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Dispute Settlement Body
5 November 2001

MINUTES OF MEETING

Held in the Centre William Rappard
on 5 November 2001

Chairman: Mr. R. Farrell (New Zealand)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.23)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He drew attention to document WT/DS27/51/Add.23 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

2. The representative of the European Communities said that the Working Party to examine the waiver requests submitted by the EC and the ACP countries had met in the past week. A very constructive exchange of views had taken place and good progress had been made. However, differences still remained. The EC expected that the examination would continue to be carried out in the constructive spirit and that a positive decision would be taken shortly.

3. The representative of Honduras said that on 5 October 2001, his country had withdrawn its objection to the initiation of the examination procedure for a waiver requested by the EC in order to grant preferences to the ACP countries. Originally, Honduras had raised serious procedural objections and the only reason for its decision to withdraw them was the unprecedented economic and political pressure to which it had been subjected. Throughout this long dispute, his country had continued to believe in the dispute settlement system and had played by the rules. However, its good faith efforts had not been matched by the EC's full compliance with the DSB's rulings. Instead the EC had requested a waiver. Honduras had never been against the granting of a waiver, but considered that the EC's request for a waiver was vague and, therefore, tainted by an illegality which would disqualify it from examination. This situation raised the following question: What was the point in claiming WTO rights, when in the end, a country like Honduras would be forced to accept a waiver with a series of conditions which were contrary to its interests? He emphasized that by giving its consent to the initiation of the examination of the waiver, Honduras would not forego its legitimate rights. He noted that many issues still remained unresolved after the discussion of preliminary objections. However, it was essential that the examination of the waiver requests be completed within 90 days. Honduras called on the ACP countries to recognize, in the spirit of solidarity, that what was being requested was not normal preferences, but a waiver that would be to the detriment of countries such as Honduras.

4. The representative of Ecuador said that his country had noted the status report submitted by the EC at the present meeting. Over the past three weeks, Ecuador had taken part in the intensive work carried out by the Working Party to examine the requests for a waiver submitted by the EC and the ACP countries to cover the WTO-inconsistent provisions of the Cotonou Agreement and the EC banana import regime. During the examination, Ecuador had noted with concern that the EC's intention was to apply preferential tariffs in favour of the ACP countries in such a way as to preserve WTO-inconsistent elements of the current banana import regime, which would not be covered by the requested waivers. Unlimited preferential tariffs designed for the ACP countries would result in market conditions that would discriminate against bananas from Ecuador since its share of bananas under tariff quotas would not increase. At the same time, the ACP countries would have practically unlimited market access under highly advantageous tariff preferences. Furthermore, Ecuador was concerned about the EC's insistence that the waivers should remain in force for a longer period of time than the duration of the transitional regime. A waiver from Article I of GATT 1994, which delayed the introduction of a tariff-only regime for a further two years, would prejudge and place conditions on the negotiations to be held under Article XXVIII of GATT 1994. He recalled that Ecuador had concluded an understanding with the EC, which could serve as a good basis for a solution to the dispute, and was ready to agree to the granting of the waivers. However the EC, despite the fact that it had the time and resources available to modify its regime, was still looking for a way to evade and only partially fulfil its obligations. As a result, the EC would continue to cause damage to countries such as Ecuador.

5. The representative of Panama reiterated his country's statement made at the previous DSB meeting. In Panama's view, the EC did not wish to comply with the DSB's recommendations. Panama believed that even if the waiver was granted, the dispute would not be solved. In Panama's view, many aspects related to this dispute could not be resolved through granting of the waiver, in particular, in light of the request submitted by the EC. He recalled that Panama had never opposed granting of the waiver but had objected to the EC's attempts to avoid compliance. He noted that discussions on the scope of the waiver were under way in another forum.

6. The representative of Mexico said that his country was an interested party in this case and urged other interested parties to try to find a satisfactory solution to this matter. He recalled that Mexico's preference was to put into place a tariff-only system at a level that would enable Mexico to have access to the EC's market.

7. The representative of the United States said that her country was pleased that the Working Party had begun its examination of the waiver requests for the new ACP-EC Partnership Agreement and looked forward to making further progress toward resolving this dispute. She said that the United States would play as constructive a role as possible in that examination.

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

2. United States – Preliminary determinations with respect to certain softwood lumber from Canada

(a) Request for the establishment of a panel by Canada (WT/DS236/2)

9. The Chairman drew attention to the communication from Canada contained in document WT/DS236/2.

10. The representative of Canada recalled that on 21 August 2001 Canada had requested consultations with the United States regarding the preliminary countervailing duty and critical circumstances determinations made by the US Department of Commerce on 9 August 2001 with respect to certain softwood lumber from Canada, together with the expedited and administrative review provisions of US law. These consultations, which had been held on 17 September 2001, had unfortunately failed to resolve the dispute. The preliminary countervailing duty determination contained a number of WTO-inconsistencies, including treating the right to harvest standing timber as constituting a "financial contribution" under the SCM Agreement. The critical circumstances determination was similarly flawed. In particular, Canada was concerned that there was no basis under the SCM Agreement for the application of provisional measures pursuant to a critical circumstances determination. Canada also considered US countervailing duty law regarding expedited reviews to be inconsistent with US obligations under the SCM Agreement and the WTO Agreement. It failed to provide for reviews in countervailing duty cases in certain circumstances, and mandated the imposition of inconsistent countervailing duty rates. Consequently, and in accordance with the relevant provisions of the DSU, the GATT 1994, and the SCM Agreement, Canada was requesting the establishment of a panel to consider these matters.

11. The representative of the United States said that her country regretted that Canada had chosen to request the establishment of a panel. As a substantive matter, the United States believed that Canada's claims lacked merit. Moreover, the determinations made by the US Department of Commerce were preliminary and subject to change. Therefore, in the view of the United States, Canada's request for a panel was premature and the United States urged Canada to reconsider its request. In any event, her country was not prepared to consent to the establishment of a panel at the present meeting.

12. The representative of Canada said that he wished to respond to one point made by the United States. In Canada's view there were numerous important WTO-inconsistent aspects to the preliminary determinations. These aspects were reviewable under the SCM Agreement and Canada would fully exercise its rights in this regard.

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

3. Argentina – Definitive anti-dumping measures on imports of ceramic floor tiles from Italy

(a) Report of the Panel (WT/DS189/R)

14. The Chairman recalled that at its meeting on 17 November 2000, the DSB had established a panel to examine the complaint by the European Communities. The Report of the Panel contained in document WT/DS189/R had been circulated on 28 September 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 now before the DSB for adoption at the request of the European Communities. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

15. The representative of the European Communities said that the EC thanked the Panel for the excellent work and welcomed its ruling. He noted that all the claims submitted by the EC had been upheld, even if the EC regretted that the Panel had unjustifiably departed from the correct interpretation of the obligation under Article 6.9 of the Anti-Dumping Agreement adopted by the Panel in the case on Guatemala - Cement II.[1] The EC wished to point out that, due to the gravity and number of violations identified by the Panel, an immediate withdrawal of the measure by Argentina appeared to be the only acceptable solution.

16. The representative of Argentina said that his country wished to thank the members of the Panel for their efforts in resolving this dispute, which due to the number of factual elements involved was particularly complex. The task fulfilled by the Panel reaffirmed the effectiveness of the dispute settlement mechanism in underpinning the principles and commitments of the Uruguay Round. Argentina was not pleased with the Panel's conclusion that the measure at issue was inconsistent with the Anti-Dumping Agreement. However, it wished to express its satisfaction with the Panel's finding that the implementing authority might choose the way in which to inform the interested parties of the essential facts of the investigation, thereby discounting the alleged existence of an obligation of means, as opposed to an obligation of results. Once again, in view of the limited resources which should be used sparingly, Argentina had decided not to use its right of appeal. Pursuant to Article 21.3 of the DSU, Argentina would provide information to the DSB on how it would implement the Panel's rulings and recommendations.

17. The representative of the United States said that her country welcomed the Panel's determination that Article 6.9 of the Anti-Dumping Agreement did not prescribe the manner in which investigating authorities were to comply with the obligation to disclose essential facts and that the obligation might be met by the authorities in a variety of ways.

18. The representative of Hong Kong, China said that his delegation was pleased to find that the rulings of the Panel had contributed to clarifying certain procedural requirements under the Anti-Dumping Agreement. First, Hong Kong, China welcomed the Panel's reaffirmation that an investigating authority might disregard the primary source of information and resort to the use of facts available only under the specific conditions of Article 6.8 and Annex II of the Anti-Dumping Agreement. To ensure fair treatment to exporters, Hong Kong, China considered it important that investigating authorities should not be easily allowed to disregard information provided by exporters. Hong Kong, China hoped that this ruling would enable investigating authorities to exercise due consideration in performing objective and unbiased evaluations of facts in the course of investigations. Second, Hong Kong, China welcomed the Panel's confirmation of the need to take into account all significant factors affecting price comparability to ensure fair comparison between

[1] WT/DS156.

export price and normal value. As required under Article 2.4 of the Anti-Dumping Agreement, there was no doubt that it was the responsibility of investigating authorities to make due adjustments for differences which affected price comparability in the relevant calculations. It was thus hoped that investigating authorities would take note of the importance of this requirement in conducting anti-dumping investigations. With these observations, Hong Kong, China supported the adoption of the Panel Report.

19. The DSB took note of the statements and adopted the Panel Report contained in WT/DS189/R.

4. United States – Transitional safeguard measure on combed cotton yarn from Pakistan

(a) Report of the Appellate Body (WT/DS192/AB/R) and Report of the Panel (WT/DS192/R)

20. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS192/6 transmitting the Appellate Body Report on "United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan", which had been circulated in document WT/DS192/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".

21. The representative of Pakistan said that his country's complaint against the US safeguard measure on combed cotton yarn from Pakistan was the first complaint brought by Pakistan, in its individual capacity, before the WTO dispute settlement system. Pakistan was pleased that the US measure had been found to be inconsistent with the Agreement on Textiles and Clothing (the ATC) and should therefore be withdrawn. However, Pakistan believed that this case had revealed that the dispute settlement system contained a number of shortcomings. At the present meeting, Pakistan wished to underscore a number of systemic concerns. The reason was that despite positive recommendations and rulings at various stages of this dispute, the rights and obligations impaired as a result of the US measure might not be restored until the measure expired under the ATC.

22. He noted that successive reviews of a transitional safeguard by the Textiles Monitoring Body (TMB), a panel and the Appellate Body, and then by the arbitrator determining the reasonable period of time to comply with the DSB's recommendations, required a considerable amount of time. While these complex, four-stage procedures were taking their course, the complainant had to bear the economic consequences of the safeguard action. Under the DSU procedures, no compensation was provided to the complainant for the trade damage incurred during the course of the proceedings. He noted that the International Court of Justice, under Article 41 of its Statute, had the power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". There was no corresponding provision in the DSU. Therefore, effectively the complainant did not have any procedural remedy until the end of the implementation period. Only then and only if the defendant did not implement the DSB's recommendations, might the complainant request compensation or an authorization to suspend concessions. This meant that for a considerable period of time it was possible to disregard the obligations under the ATC by simply refusing to accept the TMB recommendations, appealing the panel report and forcing the complainant to request an arbitrator to determine the length of the implementation period. Under Article 6.12 of the ATC, a safeguard action might be imposed for a period of up to three years. In the present case, this three-year period would expire on

17 March 2002; i.e. in the next five months. Depending on the length and results of the further proceedings in this case, the date on which the implementation period would end under the DSU could be close to the date on which the safeguard action had to, in any case, be removed under the ATC. In the best circumstances, Pakistan's invocation of its rights under the DSU would shorten the period of application of the safeguard action on its cotton yarn exports by a few months.

23. He said that the United States had justified its safeguard action on the basis of legal arguments, which in Pakistan's view were irreconcilable not only with the WTO law but also with the basic principles of justice. By forcing Pakistan to obtain rulings on these unique claims by the TMB, the Panel and the Appellate Body, the United States had succeeded in maintaining an illegal safeguard action for almost three years. Thus, if the US safeguard action was legal, it would have to be removed after three years. The case at hand raised the question of whether the DSU procedures permitted Members exporting textiles and clothing to enforce their rights under the ATC. Under Article 3.2 and 3.3 of the DSU, the main function of the DSU was to preserve the rights and obligations of Members under the WTO Agreement and to ensure a prompt settlement of disputes. However, in this case, the DSU had been used to deny a Member its rights under the ATC and to delay the settlement of a dispute so as to provide protection to domestic producers while lengthy proceedings had taken their course. Thus, the procedures to enforce WTO law seemed to have been turned into a mechanism to escape law.

24. According to Article 3.2 of the DSU, a further important function of the DSU procedures was to clarify the WTO law and to render the multilateral trading system more secure and predictable. Even if the ruling of the Appellate Body had come too late to effectively contribute to the settlement of the dispute, that ruling was nevertheless helpful by contributing to the clarification of the law and would thereby help to prevent disputes from arising in the future. It was probably this objective that the drafters of the DSU had in mind when they had instructed the Appellate Body in Article 17.12 of the DSU to "address each of the issues" raised in the appeal, thus obliging the Appellate Body to make rulings on the issues submitted to it. Pakistan believed that, in the case at hand, the Appellate Body had not fully carried out its mandate under Article 17.12 of the DSU because it had failed to address all the issues submitted to it.

25. He noted that the United States had argued before the Appellate Body that, whenever a national authority could legitimately conclude on the basis of the facts before it that the conditions for taking a safeguard action under Article 6 of the ATC were met, then the action might be imposed in accordance with Article 6 and that the only role of the panel was to examine whether the evidence available to the authority had been properly investigated. Pakistan had objected to this interpretation because there were two instances in which the United States had based its safeguard actions on information provided by the American Yarn Spinners Association which had subsequently turned out to be incorrect.

26. Pakistan's main argument was that Article 6.2 of the ATC did not state that a Member might take safeguard action whenever it was determined on the basis of the evidence available to it that increased imports caused serious damage or actual threat thereof. Article 6.2 provided that such action might be taken "when, on the basis of a determination by a Member, it is demonstrated" that increased imports caused serious damage or actual threat thereof. This wording made clear that the determination had to be such as to demonstrate that the conditions for safeguard action were met. A determination that was based on demonstrably false data would not provide the required demonstration. Moreover, under Article 6.3 of the ATC, the determination had to be based on an examination of changes in specified economic variables. A determination based on an examination in which unreliable data on those variables had been used did not meet this requirement. Therefore, the role of the panel was not merely to make an objective assessment of the national authority's investigation, but to assess whether the results of that investigation were capable of demonstrating that the conditions for imposing the safeguard action had been united.

27. The United States and Pakistan had disagreed on the question of whether a Member acted consistently with Article 6 of the ATC in maintaining a safeguard measure even if evidence that had become available after the investigation demonstrated that the conditions for taking the safeguard action had not been united at the time of the investigation, and whether a panel might examine that issue. According to the United States the answer was "no" because the panel might examine only the due diligence of the authorities during the investigation. According to the Panel the answer was "yes" because a panel had to examine not only whether the domestic authority had conducted its investigation with due diligence but also whether the results of its investigation demonstrated that the conditions for taking safeguard action had been united. An investigation during which crucial and decisive facts had been visibly not taken into account could not provide such a demonstration. This was the central issue on which the appellant and the appellee had disagreed. However, the Appellate Body had declared it to be irrelevant and had ruled in paragraph 81 of its Report that "there is no need for the purpose of this appeal to express a view on the question of whether an importing Member would be under an *obligation*, flowing from the 'pervasive' general principle of *good faith* that underlies all treaties, to withdraw a safeguard measure if post-determination evidence relating to pre-determination facts were to emerge revealing that a determination was based on such a critical factual error that one of the conditions required by Article 6 turns out never to have been met".

28. He noted that the Appellate Body had implied that a Member who was able to demonstrate that the conditions for taking safeguard action under Article 6 of the ATC had not been met might not invoke Article 6 directly, but had to rely on the principle of good faith. In Pakistan's view, this was a regrettable ruling. It was even more regrettable that the Appellate Body had explicitly declared the question of whether the principle of good faith applied in this case to be an open legal issue. The Panel had given a clear and a well-reasoned response to this question, but the United States had challenged the Panel's ruling. The Appellate Body had reversed the Panel's ruling on the basis of considerations unrelated to the issue before it. The Appellate Body had concluded its examination by stating that it was not necessary to rule on the issue. In Pakistan's view the Appellate Body had an obligation to address this issue because it was part of the issue of law raised by the United States in the process of appeal.

29. Pakistan had one further major concern about the Appellate Body's Report. In paragraph 119 of its Report, the Appellate Body had ruled that "Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage." In paragraph 124, it had further ruled that "An assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually." These rulings should be welcomed since they could ensure that importing Members did not attribute to one exporting country the damage caused by another or by others and that they conducted the comparative analysis required to avoid this situation. However, having made these rulings, the Appellate Body had then made a distinction between the "assessment of the share of the total serious damage" and the "attribution" of that share to the Members from whom imports had increased sharply and substantially. It concluded that while all Members from whom imports had increased sharply and substantially had to be included in the "assessment" of the share of the total serious damage, not all Members necessarily had to be included in the "attribution" of that share. The Appellate Body had justified this as follows: "The Panel considered it necessary, in its reasoning, to rule on the broader interpretative question of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. The United States also appeals the Panel's interpretation on this broader question. However, our findings resolve the dispute as defined by Pakistan's claim before the Panel. We, therefore, do not rule on the issue of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. In these circumstances, the Panel's interpretation on this question is of no legal effect" (paragraph 127 of the AB Report).

30. The Appellate Body's approach called for a number of comments. It was completely artificial to distinguish between the "assessment" of the share of the total serious damage and the "attribution" of that share. The second sentence of Article 6.4 listed the criteria that were to be used to determine the Members to whom the serious damage was "attributed". This provision did not distinguish between assessment of the damage and the attribution of the damage. Therefore, the distinction made by the Appellate Body could not be reconciled with the terms of Article 6.4. Moreover, if the criteria set out in the second sentence of Article 6.4 were not relevant for the attribution of serious damage, then there would be no criteria at all. The Appellate Body's ruling therefore implied that importing countries, when applying their safeguard measures, might be completely free to pick and choose any of the exporting Members that had contributed to the serious damage.

31. The question was how to reconcile this approach with the basic principles of the world trade order. Pakistan believed that Members should reflect on this question. Article 1.6 of the ATC explicitly stated that the ATC did not affect the rights and obligations of Members under the other multilateral trade agreements "unless otherwise provided in this Agreement". The interpreter had to proceed on the assumption that the GATT rules applied unless the ATC contained a different rule. If the provisions of the ATC were silent on a particular point, the terms "unless otherwise provided in this Agreement" obliged the interpreter to presume that the drafters of the ATC intended the GATT principles to apply. Under the GATT, the most-favoured-nation principle applied. Article 6.4 made clear to what extent Members imposing safeguard actions might deviate from this principle. However, nowhere did Article 6 state that the Member invoking this provision was entitled to freely pick and choose the Members to whom the serious damage was attributed.

32. In Pakistan's view, the Panel had presented a clearly reasoned and balanced interpretation of an important provision of the ATC, which would have provided greater security and predictability to the multilateral trading system. The Panel had endorsed Pakistan's legal claim on the basis of that interpretation. The Panel had not exceeded its competence by making this interpretation. By declaring this interpretation to have no legal effect and failing to replace it by its own interpretation, the Appellate Body had destroyed the security and predictability that the Panel's ruling would have achieved. According to Article 17.13 of the DSU, the Appellate Body had to either "uphold, modify or reverse" the legal findings of the panel. The duty to uphold, modify or reverse the findings of the panel implied that the Appellate Body had the duty to replace the panel's findings with a finding of its own. It could not simply declare a finding that the panel was competent to make to be "of no legal effect". Such a declaration would be justified only if the DSU would not permit any ruling on the issue, for instance, because the issue had not been part of the matter referred to the DSB in accordance with Article 7 of the DSU.

33. Pakistan was pleased that the case under consideration had ended with the recommendation that the United States bring its safeguard measures into conformity with the ATC. However, Pakistan found it disturbing that the United States had been able to use the DSU procedures in this case, to escape its obligations under the ATC simply by obliging three bodies of the WTO to consider, in Pakistan's view, the most frivolous arguments. Pakistan was also deeply disappointed that the Appellate Body had refused to rule on the proposition that a safeguard measure had to be withdrawn if it was based on a critical factual error and that Members could simply pick and choose the Members to which they attributed serious damage. It appeared that a neutral tribunal would not have any difficulty in endorsing these straightforward propositions. After the case on Turkey – Textiles[2] this was now the second case involving the ATC in which the Appellate Body had refused to create legal certainty on central legal points important to developing countries exporting textile and clothing products. Pakistan regretted that this did not enhance the confidence of developing countries in the dispute settlement system.

[2] WT/DS34.

34. The representative of the United States said that her country regretted that the Appellate Body had affirmed the ultimate conclusion of the Panel regarding the ATC-inconsistency of the US transitional safeguard on imports of combed cotton yarn from Pakistan. Nevertheless, the United States recognized that the DSB would adopt the Panel and the Appellate Body Reports at the present meeting and it wished to respond quickly to the DSB's recommendations and rulings, just as it expected its trading partners to respond promptly to rulings that affected them. However, before the adoption of the Reports, the United States wished to offer the following comments on the reasoning in the Reports. The United States believed that the Appellate Body in its Report had correctly found that the Panel had exceeded its mandate under Article 11 of the DSU when it had considered evidence that was not in existence at the time that the US authority had determined to establish the transitional safeguard. The Appellate Body had correctly reasoned that the examination by a panel of such evidence would allow a panel to substitute its judgment for that of the competent national authority. At the same time, the United States was concerned about the Appellate Body's reasoning on Article 6.4 of the ATC, which governed the attribution of serious damage to individual Members and the application of the non-MFN textiles safeguard. In making its findings on this Article, the Appellate Body had relied on what it considered to be the principle of "proportionality," found in a draft article on state responsibility – a principle with no textual basis in a covered agreement. The United States believed it was inappropriate for the Appellate Body to develop a new "principle" not based in the text of the ATC to conclude that the United States inappropriately attributed the totality of the serious damage to Pakistan. The United States was further concerned that, while acknowledging that the referenced draft article on state responsibility purported to apply only in the context of countermeasures against breaches of state responsibility – a context not at issue here – the Appellate Body had relied on this provision to interpret the ATC. It was important to underscore that the draft articles on state responsibility specifically provided that they were not applicable where legal consequences for an internationally wrongful act were determined by special rules of international law. Moreover, the non-MFN framework established by the ATC set forth clearly the conditions under which a transitional safeguard measure might be taken and the nature of the relief that could be imposed. Proportionality had no relevance when the duration, magnitude, and scope of the remedy was prescribed in the agreement.

35. It was not clear how an importing Member would implement this "principle". Under the ATC, transitional safeguards were established on the basis of serious damage, which was caused by increased imports. To some extent, each exporting country contributed to the increase in total imports and in turn to the serious damage. However, restraints might not be established on all exporting Members causing serious damage, but only on those meeting the criteria of Article 6.4. Thus, the structure of Article 6 was inconsistent with the type of apportionment that the Appellate Body purported to require. Moreover, because the duration and scope of the remedy that might be taken was set forth in the ATC, it was difficult to see how a Member could tailor the safeguard based on the damage caused by imports from a particular Member. Finally, the United States noted that while it had decided not to appeal the Panel's findings on actual threat of serious damage, those findings were nonetheless of concern. Although these findings were not entirely clear, the United States understood the Panel to have rejected the US actual threat analysis because it was dependent upon the US determination of serious damage, which, according to the Panel, had rested on an ATC-inconsistent definition of domestic industry. However, the Panel had gone on to offer its misguided views on what might constitute an independent actual threat analysis. These statements were not necessary to the disposition of this issue and, accordingly, should be viewed as *obiter dicta* which have no relevance for future transitional safeguard determinations. It should not be forgotten that the Agreement on Textiles and Clothing represented part of the balance of rights and obligations assumed by all Members, and the safeguard mechanism provided by Article 6 of that agreement constituted an integral part of that balance. It was critical that dispute settlement findings maintain this balance.

36. The representative of the European Communities said that the EC welcomed the ruling of the Appellate Body on the standard of review. That ruling confirmed that between total deference and

de novo review panels had an active duty to verify whether investigating authorities had correctly performed their duty under the Safeguards Agreement. The EC also welcomed the useful reminder of the link between the WTO Agreement and the general principles of international law, in particular the principle of proportionality.

37. The representative of Hong Kong, China said that his delegation also welcomed the Appellate Body Report. He recalled that the TMB had examined the unilateral action and had recommended that the unilateral restraint placed by the United States on Pakistan's export of category 301 product should be rescinded. The Appellate Body had now affirmed the Panel's finding that the US acted inconsistently with Article 6.2 of the ATC by excluding from the scope of the domestic industry production of combed cotton yarn by vertically integrated producers for their internal use. Accordingly, Hong Kong, China supported Pakistan's statement and urged the United States to bring its measure into conformity with its obligations under the ATC without delay by prompt removal of the import restrictions.

38. The representative of Mexico said that his country had an ongoing interest in this matter and wished that its interest be taken into account.

39. The representative of India said that his country had participated in this dispute as a third party. India was pleased to note that both the Panel and the Appellate Body had rejected the argument made by the United States that the production of the vertically integrated producers was not part of the domestic industry as defined in Article 6.2 of the ATC. In the Appellate Body's view the definition of the domestic industry "had to be product-oriented and not producer-oriented" and expressions "like" and "directly competitive" were characteristics of the products (paragraphs 86, 95 and 96 of the AB Report). His country agreed with this. India also welcomed the final findings of the Panel and the Appellate Body that the United States had acted inconsistently with its obligations under Article 6.4 of the ATC by not examining the exports from Mexico and possibly other appropriate Members individually when attributing serious damage to exports from Pakistan. India noted the Appellate Body's efforts to interpret Article 6.4 of the ATC (attribution of serious damage to the imports from Members individually) in the light of the rule of general international law on state responsibility *vis-à-vis* the principle of proportionality (paragraphs 120 and 122 of the AB Report). However, India agreed with the Panel's conclusion in paragraph 7.126 of its Report that: "The attribution cannot be made only to some of the Members causing damage, it must be made to all such Members" whose exports were causing serious damage. Otherwise a Member imposing a safeguard restraint could pick and choose to make attribution analysis. This would be "the least consistent with an MFN approach and, therefore, would be the least conducive to the progressive integration of the (textiles and clothing) sector into the WTO system" (paragraph 7.128). This conclusion of the Panel was based on the text, object and purpose of the ATC and the context of WTO covered agreements (paragraphs 7.126 – 7.131 and footnote 319 in the Panel Report). With regard to the standard of review, India noted that the Appellate Body had posed the issue very narrowly (paragraph 67 read together with footnotes 39 and 51) and had answered that a panel had to "put itself in the place of that Member" taking safeguard action and "must not consider evidence which did not exist" at the time of determination (paragraph 78 of the AB Report). Thus, the Appellate Body's ruling would not allow panels to do anything except to uphold Member's determination even if, in the language of AB (paragraph 81), "a critical factual error that one of the conditions required by Article 6 turns out never to have been met". This was in contrast with Panel's ruling (paragraphs 7.33 – 7.35), which was more convincing than the Appellate Body's reasoning.

40. The representative of Japan said that his country noted that the Appellate Body Report in this particular case contained many significant points. In particular, the Report had extensively dealt with the interpretation of "directly competitive", definition of the "domestic industry", the treatment of captive production and the non-attribution principle. The United States had attempted to justify the exclusion of captive market segment from its injury determination analysis by misusing the reasoning

of the Appellate Body in the case on United States – Lead and Bismuth II.[3] However, the Appellate Body had correctly rejected such an attempt and ruled that the domestic industry that produced both actual and potentially "competitive" products had to be assessed as a whole for the injury determination. Furthermore, the Appellate Body had found that attributing serious damage to an exporting Member, in excess of its actual damage caused by the imports from that Member, would amount to misattribution of damage and would be inconsistent with Article 6.4 of the ATC. Having recognized that, the Appellate Body had ruled that the United States had acted inconsistently with Article 6.4 of the ATC by not examining the effects of imports from Mexico. Japan fully endorsed the Appellate Body's view that, when determining serious damage or actual threat thereof, the Member investigating the injury must ensure non-attribution by conducting the examination of the products Member by Member, thereby preventing punitive application of the safeguard action.

41. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS192/AB/R and the Panel Report in WT/DS192/R, as modified by the Appellate Body Report.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists

42. The Chairman drew attention to document WT/DSB/W/174 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/174.

43. The DSB so agreed.

[3] WT/DS138.