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Dispute Settlement Body
11 February 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 February 2000

Chairman: Mr. Kåre Bryn (Norway)

Subjects discussed: Page

1. Implementation of the recommendations of the DSB

(a) Argentina - Safeguard measures on imports of footwear

(b) Chile - Taxes on alcoholic beverages

(c) Korea - Definitive safeguard measure on imports of certain dairy products

The Chairman recalled that in accordance with the DSU provisions, the DSB kept under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned should inform the DSB, within 30 days after the date of adoption of the Panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB.

(a) Argentina- Safeguard measures on imports of footwear

The Chairman recalled that on 12 January 2000, the DSB had adopted the Appellate Body Report on "Argentina - Safeguard Measures on Imports of Footwear" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited Argentina to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

The representative of Argentina said that in accordance with Article 21.3 of the DSU, his country wished to inform the DSB of its intentions in regard of implementation of the recommendations and rulings of the Panel and the Appellate Body Reports. Argentina wished to confirm that it would comply with the DSB's recommendations and that consultations were currently being held with various government agencies with a view to determining possible options for compliance. The Ministry of Industry, Trade and Mining - the implementing authority - had asked the investigating authority - the National Foreign Trade Commission - for an opinion on the possibility of adjusting the safeguard measure in relation to the injury determination in order to bring it into line with the standards and requirements set out by the Panel as modified by the Appellate Body. Once these options had been evaluated, Argentina would hold consultations with the European Communities in order to discuss the question of implementation. Since the safeguard measure would remain in force until 25 February 2000, Argentina considered that, by that date, the measures aimed at complying with the DSB's recommendations and rulings would be adopted.

The representative of the United States said that the Panel and the Appellate Body Reports had made it clear that Argentina's safeguard measure on footwear imports was inconsistent with its WTO obligations. The United States hoped that this represented the final chapter in Argentina's long history of protecting its footwear industry from free and open trade through WTO-inconsistent measures. Argentina had first imposed specific duties on footwear imports, only to replace them with the current WTO-illegal safeguard action. It was now time for Argentina to implement its Uruguay Round commitments on footwear. The United States believed that Argentina could easily come into compliance with the Panel and Appellate Body findings. In fact, the measure was set to expire on 24 February 2000. In view of the findings, Argentina should ensure the expeditious elimination of this problematic measure. However, the United States was concerned about recent press reports. The Argentine press had reported last week that the Argentine Secretariat of Industry and Commerce had stated that it intended to extend its protection of the footwear sector, even though Argentina's safeguard had been ruled to be contrary to its WTO obligations. Such statements were of concern. The United States could think of no WTO-consistent way that Argentina could possibly extend its safeguard measure under the circumstances. There was no legal or practical justification for extending the measure beyond 24 February. It did not send a good signal that the new Argentine Government would decide that non-compliance with a WTO determination would be the appropriate course of action in this case. Particularly in light of the clear findings by both the Panel and the Appellate Body, the United States strongly urged Argentina to allow this measure to expire as previously scheduled on 24 February 2000. Furthermore, the United States wished that Argentina ensure that additional or replacement barriers were not placed on footwear imports into Argentina.

The representative of the European Communities said that his delegation supported the statement made by the United States. This case was now decided by the Panel and the Appellate Body. It was clear that the safeguard measures were in violation of Argentina's WTO obligations. As pointed out by the United States, an earlier system imposed by Argentina, which involved minimum specific duties, had also been challenged in the WTO and had been found to be illegal. The measure in question was a replacement measure of the first one. The EC hoped that the measure set to expire on 24 or 25 February 2000 would be allowed to expire and would not be extended. Argentina had stated that consultations were ongoing among its agencies on possible options. In the EC's view there was only one option, namely, to allow the measures to expire. Any replacement of the present measure with another measure would have to be challenged. He hoped that the sector concerned would be allowed to face import competition in conformity with Argentina's WTO obligations. The EC was also aware of some press reports which were of concern but hoped that such information had simply been misreported.

The representative of Indonesia said that his delegation welcomed the statement made by Argentina to the effect that the safeguard measures which had been found to be WTO-inconsistent would cease on 25 February 2000. Indonesia supported the concerns expressed by the EC and the

United States with regard to possible modifications of the measures in order to further protect Argentina's footwear industry. Indonesia which had a substantial interest in this case, and had participated therein as a third party, wished to take part in any consultation to be held on Argentina's implementation.

The representative of Argentina reiterated that it was his country's intention to implement the DSB's recommendations in this case. His delegation noted the interests expressed by some delegations wishing to participate in the consultations to be held at an appropriate time.

The DSB took note of the statements and of the information provided by Argentina regarding its intentions to implement the DSB's recommendations.

(b) Chile - Taxes on alcoholic beverages

The Chairman recalled that on 12 January 2000, the DSB had adopted the Appellate Body Report on "Chile - Taxes on Alcoholic Beverages" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited Chile to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

The representative of Chile said that, as provided for in Article 21.3 of the DSU, his country wished to inform the DSB of its intentions in respect of implementation of the recommendations concerning Chile's system of taxation on alcoholic beverages. Mindful of its international obligations, Chile had already begun a process of examining possible options for adjusting its tax system. Since this process was still under way, it was not possible to provide detailed information on the type of adjustment to be adopted. He drew attention to paragraph 60 of the Appellate Body Report which stated that "Members of the WTO are free to tax distilled alcoholic beverages on the basis of their alcohol content and price, as long as the tax classification is not applied so as to protect domestic production over import". This important statement, which fully recognized the WTO validity of *ad valorem* tax systems, would be duly taken into account by Chile in designing the required adjustments. He pointed out that any change in the tax structure was a matter of law in Chile and therefore had to be examined and approved by the National Congress. Chile would need a reasonable period of time, as provided for in Article 21.3 of the DSU, in order to implement fully the DSB's recommendations. To this end Chile intended to hold consultations as soon as possible with the EC in order to seek agreement on a reasonable period of time. He drew attention to document WT/DS87/11-WT/DS110/10 of 7 February 2000, which contained Chile's statement of intentions. At the present meeting, he wished to add that Chile had already begun a dialogue with the EC with a view to agreeing on a reasonable period to allow prompt compliance. The preparatory examination for drafting an amendment to the current legislation had already begun under an interministerial commission set up for that purpose. The commission comprised representatives of the Ministries of Finance, Economic Affairs, Agriculture and External Relations, who would submit the draft for consideration by the President of the Republic, on whom the Constitution conferred exclusive power to initiate draft legislation on tax matters. The final draft legislation would be submitted by the President to the National Congress for approval. Chile hoped that the process would not be significantly delayed due to the current political situation in Chile, given that on 11 March 2000 there would be a change of government and the new President would take office. At the same time all ministers and other high governmental authorities would change. Work was under way to draw up a realistic timetable for compliance in keeping with these developments in Chile.

The representative of the European Communities said that the EC had noted in the past that Chile had stated that its appeal should not be considered as a delaying tactic. It was therefore the EC's understanding that Chile would be following the Appellate Body's recommendations. The EC noted Chile's willingness to do so without delay. Chile's argument concerning its legislative difficulties was valid but that should not undermine the commitment for a speedy action. The EC hoped that a

reasonable period of time for implementation in this case would be reasonable. He noted that it would be appropriate that the Interministerial Commission prepare a new recommendation for the new President before 12 March. The EC was prepared to participate in any consultations to be held by Chile on implementation. The EC was satisfied with Chile's statement but would reserve its judgment on prompt implementation at this stage.

The representative of the United States said that her country was pleased that Chile was proceeding in the direction of complying with its WTO obligations. The United States echoed the statement made by the EC, in particular with regard to the issue of legislative changes and what might be done to expedite the process making for an easy opportunity for a new Minister to make decisions. The United States was concerned about its industry and the injury to accrue to it, if compliance was not arrived at this year. The United States wished to encourage Chile to move forthwith on this matter.

The DSB took note of the statements and of the information provided by Chile regarding its intentions to implement the DSB's recommendations.

(c) Korea - Definitive safeguard measure on imports of certain dairy products

The Chairman recalled that on 12 January 2000, the DSB had adopted the Appellate Body Report on "Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited Korea to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

The representative of Korea said that at the 12 January DSB meeting his delegation had stated that, despite some significant systemic concerns, Korea would accept the adoption of the Reports in order to uphold the integrity of the dispute settlement system. In accordance with Article 21.3 of the DSU, he wished to inform the DSB that it was Korea's intention to implement the DSB recommendations in order to bring the safeguard measures into conformity with its obligations under the Agreement on Safeguards. Korea had already initiated a process to examine compliance options, including the lifting of the safeguard measure. However, in view of the complicated internal process, Korea was not yet in a position to elaborate on the details regarding its implementation plan. His country intended to act in an expeditious manner and, if necessary, work closely with the EC to this end.

The representative of the European Communities said that his delegation was glad that Korea intended to act rapidly and that it was considering the lifting of the safeguard measure. The EC expected quick and faithful implementation of the DSB's recommendations and looked forward to negotiating with Korea on possible solutions within a reasonable period of time.

The representative of the Ecuador said that his delegation noted with satisfaction that the EC had underlined the need for prompt compliance with the DSB's recommendations. The EC's statement was encouraging and Ecuador hoped that the same standard regarding prompt compliance would apply in the Bananas case.

The DSB of took note the statements and of the information provided by Korea regarding its intentions to implement the DSB's recommendations.

2. Australia - Subsidies provided to producers and exporters of automotive leather - Recourse to Article 21.5 of the DSU by the United States

(a) Report of the Panel (WT/DS126/RW and Corr.1)

The Chairman recalled that at its meeting on 14 October 1999, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by the United States in document WT/DS126/8 concerning the measures taken by Australia to comply with the DSB's recommendations in this case. The Report of the Panel, which had been circulated on 21 January 2000 in document WT/DS126/RW and Corr.1, was now before the DSB for adoption at the request of the United States.

The representative of the United States said that her country was pleased with the Report of the Panel under Article 21.5 of the DSU and supported its adoption. At a minimum, the Panel Report established that, under the Subsidies Agreement, the withdrawal of a prohibited subsidy had to be a meaningful withdrawal; a country could not merely go through the motions. The United States hoped that Australia would come into compliance immediately. This Panel Report should be understood in its context. As detailed by the Panel, the United States had been working since 1996 to put an end to the export subsidization of Australia's automotive leather industry. A settlement had been reached on one set of export subsidy programmes in 1996, only to have them replaced immediately by other export subsidies, including the $A 30 million grant. The United States had tried but had failed to negotiate a withdrawal of the $A 30 million export subsidy grant. Her country had launched a year-long panel proceeding, which established that the $A 30 million was a prohibited export subsidy and had to be withdrawn. Australia had then claimed to have "withdrawn" the subsidy by having the recipient repay only about a quarter of the grant, and immediately reimbursing that repayment through yet another subsidy. In this context, and presented with non-recurring significant lump sum grants bestowed in the past, the Panel had concluded that the entire grant amount had to be paid back, and that reimbursing the partial repayment nullified that partial repayment. The United States did not agree with every word of the Panel Report. The Panel's remedy went beyond that sought by the United States. Nevertheless, because this case had gone on for far too long, because the parties had agreed up front that they would not appeal, and because of the unique facts of this case, the United States believed that it was time to bring this dispute to a close by adopting the Panel Report.

The representative of Australia said that he wished to underscore his delegation's dismay at the reasoning of the Panel Report. It struck his delegation that it was ironic that a dispute concerning such a minuscule amount of trade went to the systemic heart of so much that Members held of value in terms of how the WTO, and in particular the DSU, operated. He asked Members to listen carefully to the statement that he wished to make as it raised very serious systemic concerns which, although the amount of trade was minuscule, went to the heart of the good operation of the DSU. His country believed that this Article 21.5 Panel Report should not be adopted. Given that it was effectively forced to relinquish its appeal rights under the threat of retaliation, Australia recognized that it had no way of preventing this adoption. Normally there was little point in a losing party commenting on the adoption of a report, since comments could come across as little more than disparagement due to dissatisfaction. However, Australia felt that these circumstances demanded some degree of frankness about the Panel Report and the implications for the dispute settlement system of the way in which this dispute had been handled to see what lessons might be drawn from it. There were significant systemic issues at stake in relation to this Panel Report that should be of concern to all Members. First, in every dispute where a respondent was forced to forgo appeal avenues - and when the disciplines of appellate review ceased to have application - there was the potential for "judicial adventurism". Second, the findings as to the "remedy" involved retrospectivity and were of a punitive nature. Third the Panel determined that it had the authority to make findings on a basis not sought by the United States. That went even further than the approach taken by a panel in another dispute - of seeking to make the case for the complainant - and which had been rightly overruled by the Appellate

Body. The approach in this Panel Report put Australia in an almost impossible position with regard to implementation. Australia would seek to arrive at a mutually satisfactory resolution of the issue, but the nature of the Panel's finding was so at odds with democratic governance and economic reality that Australia could, in a theoretical sense, find itself in a state of non-implementation as long as the WTO existed. This was a seriously flawed interpretation of a treaty commitment. Members, especially smaller Members, should think deeply about this - not to feel sympathy for Australia, but about the consequences for themselves in the future.

The Report indicated that $A 30 million that had been paid over a period of three financial years and which had been found by the first panel report to be in fact tied to exports of automotive leather through to 30 June 2000 had to be repaid by the company in full. If it was not repaid in full, then Australia would not have implemented. The tie of the money to exports of automotive leather, found by the first report as critical in its determination, was apparently irrelevant to implementation. Indeed, on the basis of the implementation Panel Report, any economic linkage to production, let alone exports, was irrelevant. The money had been paid lawfully to the company and so the government could not force recovery of the money. In any case, what if the company involved disappeared, how would a government confiscate money? This was setting up an outcome that was a nonsense. This was a punitive remedy which appeared designed to punish both Australia and the company. There was no basis in the WTO for punishing private companies. They had broken no WTO law. Neither was the WTO system about punishing sovereign states. It was about bringing measures into conformity, and about balancing rights and obligations. One could argue about when the effect of this $A 30 million disappeared - but no rational person would argue that the effect would go on beyond a finite time. The WTO was about trade not about some notion of deterrence through retrospective punishment. In paragraph 6.33 of its Report, the Panel had a notion of enforcement that went beyond any adverse trade effect. In paragraph 6.38 it was opposed to what it called "absolution" in cases where the "export contingency is entirely in the past". This made no legal sense. Exactly the same theology could be applied to every violation of a WTO rule. While this case was specific to Article 4 of the Subsidies Agreement, it set a dangerous precedent for the WTO. Retrospectivity was a risky path for this organization to go down. It was retrospectivity without any statute of limitations. The notion behind the Panel's views was that a case could be brought 50 years after a subsidy had been given and it would still have to be paid back whether or not the firm or even the industry still existed. Did anyone believe that when his or her government ratified the WTO that it had contemplated that the treaty would require it to confiscate lawful assets without compensation? Did anyone believe governments imagined interpretations could be developed that would mean that the provision in good faith of a subsidy which was later found to be inconsistent, would risk their country remaining ever afterwards in a situation of non-implementation? It did not further the objectives of this organization to have a situation where Members might not be able to implement even after a time when no one would claim there was any economic effect whatsoever. It might be that the United States believed that it could overturn this interpretation on appeal in some future case, and so would not allow this case to be tested in the Appellate Body because it knew that it was a bad finding. Or it might be that the United States sought to take comfort from the words in paragraph 6.34 that: "This specific remedy, withdrawal of the prohibited subsidy, does not merely counteract adverse trade effects, but is intended to enforce the absolute prohibition on the grant or maintenance of such subsidies. In our view, terminating a programme found to be a prohibited subsidy, or not providing, in the future, a prohibited subsidy, may constitute withdrawal in some cases. However, such actions have no impact, and consequently no enforcement effect, in the case of prohibited subsidies granted in the past." If that was the case, then it should be concerned by the fact that these words would still imply the repayment of subsidies already paid. Moreover, the Panel stated in paragraph 6.38 of its Report that: "If we were to accept the conclusion that 'withdraw the subsidy' does not encompass repayment, then that recommendation, far from providing a remedy for violations of Article 3.1(a) of the SCM Agreement, would grant full absolution to Members who grant export subsidies that are fully disbursed to the recipient before a recommendation to withdraw the subsidy is issued in dispute settlement, and for which the export contingency is entirely in the past. We do not believe that the

drafters of the SCM Agreement would have established in Article 3.1(a) the strict prohibition against subsidies contingent on export performance, including one-time subsidies contingent in fact on export performance, only to undermine that prohibition by providing a remedy which is ineffective in the case of such subsidies." Termination of an on-going programme of subsidies paid in arrears was even more ineffective than a partial withdrawal of a subsidy paid in advance. A rationale could be made for withdrawing part of a subsidy that had been paid but was tied to what was still future performance. However, the distinction that the Panel was seeking to make between past and on-going subsidies had no basis in the Subsidies Agreement. The enforcement justification given by the Panel applied equally to subsidies paid after the event as before the event. It applied equally to programmes that might have ceased for a number of years but which might be subsequently challenged and found to have been inconsistent at the time. This should be of concern to all Members. But, as the United States, in particular, seemed comfortable with these findings, Australia trusted it would support this conclusion when it was applied to it over one of its own measures. Australia considered that the first report was not a good legal report and was not alone in this. However it was prepared to accept it because it stated that: (i) the $A 30 million was in fact tied to exports in the period to 30 June 2000 because of nominal sales targets on all goods and services by the company, put there to meet the US requirements with respect to serious prejudice under Article 6.1(a) of the Subsidies Agreement; (ii) a loan without any production targets was consistent; and (iii) an inconsistent subsidy could be replaced by a consistent one. This Australia could do under its law and quickly settle the dispute. So it had accepted the Report and had done the best it could to implement on that basis. The current Report stated that Australia had misunderstood the Panel's original determination. Australia was not convinced however of the Panel's explanation of its previous view of the significance of the sales performance targets for its original findings. The Report continued to state that legal subsidies could be provided to the company. However, when a legal subsidy was provided, it claimed that it nullified the repayment. This did not make sense unless the suggestion was that the Australian Government should have done this covertly. This was simply not what happened in democratic countries, and it was not in keeping with any view on transparency. The rules on prohibited subsidies were about conditions imposed by governments on recipients. When there were no conditions or when the subsidies had gone, there was no basis for having further remedy. That was not the object and purpose of the WTO. An effective remedy was one where the measure was brought into conformity. The Panel recognized that its version of "withdraw the subsidy" had gone much much further than the requirements for compliance with any other area of the WTO. The Report would be adopted but Australia asked Members to consider in their own national interest what steps could be taken in the context of the DSB and DSU to prevent a recurrence of this.

The representative of Canada said his country wished to express its serious concerns regarding the conclusions of the Panel Report. While Canada expressed no opinion as to whether or not Australia's action was adequate to withdraw the subsidy previously found to exist, it had great concern about the Panel's approach. In Canada's view the logic of the Panel was not persuasive. First, the Panel had not interpreted the operative phrase, "withdraw the subsidy", in a manner consistent with similar expressions used in the other WTO Agreements. In particular, the Panel had not interpreted the phrase consistently with the expression "withdrawal of the measures concerned" in Article 3.7 of the DSU. As stated by all the parties to this proceeding, the customary practice under the GATT and the WTO, as established in a number of cases, was to interpret the appropriate remedy to be prospective action. Canada was not convinced that a change from that position was justified by the text of Article 4.7 of the SCM Agreement. As the Panel noted, Article 4.7 of the SCM Agreement was indeed a special and additional rule but a fair reading of that rule revealed that it was only a special and additional rule regarding timing. Consistent with the other accelerated time-frame provisions in Article 4, Article 4.7 was entirely concerned with timing, and its thrust was that the offending Member had to withdraw the prohibited subsidy "without delay". In addition to retroactivity being contrary to GATT/WTO custom and practice, it was also in conflict with the principle underlying Article 28 of the Vienna Convention on the Law of Treaties and with customary international law. From its inception the Appellate Body had repeatedly emphasised the importance

of adhering to the principles of the Vienna Convention on the Law of Treaties and customary rules of international law. Retroactivity should only be inferred where the language of the treaty clearly indicated that it had to be inferred. Contrary to the Panel's statement that it was not precluded from concluding that "withdraw the subsidy" was not limited to purely prospective action and might encompass repayment of prohibited subsidies, Canada believed the Panel could only draw such a conclusion if the language of the SCM Agreement clearly required such a result. It did not. Members would have made retroactivity explicit given that it was a significant departure from previous practice and its potential implications, including for the financial solvency of affected companies. While the principle of binding precedent was not, as a matter of law, recognised in WTO dispute settlement proceedings, the reality was that Panels and the Appellate Body did rely on past decisions for guidance. In this regard, Canada was concerned that the principles of retroactivity and a restitution-like remedy introduced by this Report might be cited and followed by future panels. The view expressed that this case was limited to past, one time grants was of little comfort as once these principles were accepted, they could be applied in other circumstances. Canada noted that the Appellate Body had not had the opportunity to review the Report. The views of the Appellate Body would have been most instructive in this particular case. In the absence of a negative consensus, Canada would urge Members to express on the record their dissatisfaction with the principles espoused in the Report and indicate to future panels that it was their intention that the Report be regarded as a one-time aberration of no precedential value.

The representative of Brazil said that his authorities were carefully reviewing the Panel's decision. Brazil fully shared the concerns expressed at the present meeting. His delegation noted the fact that the Panel had indicated that its decision was granted under the circumstances of the case. In Brazil's view the Panel's decision constituted a bad legal decision and was against GATT practice. Brazil noted that the Panel had profound systemic implications, which Members, including the United States, might not be in a position to support in future cases. Members should ponder on this issue and should react accordingly.

The representative of Japan said that the Panel Report had dealt with very important legal issues. The most important issue was the interpretation of the phrase "withdraw the subsidy" in Article 4.7 of the SCM Agreement. Although the parties concerned had argued that an interpretation of Article 4.7 of the SCM Agreement which would allow a retroactive remedy was inconsistent with the relevant DSU provisions and customary practice under the GATT 1947 and the WTO, the Panel had rejected this argument and had concluded that the recommendation to "withdraw the subsidy" was not limited to prospective action only but might encompass repayment of the prohibited subsidy. It had further concluded that full repayment in this case was necessary in order to resolve this dispute. This interpretation developed by the Panel would have a significant impact on implementation of other subsidy-related disputes. Japan shared the view that the retroactive remedy was inconsistent with the relevant provisions of the DSU and the customary practice under the GATT 1947 and the WTO. Japan doubted whether the Panel's interpretation was the best solution in this case. He noted that Article IX:2 of the Marrakesh Agreement provided that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". If necessary, this issue could be taken up by the General Council in order to decide what should be the correct interpretation of the phrase "withdraw the subsidy".

The representative of Hong Kong, China said that his delegation believed that the credibility of any dispute settlement mechanism depended, to a large extent, on the efficiency and effectiveness of the remedies provided for by the system. This Panel Report supported the proposition that effective remedies were necessary for a Member imposing an illegal act to bring its measures into compliance. Any reading of Article 4.7 of the SCM Agreement other than that proposed by the Panel would make Article 4.7 totally ineffective in deterring violations of Members' obligations under Article 3 and make "compliance" rather meaningless. Hong Kong, China noted that in this case the basis of the Panel's recommendations was Article 4.7 of the SCM Agreement rather than Article 19.1

of DSU, and that it had not ruled one way or the other whether a "retrospective" remedy was permissible under Article 19.1 (paragraph 6.42). Nonetheless, it had made it clear that Article 19.1 of DSU did not "require the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action" (paragraph 6.31). Hong Kong, China welcomed this conclusion. It was his delegation's long time position that Article 19 of DSU did not prejudge time-wise at all the remedies recommended. It was true that it did leave a large degree of discretion to the violating Member to bring its measures into compliance. This discretion covered the time function of remedies as well. It could be the case that a violating Member would take retrospective action to bring its measures into compliance. Such action was in full compliance with Article 19 of the DSU. Hong Kong, China appreciated that effective remedies represented a cost to violating Members. This cost, however, should be measured against the damage inflicted on other Members through illegal actions: i.e. actions in defiance of the basic obligation imposed on all Members to always observe the WTO Agreement (*pacta sunt servanda*).

The representative of the European Communities said that the Panel Report had some important systemic implications. At the present meeting, he only wished to comment on the procedures involved in this case. This was an expedited process under Article 21.5 of the DSU which involved a very short period in which a complicated report had to be adopted. The Panel Report had to be placed on the Agenda within 30 days from its circulation as provided for in the SCM Agreement. Such a short period of time made it very difficult for other Members to examine the Report and to consider its implications. He did not wish to take a position on the substance. He recognized that there were some systemic points about what withdrawal meant and what Australia should do in order to be in compliance. These points required further reflection. His authorities were carefully examining the potential consequences of the Panel Report. He considered that this matter could be taken up in the context of future discussions on the implementation issues. It was understandable that under the Article 21.5 process one had to act quickly, but the Report was complicated and it was difficult for Members to examine it within a short period of time. In accordance with the current DSU procedures, the Report would have to be adopted at the present meeting. However, some points should be further pursued in the future.

The representative of Malaysia said that his country shared the views expressed by previous speakers with regard to serious systemic implications resulting from the approach adopted by the Panel.

The representative of the United States said that her delegation noted the statements made at the present meeting. The United States did not agree with any statements that the basis for the Panel's findings was the need for a deterrent effect in the SCM Agreement. The Panel Report was not aimed at punishing a party. Instead, the issue was the meaning of the language "withdraw the subsidy" and whether and how the SCM Agreement provided for a meaningful remedy in cases in which prohibited export subsidies of this nature were granted. The Panel's determination that the SCM Agreement did provide for a remedy in such a case and that the meaningful remedy was the repayment of the entire grant was what was significant in this case. Some Members had appeared to assert that under the Panel's reasoning there was no valid basis for distinguishing between the non-recurring or one-time subsidy such as the $A 30 million grant provided by Australia and a recurring subsidy that was provided year after year. The argument was made that retroactive repayment either should be required in both cases or in neither case. In the view of the United States, with regard to the Panel's treatment of the non-recurring subsidies there was a legitimate basis for not requiring the repayment of recurring subsidies that had been granted in the past. Among other things, termination of the recurring subsidies programme had an enforcement effect that was sufficient to accomplish the objective of the SCM Agreement with respect to prohibited subsidies.

The DSB took note of the statements and adopted the Panel Report contained in WT/DS126/RW and Corr.1.

3. Appointment of Appellate Body members

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", recalled that the deadline for submission of candidates for Appellate Body members was 17 February 2000. The Selection Committee would start its work as soon as possible thereafter. It was the Committee's intention to start interviews of candidates in the week of 28 February 2000. If Ambassadors wished to meet with candidates they should address themselves to the Council Division in order to obtain information where and when they could be reached.

The DSB took note of the statement.