatible with the principle of effective interpretation of treaties, and reduced Article 21.5 of the DSU to the level of a mere alternative procedure. It was clear from the text of the DSU that paragraph 5 of Article 21 of the DSU was specifically framed to apply to cases of "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". The DSU text did not justify the view that the procedure under Article 21.5 was merely an alternative procedure. On the contrary, the arbitration provided for in Articles 22.6 and 22.7 of the DSU related only to the determination as to whether the level of suspension of concessions or other obligations was equivalent to the level of nullification or impairment. The Panel had therefore wrongly assumed that the arbitration mandate provided for in paragraphs 6 and 7 of Article 22 of DSU included the authority to determine whether the DSB's recommendations had been complied with. In Argentina's view, there was no support for this assumption anywhere in the text of the DSU nor that such authority was assigned to the Panel referred to in Article 21.5 of the DSU. Argentina welcomed any efforts by Members to resolve the problem of the sequence between Articles 21.5 and 22 of the DSU.

37. The representative of Saint Lucia said that the procedural issues discussed in the Appellate Body Report raised systemic concerns of importance to the whole Membership. This was not simply an attempt in isolation to establish procedures, but more immediately an attempt to rule on the matter in which actual trade measures were implemented; measures which continued to have an indirect but dramatic impact on her country's trading interests as well as on those of several of its neighbours. Saint Lucia believed that the Appellate Body Report had enhanced the WTO jurisprudence in several respects. First, and foremost, it had erased most of the Panel's questionable simple legal logic. In addition, it had confirmed that by adopting the 3 March 1999 measure the United States had acted inconsistently with its obligations under Articles 3.7, 21.5, 22.6, 23.1 and 23.2(c) of the DSU. The Appellate Body Report, therefore, had reaffirmed the strength of the multilateral trading system, and had condemned unilateralism. However, for some reason, the Appellate Body had refrained from addressing the more difficult, though fundamental, systemic issues leaving them unresolved. The aberration to the rules-based system, which was evident in the 3 March 1999 US measure, had continued in effect through the 19 April 1999 action. The Appellate Body had found that these measures were not appropriately before the Panel, and that the pronouncement of the Panel on this issues was therefore of no legal effect. The principal of judicial economy provided the Appellate Body with the opportunity of remanding this issue to Members. The default decision of the Appellate Body was clearly the least offensive route it could have taken and Saint Lucia welcomed this approach. However, as a consequence, the Appellate Body had failed to clarify the systemic issues involved, and had thus left the door open to certain actions which could lead to negative and uncertain consequences for the multilateral trading system. In the light of the above, Saint Lucia reaffirmed that the ordinary meaning of Article 22.6 of the DSU, read in its context, in particular Articles 3.7, 21.5, 22.2, 22.7 and 23 of the DSU, suggested that if there was any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB's rulings and recommendations recourse had to be made to Article 21.5 of the DSU prior to any determination on the equivalent level of suspension of concessions in the context of Article 22.6 of the DSU. Saint Lucia hoped that Members would affirm this view in the context of Article IX:2 of the Marrakesh Agreement.

38. The Chairman said that a significant number of substantive comments and views had been expressed on the Reports before the DSB at the present meeting not only by the parties or third parties to this dispute but also by Members who had not participated in the proceedings of this case. It was clear that this particular case touched in some respects on some important systemic concerns which a number of Members had and, depending on further consideration by the General Council of the proposal to amend certain provisions of the DSU, there could be further opportunities to exchange views on these matters.

39. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS165/AB/R and the Panel Report in WT/DS165/R and Add.1, as modified by the Appellate Body Report.