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Chairperson: Ms Amina Mohamed (Kenya)

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1. Surveillance of implementation of recommendations adopted by the DSB

- (a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.25 – WT/DS162/17/Add.25)
- (b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.18)
- (c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.18)
- (d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.6)
- (e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.3 – WT/DS234/24/Add.3)

1. The Chairperson 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". She proposed that the five sub-items to which she had just referred be considered separately.

- (a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.25 – WT/DS162/17/Add.25)

2. The Chairperson drew attention to document WT/DS136/14/Add.25 – WT/DS162/17/Add.25 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

3. The representative of the United States said that her country had provided an additional status report in these disputes on 7 April 2004, in accordance with Article 21.6 of the DSU. As noted in the report, legislation repealing the 1916 Act was pending in both the US Senate and US House of Representatives. On 29 January 2004, HR 1073, which would repeal the 1916 Act, had been reported favourably out of the Committee on the Judiciary of the US House of Representatives. The US administration was continuing to work with Congress to achieve further progress in resolving these disputes with the EC and Japan.

4. The representative of the European Communities said that three years and a half had now passed since the adoption of the DSB's rulings and recommendations in this dispute. During this period, repealing bills had been introduced, but not even discussed. And, it was only three months ago that a bill had finally been voted out of the House Committee for consideration by the whole house. The EC called on the United States to undertake the next steps without further delay. Otherwise, the EC would have no other choice, but to use its right to suspend the application to the United States of its obligations under the GATT 1994 and the Anti-Dumping Agreement.

5. The representative of Japan said that his country continued to be concerned about the fact that the United States was yet to secure the implementation of the DSB's recommendations and rulings even 42 months after the adoption of the reports of the Appellate Body and the Panel, which had taken place on 26 September 2000. That was more than four times than the length of the original reasonable period of time, which had been granted to the United States. Japan reiterated that prompt implementation by way of repealing 1916 Act by the United States was imperative not only to resolve

this dispute between Japan and the United States, but also to preserve the credibility of the WTO dispute settlement system. Japan was especially concerned that the Japanese companies were still being forced to incur substantial damages including significant legal costs in cases brought under this WTO-inconsistent Act. Therefore, legislation repealing the 1916 Act must also have the proper retroactive effect to terminate the pending cases. Japan urged the US administration to work with the Congress to secure the passage of bills repealing the 1916 Act with proper retroactive effect at the earliest juncture during the second session of the 108 Congress. Japan also expected more detailed reports by the United States on further progress regarding the status of all the repealing bills. Japan had not yet made a final decision on the reactivation of the DSU Article 22 arbitration. Nevertheless, Japan would like to remind the United States of its right to suspend concessions or other obligations.

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

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.18)

7. The Chairperson drew attention to document WT/DS176/11/Add.18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

8. The representative of the United States said that her country had provided a status report in this dispute on 7 April 2004, in accordance with Article 21.6 of the DSU. The US administration was continuing to work with the US Congress concerning appropriate statutory measures that would resolve this matter.

9. The representative of the European Communities said that the two bills pending respectively in the House and in the Senate for the "US-Cuba Trademark Protection Act" would ensure an effective protection of intellectual property rights both in Cuba and in the United States. In this context, they would repeal Section 211. These bills offered a basis for resolving this dispute to the benefit of all and were consistent with the United States' calls for effective and non-discriminatory protection of intellectual property rights. Both were receiving the support of an increasing and significant number of co-sponsors. The EC expected that the US administration would support these bills as an appropriate solution to this dispute.

10. The representative of Cuba said that her delegation wished to reiterate the points referred to in its statement made at the DSB meeting on 19 March 2004, which had been circulated on 2 April 2004 in document WT/DSB/COM/6. In addition, Cuba wished to emphasize that, as in the past, the report submitted by the United States contained very limited information on the status of the bills pending for adoption before the US Congress. It would seem that this attitude on the part of the United States was a delaying tactic designed to avoid compliance with the DSB's recommendations and making its legislation consistent with WTO rules. Therefore, Cuba requested that future status reports should contain more detailed information so as to give further indications of developments in this process. Finally, Cuba wished to reiterate that the systematic failure of the United States to comply with the DSB's recommendations cast doubt on the effectiveness of the dispute settlement mechanism and had given rise to mistrust in the multilateral trading system, at a time when all Members were making efforts to strengthen the system. Accordingly, Cuba urged the United States to abide by the DSB's decisions.

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

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan:
Status report by the United States (WT/DS184/15/Add.18)

12. The Chairperson drew attention to document WT/DS184/15/Add.18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

13. The representative of the United States said that her country had provided a status report in this dispute on 7 April 2004, in accordance with Article 21.6 of the DSU. The US administration was continuing to work with the US Congress with respect to the recommendations and rulings of the DSB that had not been addressed by 23 November 2002.

14. The representative of Japan said that his country had taken note of the US status report. As mentioned in the report, the DSB had extended, for the second time, the reasonable period of time in this proceeding until 31 July 2004. Yet, no concrete signs of progress toward the full implementation had been reported by the United States. Japan urged the United States to undertake a prompt and fully-fledged implementation of the DSB's recommendations and rulings in order to end this dispute. In this light, Japan urged the United States, once again, to secure the passage of "specific legislative amendments" during the second session of the 108th Congress at its earliest juncture. As Japan had reiterated in the past, every additional month a Member procrastinated implementation of the DSB's recommendations and rulings, which further compromised the credibility of the WTO dispute settlement mechanism. Should the United States fail to implement the DSB's recommendations and rulings by the end of the reasonable period of time, Japan had the right to the recourse set forth in the DSU provisions.

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

(d) Chile – Price band system and safeguard measures relating to certain agricultural products:
Status report by Chile (WT/DS207/15/Add.6)

16. The Chairperson drew attention to document WT/DS207/15/Add.6, which contained the status report by Chile on progress in the implementation of the DSB's recommendations in the case concerning price band system and safeguard measures relating to certain agricultural products.

17. The representative of Chile said that his country had submitted a new status report in spite of the fact that there had been no progress to report since the previous DSB meeting. Even though Chile had, in its view, fully complied in both the form and substance with the DSB's recommendations and rulings in this dispute, it had always been, and would remain, open to discussions with Argentina on this and other issues within the overall framework of its bilateral relations.

18. The representative of Argentina said that Chile and Argentina were holding discussions aimed at resolving the existing disagreement with regard to compliance with the DSB's recommendations and ruling in this dispute. In this respect, Argentina reiterated that if the disagreement within the meaning of Article 21.5 of the DSU would continue, it would request Chile to enter into consultations pursuant to the Understanding, signed on 24 December 2003, with regard to the procedures under Articles 21.5 and 22 of the DSU (WT/DS207/16).

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

(e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.3 – WT/DS234/24/Add.3)

20. The Chairperson drew attention to document WT/DS217/16/Add.3 – WT/DS234/24/Add.3, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

21. The representative the United States said that her country had provided a status report on 7 April 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003, legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with the WTO obligations of the United States had been introduced in the US Senate (S. 1299). On 10 March 2004, legislation repealing the CDSOA had been introduced in the US House of Representatives (H.R. 3933). In addition, on 2 February 2004, the US administration had, once again, proposed repeal of the CDSOA, in its budget proposal for fiscal year 2005. The US administration was continuing to work with Congress to achieve further progress in resolving these disputes with the complaining parties.

22. The representative of the European Communities said that according to the information recently released by the US Customs, the fiscal year 2003 disbursements already amounted to more than US\$190 million and some US\$50 million would be later distributed. With regard to the three distributions that had taken place since the entry into force of the Byrd Amendment, foreign producers had been forced to subsidize their US competitors up to more than US\$800 million. The introduction of repealing bills were positive signs. However, they remained unconvincing if no further action was undertaken and if repeated statements opposing to implementation and calling for re-negotiation of the WTO rules were to be made. Neglecting another WTO recommendation and the widespread concerns raised by the Byrd Amendment seriously undermined the credibility of the US commitment to its international obligations. The EC called on the United States to ensure prompt implementation of the DSB's recommendations.

23. The representative of Canada said that his country, once again, noted the status report of the United States. He recalled that the DSB had ruled on this dispute over a year ago. Canada continued to be disappointed that the United States had not made progress to comply with the DSB's rulings and recommendations. The DSB had found that the Byrd Amendment was an illegal specific action against dumping or subsidization. Indeed, the US Trade Representative had admitted that the Byrd Amendment was a "double hit" on foreign producers subject to antidumping or countervailing duties. The fact was that, in addition to harming foreign producers, the Byrd Amendment had detrimental effects on US economic interests. This was not what the complainants alleged; it was what the Congressional Budget Office had found. In this light, it was all the more puzzling that the United States continued to remain in violation of its obligations by not repealing the Byrd Amendment. Canada, once again, called upon the United States to uphold the integrity of the international trading system by ending its violation of its international obligations. The United States should repeal the Byrd Amendment and end this dispute.

24. The representative of Chile said that, once again, his country regretted that, in spite of the good intentions expressed by the US administration, there had been no developments with regard to compliance. The level of nullification and impairment suffered by Chile as a result of the Continued Dumping and Subsidy Offset Act of 2000 continued to increase with each passing day insofar as new "offset payments" were available to the US companies, which competed with Chilean exports. Chile, once again, called on the US administration to work with Congress to secure the repeal of the Byrd Amendment as soon as possible and thereby to avoid recourse to the measures of last resort, for which Chile had already sought the DSB's authorization.

25. The representative of India said that his country urged the US administration to redouble its efforts to repeal the Continued Dumping and Subsidy Offset Act of 2000 in the US Congress in order to achieve an amicable end to this dispute.

26. The representative of Japan said that the failure by the United States to implement the DSB's recommendations and rulings within the reasonable period of time had compelled Japan and seven other complaining parties to request the DSB's authorization to suspend concessions and other obligations *vis-à-vis* the United States. While the matter was pending before the DSU Article 22.6 arbitration, Japan strongly hoped that the United States would make its utmost efforts to secure the implementation of the DSB's recommendations and rulings, by promptly repealing the CDSOA, so as to render unnecessary to apply the retaliatory measures by the complaining parties.

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

2. European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil

(a) Statement by Brazil

28. The Chairperson said that this item was on the agenda of the present meeting at the request of Brazil and invited the representative of Brazil to make a statement.

29. The representative of Brazil said that, in a communication circulated on 23 March 2004 (WT/DS219/13), the EC contended, through its Council Regulation (EC) No. 436/2004 of 8 March 2004, that it had fully implemented the findings of the Panel and the Appellate Body in the dispute on: "European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil", which had been adopted on 18 August 2003 by the DSB. He recalled that the EC had been found to breach the Anti-Dumping Agreement, and more specifically: (i) Article 2.4.2 of the Anti-Dumping Agreement in "zeroing" negative dumping margins in its dumping determination; (ii) Article 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to make discernible, from the published provisional or definitive determinations, that the EC had addressed, or explained the lack of significance, of the following injury factors listed in Article 3.4 of the ADA: i.e. return on investments, wages, productivity, cash flow, ability to raise capital and magnitude of the actual margin of dumping; and (iii) Articles 6.2 and 6.4 of the Anti-Dumping Agreement by failing to disclose to the interested parties during the anti-dumping investigations the information on the injury factors listed above, thus preventing the parties during the investigation to have the full opportunity to present their defence. With respect to the "zeroing" practice, Brazil noted that the EC had recalculated, in accordance with the Panel's findings, the dumping margin without using the "zeroing" methodology. Brazil was, however, concerned about the implementation of the Appellate Body's findings relating to the breach of the due process requirements. Brazil believed that the EC had not fully implemented the findings of the Appellate Body in that respect. In its Regulation (EC) No. 436/2004, the EC specified that "all parties were informed of the essential facts and considerations on the basis of which it was intended to amend and confirm the Definitive Regulation" and that "all comments submitted by the interested parties were considered and, where appropriate, reflected in the amended findings".

30. "Tupy", the Brazilian company, had been informed of the essential facts and considerations and had been given the opportunity to submit comments. Such comments had subsequently been submitted. However, it appeared from Regulation (EC) No. 436/2004 that the EC had failed to properly consider the arguments and comments submitted by "Tupy" and, as a result, had failed to fully implement the Appellate Body's findings. In its comments on the disclosure of the EC's findings on the magnitude of the margin of dumping, "Tupy" had, *inter alia*, submitted that the injury suffered by the EC industry, if any, had not been caused by dumped imports, but by the lack of productivity of

EC producers, as demonstrated by the significant difference between the dumping margin and the underselling margin. The EC had rejected this argument on the ground that it had been put forward and turned down by the Panel and the Appellate Body. Such a conclusion failed, however, to consider that the factual elements raised by "Tupy" in its comments were different from the ones, which had been taken into account by the Panel and the Appellate Body in reaching its decision. The Panel and the Appellate Body had made their findings with respect to the issue of causation on the basis that the EC Commission had investigated the alleged differences in costs of production and market perception and had reached factual findings that the difference in costs of production was minimal. However, such factual findings had been based only on a finding relating to the difference between black and white heart fittings. The EC had never carried out an overall assessment of the difference in production costs between "Tupy" and the EC industry and the relevance of such difference on the causality findings. The EC had thus failed to properly reassess the information disclosed in the light of the arguments submitted by "Tupy", as requested by Articles 6.2 and 6.4 of the Anti-Dumping Agreement. As underlined by the Appellate Body, Article 6 established a framework of procedural and due process obligations which was central in anti-dumping proceedings and must be consistently applied by investigating authorities throughout the investigation (para. 138 of the AB Report). The findings of the Appellate Body had confirmed that the analysis of all injury factors listed in Article 3.4 must not only appear in the Provisional or Definitive Regulation in accordance with Article 12, as already found by the Panel, but also be disclosed to the parties during the investigation in order to allow the interested parties to have the full opportunity to present their defence as required by Article 6. Articles 6.2 and 6.4 were aimed at protecting fundamental procedural rights. Their violation consequently undermined the entire investigative process and could hardly be cured retroactively. In any event, the implementation of the Appellate Body's findings that Articles 6.2 and 6.4 of the Anti-Dumping Agreement were breached required more than a simple post facto disclosure of the analysis of the injury factors, which had been undisclosed during the initial investigation. It required the investigating authority to reconsider the information in the light of the comments submitted by the interested parties. This would be the only way to attenuate the impairment of the Brazilian exporter's right to a full defence during the investigation. Brazil would maintain this issue under consideration and naturally reserved all rights to further pursue this matter, if necessary.

31. The representative of the European Communities said that it was the EC's understanding that Brazil was slightly frustrated by the outcome of this case. However, this was due to the decision of the Panel and the Appellate Body, not the EC's implementation. In this regard, the EC wished to stress that with remarkable speed and diligence, and within the reasonable period of time agreed upon, it had reassessed the findings by taking fully into account the findings and conclusions of both the Panel and Appellate Body Reports. The EC's reassessment had taken into account not only the zeroing-related findings, but also those concerning publication and disclosure. The new Council Regulation (EC) No. 436/2004, which had already been notified to the DSB (WT/DS219/13), explained in detail the Commission's reassessment both in terms of procedure and substance in compliance with the "publication" requirements of the Anti-Dumping Agreement and the relevant Panel and Appellate Body's findings. While the EC was ready to provide Brazil with any further explanations it might need, it wished to express its hope that Brazil would eventually agree with the EC's conclusion. This would enable the parties to put a definite end to this dispute.

32. The DSB took note of the statements.

3. **European Communities – Conditions for the granting of tariff preferences to developing countries**

(a) Report of the Appellate Body (WT/DS246/AB/R) and Report of the Panel (WT/DS246/R)

33. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS246/9 transmitting the Appellate Body Report on "European Communities –

Conditions for the Granting of Tariff Preferences to Developing Countries", which had been circulated on 7 April 2004 in document WT/DS246/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/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. She 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".

34. The representative of India said that his country had requested, on 7 April 2004, that the adoption of the Panel and Appellate Body Reports in the dispute on "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries" be placed on the agenda of the present meeting. India, thanked first of all the members of the Panel, the Appellate Body as well as the Secretariat for their diligence and hard work during the course of this dispute. India was pleased with the result that the EC measure in question before the DSB had been held to be in violation of its obligations under the WTO. The case was of great systemic importance to the multilateral trading system in general and the developing countries in particular. India, therefore, wished to delve in some greater detail on the reasoning leading to certain rulings in the Appellate Body Report to be adopted at the present meeting.

35. He said that India had invoked the dispute settlement proceedings in this case with extreme reluctance, and only after having exhausted all available avenues for a negotiated settlement with the EC. The Drug Arrangements window had been in the EC GSP Scheme since 1990. But it had started hurting Indian exports in 2001 when the EC had decided to extend the window to Pakistan. In particular, its textiles sector experienced a severe setback because of tariff advantages that had been granted to the beneficiary countries, but not to all other developing countries. The EC had several policy options available to it, if it wanted to help Pakistan. Assistance could be given by foreign aid, or a GSP tariff preference that helped all developing countries or a selective tariff preference. All these options were similar in that they benefited the recipients; but there were significant differences. In particular, selective GSP schemes had the unique feature as observed in the present case; unlike foreign aid, they invariably inflicted costs on other developing countries. In this case the EC had chosen a selective tariff preference and the price had been paid not by the EC, but by other developing countries.

36. He noted that the EC had been repeatedly approached, at various levels, to arrive at a mutually agreed solution. India had approached the EC before, during and after the commencement of the dispute. The EC had been told that this measure violated Article I:1 of the GATT and was not justified under the Enabling Clause. The EC had not agreed. Some of the beneficiaries of the Drug Arrangements had also requested the EC to resolve this matter by obtaining a waiver. The EC had not proceeded with that course of action either. As a result, India had proceeded with this dispute and had made two basic claims, both upheld by the Panel: (i) the Drug Arrangements were inconsistent with Article I:1 of the GATT; and (ii) the Drug Arrangements were not justified under the Enabling Clause.

37. In its appeal, the EC had requested the Appellate Body to reverse the Panel's conclusions on India's basic claims. The Appellate Body had upheld the Panel's conclusions with modified reasoning. Therefore, two basic claims of India – that the Drug Arrangements were inconsistent with Article I:1 of the GATT and that they were not justified under the Enabling Clause – had been upheld by both the Panel and the Appellate Body. The EC would now have to bring its illegal measure into conformity with WTO law. It was unfortunate that India had been forced to go through a prolonged and complex proceeding in order to ensure that the EC bring its measure into conformity. It was the more unfortunate because certain aspects of the reasoning of the Appellate Body might have far-

reaching implications for all WTO Members. India would like to comment on these aspects at the present meeting.

38. With regard to the meaning of "non-discriminatory", the Panel had found, among others, that the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause required that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations, and that the term "developing countries" in paragraph 2(a) of the Enabling Clause should be interpreted to mean *all* developing countries, with the exception that where developed countries were implementing a priori limitations, "developing countries" might mean *less than all* developing countries. On appeal, the Appellate Body had reversed the foregoing and had found, in paragraph 165 of its Report, that "a GSP scheme may be 'non-discriminatory' even if 'identical' tariff treatment is not accorded to 'all' GSP beneficiaries" and that "GSP schemes may be 'non-discriminatory' when the relevant tariff preferences are addressed to a particular 'development, financial [or] trade need' and are made available to all beneficiaries that share that need." In the context of the GSP, these findings negated the MFN rights of developing countries *as between themselves*, and absolved developed countries from their corresponding MFN obligations towards developing countries. The findings were not based on the terms of a provision in which the developing countries had given their consent to forego their MFN rights. Developing countries were, thus, being deprived of their MFN rights by judicial fiat within a dispute settlement system established precisely to preserve the rights and obligations of all Members. The Enabling Clause had been adopted *specifically* for the purpose of transferring benefits from developed to developing countries. It did not, and had never intended to, permit developed countries to shift market access benefits from some developing countries to others.

39. The Appellate Body Report had correctly started out with the reaffirmation of its previous findings in "Canada-Autos" and "United States-Section 211 Appropriations Act" that the MFN principle embodied in Article I:1 was a "cornerstone of the GATT" and "one of the pillars of the WTO trading system", which had consistently served as a key basis and impetus for concessions in trade negotiations. However, in the remaining part of its Report, the Appellate Body had proceeded to remove from the trade relations between developed and developing countries this pillar of the system and key basis for concessions in trade relations. There was no textual or contextual basis for findings of the Appellate Body on non-discrimination. The Appellate Body had found that "only preferential tariff treatment that is in conformity with the description 'generalized, non-reciprocal and non-discriminatory' treatment can be justified under paragraph 2(a)".¹ Paragraph 2(a) of the Enabling Clause referred to preferential tariff on *products*. Non-discrimination, thus, could not be interpreted as discrimination between *countries* based on criteria. However, the Appellate Body, in proceeding to determine the ordinary meaning of the adjective "non-discriminatory" on the basis of the ordinary meaning of the verb "discriminate", had done just that.

40. The issue before the Appellate Body was not what "non-discriminatory" meant in general, but what it meant in the context of tariff treatment. The ordinary meaning of "discriminatory tariff" was "a tariff containing duties that are *applied unequally to different countries*".² Under the GSP, developed countries were permitted to grant preferential *tariff* treatment to *products* originating in developing countries. Therefore, the ordinary meaning of the phrase "non-discriminatory preferences" in footnote 3 to the Enabling Clause that could be derived from the above was "preferential tariff treatment that is applied equally" to different countries. The Appellate Body Report had not addressed this point, which had been raised by India. In the GATT, "non-discrimination" meant affording equal competitive opportunities to like products. In the case of tariffs, this was achieved by according formally identical treatment to like products irrespective of origin.

¹ Para. 145 of the AB Report.

² Black's Law Dictionary, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1468.

The Appellate Body itself had confirmed that: "[T]he essence of the non-discrimination obligations is that like products should be treated equally irrespective of their origin ... ".³

41. Thus, the Appellate Body itself had defined "non-discrimination" to mean in the GATT that like products should be treated equally irrespective of their origin. "Irrespective of their origin" meant regardless of whether or not a country from which the like products originated was in the same or different situation compared to that of the others. Thus, under the GATT, making a distinction in the tariff treatment of like products was *per se* discriminatory. Where the GATT permitted distinctions in the treatment of like products as an exception, its language qualified the term "discrimination" with other terms. For example, Article XX of the GATT, which permitted measures that were otherwise inconsistent with the other provisions of the GATT, including Article I:1, used the phrase "arbitrary or unjustifiable discrimination". On the other hand, the phrase "non-discriminatory" in the Enabling Clause was unqualified. Consequently, India was of the view that the Appellate Body had erroneously disregarded the ordinary meaning of the phrase "non-discriminatory preferences" derived from the ordinary meaning of "discriminatory tariffs", and had disregarded its own jurisprudence on the meaning of "non-discrimination" in relation to like products.

42. India noted that in paragraphs 151 and 152 of its Report, the Appellate Body had set out two ordinary meanings of non-discrimination cited by India and the EC. The Appellate Body had concluded that these ordinary meanings were "divergent" and had proceeded to conduct an extended contextual examination, which had resulted in an endorsement of the "divergent" meaning cited by the EC. On closer examination it appeared that the Appellate Body had not adequately analysed these definitions. Had the Appellate Body conducted a proper analysis of both meanings, it would have had to recognize that the following phrase, word for word, was incorporated in both meanings: "to make a distinction in the treatment of different categories of peoples or things"; that the only difference was that the definition cited by India was confined to that phrase, and that the definition cited by the EC added the following phrase: "[especially] unjustly or prejudicially against people on grounds of race, colour, sex, social status, age, etc." This added phrase only indicated a type of distinction between people that was especially discriminatory. It did not detract from the fact that these definitions converged on the understanding that that all types of distinctions in the treatment of *different* categories of people or things were discriminatory. However, the Appellate Body drew the opposite conclusion from these definitions. In the Appellate Body's view, somehow these definitions converged on the understanding that distinctions in the treatment of *similar* categories of people or things was discriminatory.

43. Furthermore, the Appellate Body had failed to conduct an analysis of Article I:1 of the GATT as part of the context of "non-discriminatory". Having upheld the Panel's findings that the Enabling Clause was an exception to and did not exclude the applicability of Article I:1 of the GATT, the Appellate Body should have likewise analysed the meaning of "non-discriminatory" in the Enabling Clause in light of Article I:1 of the GATT. Paragraph 102 of the Appellate Body Report stated that "... as a matter of procedure the challenged measure is submitted successively to the test of compatibility with the two provisions." Thus, according to the Appellate Body itself, its own examination should have commenced with an analysis of the compatibility of the Drug Arrangements with Article 1:1 of the GATT. And yet, the Appellate Body Report had not presented such an analysis. Had the Appellate Body started its analysis with Article I:1 of the GATT, it could have made no conclusion other than that the Drug Arrangements were inconsistent with Article I:1 of the GATT because the advantages by way of tariff preferences granted to products originating in the twelve beneficiaries of the Drug Arrangements were not accorded immediately and unconditionally to the like products originating in all other Members. Following this "confirmatory" finding, the Appellate Body should then have been guided by its own previous ruling that: "... Non-discrimination obligations apply to all imports of like products, except when these obligations are

³ AB Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III"), WT/DS27/AB/R, paras. 190-191.

specifically waived or are otherwise not applicable as a result of the operation of *specific provisions of the GATT 1994*⁴ (emphasis added).

44. Nowhere in the Appellate Body Report was there any indication that the Appellate Body had examined the Enabling Clause to determine whether under its terms: (i) developing countries had waived their MFN rights under Article I:1 of the GATT as between themselves; or (ii) whether Article I:1 of the GATT was not applicable as a result of the specific provisions of the Enabling Clause, that was to say, whether there was an irreconcilable conflict between rendering the Enabling Clause operational and the preservation of the MFN rights of developing countries as between themselves. In this regard, in relation to India's assertion that [in agreeing to the GSP and the Enabling Clause] developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT *vis-à-vis* other developing countries, the Appellate Body Report had responded with a cryptic one-sentence statement, bereft of any analysis, which read: "In fact, we note that the Enabling Clause *specifically* allows developed countries to provide differential and more favourable treatment to developing countries 'notwithstanding' the provisions of Article I."(para. 166).

45. Not having commenced with the analysis of the compatibility of the Drug Arrangements with Article I:1 of the GATT, the Appellate Body had proceeded directly to the analysis of the compatibility of the Drug Arrangements with the Enabling Clause, as if the Enabling Clause had not been an exception to and had excluded the applicability of Article I:1 of the GATT, notwithstanding the fact that it had upheld the Panel's findings to the contrary. Further, the Appellate Body stated in paragraph 154 of its Report that "Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries". It, then, should have ruled that developing countries had not specifically waived their MFN rights under Article I:1 of the GATT in the context of the GSP. That the Appellate Body had found that paragraph 2(a) did not explicitly prohibit the granting of different tariff preferences to different GSP beneficiaries was of no significance because of the subsisting prohibition under Article I:1 of the GATT.

46. Finally, India noted that the Appellate Body had failed to examine the usage of the term "non-discriminatory" in the UNCTAD documents establishing the GSP. The Panel had devoted over 24 paragraphs of its Report to examining the UNCTAD documents and their relevance for the interpretation of the term "non-discriminatory". During the appeal, both India and the EC had agreed that these documents provided relevant context for the interpretative task of the Appellate Body. Yet the Appellate Body had not examined these documents and had not even provided an explanation as to whether they were relevant or irrelevant. If the Appellate Body had examined the UNCTAD arrangements, it would have been apparent that it was consistently understood that differentiation between developing countries was impermissible.

47. With regard to paragraph 3(c) of the Enabling Clause, he said that having disregarded the ordinary meaning of "non-discriminatory", having disregarded the meaning of "non-discrimination" in WTO jurisprudence, having failed to conduct an analysis of "non-discriminatory" in the context of Article I:1 of the GATT, having found paragraph 2(a) not determinative of the issue of "non-discriminatory" and having failed to examine UNCTAD documents for its interpretation, the Appellate Body had then examined paragraph 3(c) and had found in paragraph 165 of its Report: "Accordingly, we are of the view that, by requiring developed countries to 'respond positively' to the 'needs of developing countries', which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be 'non-discriminatory' even if 'identical' tariff treatment is not accorded to 'all' GSP beneficiaries. Moreover, paragraph 3(c) suggests that tariff preferences under GSP schemes may be 'non-discriminatory' when the relevant tariff preferences are addressed to a particular 'development, financial [or] trade need' and are made available to all beneficiaries that share that need".

⁴ AB Report, "European Communities – Regime for the Importation, Sale and Distribution of Bananas" ("EC – Bananas III"), WT/DS27/AB/R, adopted 25 September 1997, paras. 190-191.

48. The Appellate Body had made its findings on the meaning of the term "non-discriminatory" solely on the basis of paragraph 3(c) of the Enabling Clause, as if this were the only provision applicable in this dispute. It was not. Paragraph 3 of the Enabling Clause regulated *how* Members were to make use of the rights conferred upon them by paragraph 2; it did not confer rights additional to those set out in paragraph 2. This was made clear by the introductory terms "Any differential and more favourable treatment *provided under this clause ... shall*". In the absence of a conflict between the rights conferred by paragraph 2 and the obligations set out in paragraph 3, there was simply no basis in law or logic to use paragraph 3 as the basis for an expansion of the rights conferred by paragraph 2. According to the Appellate Body, the *requirement* to "respond positively" to the needs of developing countries under paragraph 3(c) meant that developing country beneficiaries could be treated differently, depending on their needs. This conclusion was based on the assumption that, in agreeing to this requirement, developing countries had agreed to forgo their MFN rights as between themselves. However, paragraph 3(c) did not express that agreement. The GSP was precisely established to do away with the special preferences then granted by some developed countries to a limited group of developing countries on the basis of certain factors, including historical ties and geography, thus discriminating against all other developing countries. It was, therefore, not reasonable to presume that, in seeking to abolish discrimination on the basis of historical ties and geography, developing countries deliberately and voluntarily had agreed that developed countries might continue to discriminate among them on the basis of *other* factors – in this case based on needs determined by developed countries.

49. There was an apparent safeguard, as the Appellate Body had ruled that the needs must be "assessed according to an objective standard", i.e. "broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations ...". But there was no legal basis for relating the recognition of a particular need of some developing countries under the WTO Agreement to the justification of tariff preferences solely to those countries with the particular need, to the exclusion of all other developing countries. In fact, the extremely worrisome consequence of this ruling was that criteria and concepts were imported from other international organisation, even those unrelated to the objectives of the WTO, into the law of the WTO without the consent of WTO Members. The Appellate Body had not based its interpretations of paragraph 3(c) of the Enabling Clause on the terms of this provision. The Appellate Body had first correctly noted in paragraph 158 of its Report that the use of the word "shall" in paragraph 3(c) of the Enabling Clause set out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to "respond positively" to the "needs of developing countries". However, in paragraph 162 of its Report, the Appellate Body claimed that paragraph 3(c) of the Enabling Clause "authorizes" differentiation between developing countries with different needs. No principle of interpretation allowed conversion of a provision that explicitly established an obligation into an "authorization". Further, paragraph 5 of the Enabling Clause, which dealt with the principle of non-reciprocity explicitly referred to the "*individual* development, financial and trade needs"; paragraph 3(c) did not contain a reference to "*individual*" needs. The Appellate Body had simply ignored this obvious and telling difference between two related provisions. Still further, paragraph 3(c) referred to the "*development, financial and trade needs*". However the Appellate Body had stated that a donor acted consistently with paragraph 3(c) if it responded positively to "*development, financial or trade needs*".⁵ No interpretative principle allowed that the conjunctive "and" be turned into the conjunctive "or".

50. With regard to the burden of asserting a defence, India said that having upheld the Panel's finding that the Enabling Clause was an exception to Article I:1 of the GATT, the Appellate Body had correctly found that "the European Communities bore the burden of *proving* that the Drug Arrangements satisfy the conditions of the Enabling Clause in order to justify those Arrangements under that Clause." [para. 190 (c)]. However, at the same time, the Appellate Body had found that "it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with

⁵ Para. 164, third sentence.

Article I:1 of the GATT 1994." [para. 190(c)]. As far as this dispute was concerned, there were no immediate adverse consequences to India because, as a matter of prudence, and as the Appellate Body had found, "India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel." But the course of future dispute settlement proceedings could not be charted by India's act of prudence – or the act of prudence of any other complainant, for that matter. India was of the view that the Appellate Body had erred in finding that it was incumbent on India to "raise" the Enabling Clause, notwithstanding that it was an exception. The Appellate Body had first reaffirmed its rulings in "US-Wool Shirts and Blouses", that "As a general rule, the burden of proof for an 'exception' falls on the respondent, that is, ... on the party 'assert[ing] the affirmative of a particular defence'" (para. 104), but then had made a novel distinction between (i) proving an exception as a defence and (ii) asserting the exception. The Appellate Body Report had gone on to state that "*a complaining party has to define the parameters within which the responding party must make a defence.*" The implications of these rulings for future WTO disputes was that a complaining party must anticipate every possible exception as a defence because it was incumbent on the complaining party to "define the parameters" of a defence. The Appellate Body had not based its novel concept on WTO law or the jurisprudence of international tribunals or general principles of law, as none existed.

51. In conclusion, India said that Article I:1 of the GATT was a pillar and cornerstone of the multilateral trading system. The Appellate Body had previously affirmed that the object and purpose of Article I:1 was to prohibit discrimination among like products originating in or destined for different countries⁶, and that Article I:1 "has consistently served as a key basis and impetus for concessions in trade negotiations". By its rulings on the interpretation of non-discrimination, based neither on recognized principles of interpretation nor in conformity with its own rulings in previous cases, the Appellate Body in this dispute had removed this pillar from the trade relations between developed and developing countries. The developing countries had never agreed to permit developed countries to discriminate between developing countries; in fact, the whole purpose of their negotiating efforts culminating in the adoption of the Enabling Clause was to eliminate such discrimination. The Appellate Body had thus constructed consent where no consent had been given and had turned a clause designed to shift market access benefits to developing countries into a clause permitting transfer of market access benefits from some developing countries to others. If these rulings informed future jurisprudence in the WTO, developing countries would no longer be able to negotiate tariff concessions with the assurance that the concessions they obtained in exchange for the concessions they granted would not be eroded by discriminatory treatment. The value of the concessions granted or offered by a developed country could be impaired by the unilateral act of that developed country by according further tariff reductions to other developing countries. As developing countries competed mainly between themselves in the markets of the GSP donor countries, it could have adverse effect in future rounds of tariff negotiations.

52. Further, the findings of the Appellate Body on "non-discriminatory" would now require panels and the Appellate Body to resolve conflicts about the merits of a distribution of market access benefits among developing countries without any normative guidance of the WTO membership. Thus far, the establishment of categories of Members accorded special privileges under WTO law had always been the result of negotiations between, and the specific consent of, Members. There were good reasons for this practice. The WTO membership could permit preferences on the basis of any criterion it saw fit. However, panels and the Appellate Body must base their rulings on generally-accepted legal principles or multilaterally-determined criteria expressed in the texts of the covered agreements. Moreover, the WTO membership could approve a preferential scheme on conditions ensuring that the balance of rights and obligations under the WTO Agreement was maintained, for instance on the condition that Members excluded from the preferences be given compensatory market access rights. Panels and the Appellate Body did not have the means to ensure that compensation was

⁶ AB Report "Canada – Certain Measures Affecting the Automotive Industry" ("Canada – Autos"), WT/DS139/AB/R, para. 84.

granted to those falling outside of this category. For these reasons, the findings of the Appellate Body had effectively transferred the prerogatives and powers of WTO Members to panels and the Appellate Body. India believed that the Appellate Body's rulings in this case raised the question of how developing countries should negotiate tariff concessions with developed countries. Should they negotiate only zero-tariff concessions, given that all other concessions were of extremely limited value? Or should they request that developed countries combined all tariff reduction commitments in their schedules of concessions with a scheduled commitment not to make use of the right that the Appellate Body conferred upon them? India was studying all these questions carefully and invited all other developing countries to do the same.

53. The representative of the European Communities said that the EC welcomed the Appellate Body Report. Although the EC maintained reservations on certain aspects of the Report, it wished to thank the Appellate Body for its high-quality work on this complex and sensitive dispute. In particular, the EC attached great importance to the Appellate Body's finding that developed countries might differentiate under certain conditions among GSP beneficiaries with the objective of responding positively to special needs of developing countries. The EC was glad that the Appellate Body had rejected the rigid interpretation given by the Panel to the term "non-discriminatory" under the Enabling Clause under which strictly identical preferences would have to be given to all developing countries without any differentiation. As to the WTO-inconsistency of the Drug Arrangements, the Appellate Body's finding that the EC "failed to demonstrate that [they] are justified under paragraphs 2(a) of the Enabling Clause" was based on the lack of "due process and fair administration". The EC did not agree that the Drug scheme functioned on the basis of criteria that lacked objectivity and transparency under the current GSP Regulation. Yet, the EC was reflecting on this Appellate Body's specific findings and intended to fully implement the DSB's ruling.

54. The representative of Ecuador, speaking on behalf of Bolivia, Colombia, Ecuador, Peru and Venezuela (the Andean Community) said that he wished to convey the Andean Community's gratitude to the Appellate Body and the Secretariat for their valuable work in settling this complex dispute brought by India. The Report to be adopted at the present meeting by the DSB was of great importance to the members of the Andean Community as it had established that the Enabling Clause permitted the granting of "additional preferences to developing countries with special needs" and clarified that the term "non-discriminatory" did not mean identical preferences for all developing countries, but for those with particular development needs in a similar situation. The Andean Community agreed with the Appellate Body's reasoning that particular needs, such as those arising in connection with illicit drug production and trafficking, could be met in a satisfactory manner through special schemes put into place by the countries granting trade preferences. They particularly welcomed the fact that the Appellate Body had decided to analyse the EC's special scheme in the light of the specific parameters of the Enabling Clause. The Appellate Body had properly reversed the Panel's reasoning that the Enabling Clause would permit a priori exclusions among developing countries, but that once such exclusions had been made it prohibited any differentiation between such countries. Thus, the analysis conducted by the Panel were not only found to be inconsistent, but would also have entailed serious problems of a systemic nature by turning into obligations discussions held in the UNCTAD more than 30 years ago.

55. With regard to future implications in terms of requirements, procedures and, more generally, the legal technique used to conduct dispute proceedings under the multilateral trading system, the Andean Community considered the Appellate Body's decision as a matter of paramount importance in terms of the scope it had given to Article 6.2 of the DSU. From their standpoint as third parties to the dispute, and considering the importance of the Enabling Clause and recognition that it was in the nature of a special exception, they understood that, under the disciplines of the DSU, it was not enough for India to make a claim of inconsistency with Article I:1 of the GATT. The Andean Community accorded particular importance to the Appellate Body's reasoning because, in their view, it would prevent any recurrence of this manner of conducting dispute proceedings, which would

impose unjustifiable burdens on the responding parties. Finally, the Andean Community thanked the Panel for extending third-party rights.

56. The representative of El Salvador, speaking on behalf of Guatemala, El Salvador, Honduras and Nicaragua, said that they wished to thank the Appellate Body and the Secretariat for their work in this dispute. As it had been indicated on other occasions, they attached great importance to the drug regime. This was an important means for their countries to develop both economically and socially as they were affected by the drug trade. Therefore, they were concerned about India's initiative to launch a dispute. They were also concerned about some findings of the Appellate Body. They hoped that compliance with the recommendations would not undermine or impair their benefits and that favourable treatment granted to them would be maintained.

57. The representative of Costa Rica said that his country first wished to thank both the members of the Appellate Body and the Panel as well as the Secretariat for their work they had done in connection with such a highly complex dispute. Costa Rica was pleased to note that the Appellate Body had very rightly amended the Panel's conclusions in two fundamental respects: (i) having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, the Appellate Body had concluded that the term "non-discriminatory" did not restrict the ability of preference-granting countries to accord different preferences to products originating in different beneficiaries.⁷ This confirmed that the term "non-discriminatory", as contained in the Enabling Clause, was not designed to ensure that identical tariff preferences would be granted equally to all developing countries. Thus the Enabling Clause permitted, for example, the granting of special treatment to countries affected by problems relating to drug production and trafficking, as provided under the EC's Drug Arrangements; (ii) the Appellate Body had likewise concluded that the term "developing countries" in paragraph 2(a) of the Enabling Clause did not mean all developing countries. Accordingly, in addressing the particular needs of a group of developing countries, and not of all the developing countries alike, the EC's Drug Arrangements were consistent with the Enabling Clause. Contrary to Costa Rica's view, however, the Appellate Body considered that the EC had failed to demonstrate that the Drug Arrangements were justified under paragraph 2(a) of the Enabling Clause. Costa Rica nevertheless believed that the Appellate Body's conclusions and its sound interpretation of the above provided the necessary latitude for maintaining the treatment granted to developing countries affected by particular problems, such as the Latin American beneficiaries of the scheme in question.

58. The representative of the United States said that her country had participated in this proceeding because of the importance of the issues presented from a systemic perspective, particularly for the operation and continued viability of GSP programs generally. These programs were important to developed and developing Members alike. In this regard, the United States had been concerned with some of the overly broad findings of the Panel. The United States was, therefore, pleased that the Appellate Body had recognized this overbreadth, and that it had reversed the Panel's finding that the Enabling Clause required developed countries under their GSP programs to provide *identical* tariff preferences to *all* developing countries. At the same time, however, the United States was concerned about the Appellate Body's finding that it was incumbent upon India to *raise* the Enabling Clause, but that the EC bore the burden of proving that the Drug Arrangements were *consistent* with the Enabling Clause. The United States did not see the legal foundation for this hybrid approach. Moreover, this new approach could lead to confusion in future disputes where there was an issue about the burden of proof. For example, if India had only cited to one clause of the Enabling Clause in its panel request, would that have meant that the EC only needed to bear the burden of proof to show it complied with that one clause? If India had cited to each and every clause of the Enabling Clause, would that have changed the EC's burden? It seemed odd that the complaining party would be able to set the burden of proof for the responding party, yet that would appear to be the consequence of the Appellate Body's approach. In any event, the United States took note that the Appellate Body's approach applied only

⁷ Para. 173 of the AB Report, WT/DS246/AB/R.

to the Enabling Clause and nothing in this Report would affect the burden under other WTO provisions.

59. Further, the United States was troubled that the Reports did not properly consider that the parameters for a GSP program included that it be "mutually acceptable". Indeed, the United States did not understand why the Appellate Body had omitted this text when describing in paragraph 145 the conditions for preferential treatment under paragraph 2(a) of the Enabling Clause. In the US view, this was a key element in understanding how the Enabling Clause fit into the balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement. Nevertheless, the Appellate Body's findings reversing the Panel were important, and would help maintain the viability of GSP programs.

60. The representative of the Philippines said that his country attached importance to, and supported in full, the statement made by India. While India's intervention was comprehensive, the Philippines would like to focus on certain specific portions of the Appellate Body Report, which it found disturbing. In particular, the Philippines' concerns related to the Appellate Body's findings with regard to: (i) the relationship between the Enabling Clause and Article I:1 of GATT 1994 and the resulting issues of the burden of proof; and (ii) the non-discrimination aspect of the GSPs. With regard to the first issue, while the Philippines agreed with the special status accorded by the Appellate Body to the Enabling Clause in the WTO system, it was concerned about the way the Appellate Body had characterized this in relation to the WTO dispute settlement system. In particular, the Philippines was concerned with the Appellate Body's apparent conclusion that because of such special status, a complaining party must, therefore, allege inconsistency with the Enabling Clause, not just inconsistency with Article I:1 of GATT 1994, notwithstanding that the Appellate Body had recognized that the Enabling Clause constituted an exception to the general rule laid down in Article I:1. This deduction of the Appellate Body appeared to stand on its head with regard to the fundamental and well-established principle of the burden of proof (i.e. that the Member who alleged an exception as a defence bore the onus of citing the rule or decision giving rise to the exception, proving its compliance and the right to the exception) without any clear, logical rationale other than the "special status" of the Enabling Clause.

61. The Philippines found disturbing the Appellate Body's statement that "... although a responding party must defend the consistency of its preference scheme with the conditions of the Enabling Clause and must prove such consistency, a complaining party has to define the parameters within which the responding party must make that defence." Indeed, if it was up to the responding party to claim an exception, such as the Enabling Clause in this case, as a defence. Presumably it was the responding party which must allege the particulars of its defence; i.e. "the parameters" of its defence, not the complaining party. This in concrete terms included identifying the provisions of the WTO Agreements or decisions with which the scheme was allegedly inconsistent, as well as establishing the facts necessary to support such inconsistency. The Philippines believed that the onus placed by the Appellate Body on India as a complaining party had raised the standard of good faith or benchmark for engagement beyond reason. The fact that a complaining party was on notice regarding the particulars of a measure and the fact that a complaining party anticipated the possible defences of the responding party was not sufficient to shift the burden of identifying the provisions of the instrument to be cited as a defence to the complaining party. India was appropriately held to have sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1, however, the Philippines disagreed with the Appellate Body's conclusion that it was incumbent, in the first place, upon India to raise the Enabling Clause in making its claim of inconsistency with Article I:1 of GATT 1994.

62. With regard to the second issue on the non-discrimination aspect of GSPs, the Philippines noted that, in reaction to the Appellate Body's finding that "pursuant to the term 'non-discriminatory' in footnote 3, similarly-situated GSP beneficiaries should not be treated differently" (para. 153), all GSP beneficiaries were from an economic standpoint similarly situated. This was precisely why they

were all included as beneficiaries, regardless of the probably divergent causes underlying their economic situation. His country noted the determination by the Appellate Body that the absence of "an explicit requirement in the text of para. 3(c) of the Enabling Clause to respond to the needs of 'all' developing countries or to the needs of 'each and every' developing country suggests ... that provision imposes no such obligation" (para. 159). This in the Philippines' view, dismissed the relevance of the term "generalised" and the manner in which it complemented the term "non-discriminatory", specifically in considering paragraph 3(c). A fuller consideration of this complementary nature would have evinced a contrary finding by the Appellate Body.

63. In support of its contention, he noted that the Appellate Body had interpreted, in another section, the Preamble of the WTO Agreement which recognized "the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development" (para. 161) as necessarily referring to differing needs among developing countries according to their levels of development and particular circumstances. However, it could rather be just as conveniently construed that these "differing needs" of developing countries, in the context of international trade, existed *vis-à-vis* developed countries or least-developed countries. While not wishing to extrapolate the Appellate Body's conclusions on this point given his country's concerns and difficulty in conclusively accepting their specific findings, one might wonder whether the Appellate Body was insinuating some form of gradation between levels of economic development among developing countries beyond the accepted dichotomy between developing countries and least developed countries.

64. Further, while the Appellate Body had found unwarranted the Panel's conclusion that allowing tariff preferences such as the Drug Arrangements would necessarily result in the collapse of the whole GSP system and a return back to special preferences favouring selected countries (para. 156), reality on the ground appeared to indicate that while the GSP system as a whole might not collapse, there appeared an increasing propensity for selected countries within the set of beneficiary countries under GSP schemes to be indeed favoured. Footnote 323 of the Appellate Body Report listing some of the special preference-type schemes, if anything, seemed to support this concern. Further, he noted the statement by the Appellate Body that "the very purpose of the special and differential treatment permitted under the Enabling Clause was to foster economic development of developing countries and that it was simply unrealistic to assume that such development would be in lockstep for all developing countries at once, now and for the future". In this context, the Philippines wondered whether the present conclusions made by the Appellate Body in its Report would not facilitate such disparity among developing countries by endorsing discrimination in the preferential tariff arrangements among and between developing countries.

65. Finally, placing the Appellate Body's conclusions in the context of what all Members faced in the current Doha Round of negotiations, particularly in the negotiations on non-agricultural market access (NAMA), he questioned whether one was not contemplating a scenario where at the conclusion of the round, developed countries could expect their exports to developing countries to enjoy full MFN-treatment, but developing countries could not, now with this ruling, fully expect that the tariffs they had negotiated under the NAMA would be implemented on an MFN basis, simply because the Appellate Body had endorsed developed countries' ability under preferential arrangements to discriminate among developing countries? Perhaps this implication would need to be clarified either in the NAMA negotiations or possibly through an authoritative interpretation, or some other means to be determined by Members as a consequence of this Report.

66. The representative of Paraguay said that his country had decided to participate as a third participant in the case under consideration because the principle of most-favoured-nation treatment enshrined in Article I of the GATT 1994 was at issue. Furthermore, because the most-favoured-nation obligation, as applied to developed countries with regard to products originating in developing countries had been raised as an issue. Consequently, Paraguay had a twofold interest in clarification

of the correct interpretation to be given to the Enabling Clause. First of all, Paraguay considered that the application of the Enabling Clause, in a system of generalized, non-reciprocal and non-discriminatory preferences, was of vital importance to the procedures and activities of the WTO, if it was really to serve as one of the main factors in the differential and more favourable treatment of developing countries. In other words, Paraguay had a systemic interest in this matter, which had been demonstrated through its continuous and active participation in the WTO. It relied on the clause as a defence against discriminatory trade practices by developed countries in favour of specific developing countries and defended the clause with a view to its correct application. Second, Paraguay had a direct interest in this dispute, in which the EC, under the Drug Arrangements, had granted tariff preferences to specific products from 12 countries that produced drugs or narcotics or suffered the effects of traffic in such illicit substances, without according the same preferences to like products from the other developing-country Members, which suffered the same harmful consequences as a result of the transit of drugs through their territory, causing damage and impairment to other developing economies like Paraguay. The discriminatory obstacles confronting Paraguay in the EC market as a result of this measure had a directly detrimental effect on its economy, notably on account of damage caused by the fact that the discriminatory treatment had reduced its competitiveness in 31 domestic industry and export products, and had eliminated development opportunities because the reduced market potential acted as a disincentive to investment, which had gone instead to the beneficiary countries.

67. In its Report the Appellate Body had reached a number of conclusions, which had confirmed the correctness of the technical and legal approach of Paraguay's claims with regard to special and differential treatment and, in particular the Enabling Clause. First of all, in paragraph 167 of its Report, the Appellate Body had noted that, pursuant to paragraph 3(a) of the Enabling Clause, any "differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties". It had concluded by stating that the above-mentioned paragraph 3(a) required that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members. The Appellate Body had also noted that the EC had not proved that the Drug Arrangements complied with the Enabling Clause, confirming the conclusion of the Panel. It had also confirmed that the Enabling Clause was an "exception" to Article I:1 of the GATT 1994 and that the clause did not exclude the applicability of Article I:1 of the GATT 1994. It had gone on to note that the Drug Arrangements were inconsistent with Article I:1 of the GATT 1994 and that they were not justified under paragraph 2(a) of the Enabling Clause, pursuant to the obligations imposed by the GATT 1994, as shown by Paraguay in its legal arguments as a third participant in this dispute.

68. However, the Report had raised numerous doubts about the correct interpretation to be applied to special and differential treatment. Paraguay had come across a number of ambiguities and some contradictions that could jeopardize special and differential treatment as a whole and the multilateral trading system in general. It was necessary for Members to obtain proper clarification of the interpretation given to these terms. His country's doubt had centred on the Appellate Body's interpretation of "discrimination". For example, paragraphs 161, 162 and 163 of the Report had dealt with the different needs of developing countries and the different levels of development. Paragraph 169 had dealt with these concepts in more detail, and had raised the issue of promoting preferential policies in relation to the interests of developing countries. It had referred to the "interests shared by sub-categories of developing countries". At the same time, it had put forward a new interpretation of the term "non-discriminatory". He wished to know which sub-categories of countries the Appellate Body had been referring to. He was aware of only three categories of WTO Members: least developed, developing and developed. Although the Appellate Body pointed out that paragraph 3(c) of the Enabling Clause did not authorize any kind of response to any claimed need of developing countries, and if his country's understanding of the Appellate Body's interpretation of the "discrimination" referred to was correct, he asked if this meant, for example, that the sub-category of "land-locked countries" would be accepted in the WTO, despite the wording of

paragraph 35 of the Doha Ministerial Mandate? No one could take issue with the fact that this was an objective and recognized norm within the UN system. Paragraph 165 appeared to endorse this interpretation, even though the same paragraph, as well as paragraph 180, by replacing "and" by "or", altered the letter and the spirit of paragraph 3(c) of the Enabling Clause. Paragraph 175 reconfirmed that the Appellate Body had reached the above-mentioned conclusion.

69. The reversal of the Panel's finding in paragraphs 7.161 and 7.176 on the interpretation of discrimination using *a priori* criteria, and of the finding in paragraph 7.174 that the expression "developing countries" in paragraph 2(a) might mean *less than all* developing countries, opened up an uncertain future for special and differential treatment, since it would be subject to criteria that ought to be objective, but were based on arbitrary standards adopted by developed countries, which had decided to grant preferences with a certain amount of favouritism. If that was the Appellate Body's interpretation, the delegation of Paraguay wondered whether developing countries, in agreeing to the GSP, might have deliberately given up their unrestricted most-favoured-nation rights under Article I:1 of the GATT 1994 in exchange for tariff preferences which, in the first place, developed countries were not obliged to grant, which when granted could only apply to products of their own choosing, and which, if once granted, could be withdrawn unilaterally and without consultation, when the developed country concerned so decided. It was difficult to believe this, bearing in mind the background of the "*travaux préparatoires*" when they had been under discussion within UNCTAD, as correctly cited in the "Agreed Conclusions" of 13 October 1970, leading to the Decision of 25 June 1971, which subsequently, on 28 November 1979, had become the Enabling Clause.

70. The consequences of adopting an erroneous interpretation of "non-discriminatory" were far-reaching. Developed countries had been given the power to disregard equality of competitive opportunities, guaranteed under the WTO rules, particularly as far as developing countries were concerned. As a result, developing countries found that their access to developed country markets was uncertain and unpredictable. The authority to alter conditions of competition and to assign competitive advantages was a very powerful economic weapon. Like any other power, it was subject to abuse and that was precisely why the rules of international trade existed to restrict the capacity of an individual country or a group of countries to appropriate that power to themselves and to determine unilaterally which developing countries should be more competitive and which developing countries should pay a price for that increased competitive capacity. The complexity of the Appellate Body's interpretation in this case and its significance and consequences for the future of trade negotiations within the WTO framework were infinite, as was the risk that trade distortions might be protected by a "new form of special and differential treatment". Finally, as recommended by the Appellate Body, the EC should bring Council Regulation (EC) No. 2501/2001 on the Drug Arrangements into conformity with its obligations under the GATT 1994, and in this connection, pursuant to the Report of the Appellate Body and the modified Panel Report, Paraguay should immediately and unconditionally be included in that preferential scheme.

71. The representative of Brazil said that his country, as a third party in this dispute, was seriously concerned about the Report of the Appellate Body to be adopted at the present meeting. Brazil believed that other developing countries – in fact, all developing countries – should also be concerned with the systemic repercussions of the ruling of the Appellate Body, even those that presently benefited from one of the closed-list regimes. What the Appellate Body had done, in a nutshell, might be construed, if taken without qualifications, as legitimizing the GSP as a tool of foreign policy of developed countries, something developing countries had tried to avert when negotiating the Enabling Clause in order to overcome the fragmented scheme of special preferences of the past. The interpretation given by the Appellate Body to the terms "non-discriminatory", "generalized" and "developing countries" had unduly altered the scope of the carefully negotiated Enabling Clause and unjustifiably and regrettably allowed donor countries to discriminate among developing countries. The reasoning developed by the Appellate Body was one-sided, since it would allow developed countries to enforce their policy goals, in many cases, at the expense of other developing countries. In fact, this "endorsed discrimination" allowed developed countries to simply

shift and shuffle market access opportunities among developing countries. As Brazil had already experienced in the recent past with the GSP of the EC, in a dispute about the same Drug regime, nothing new, from the Brazilian perspective, was really being created by the so-called "donors" – it was simply the Brazilian access to the EC market that was being displaced in order to privilege the access of other beneficiaries. However, as it had been repeatedly stated during these proceedings, Brazil, like India, could not recall having waived its MFN rights during the negotiations of the Enabling Clause.

72. In searching for the appropriate legal interpretation of paragraph 3(c) of the Enabling Clause, the Appellate Body had gone as far as to say that "responding to the needs of developing countries might thus entail treating different developing-country beneficiaries differently" (para. 162) and, in interpreting paragraph 2(a), the Appellate Body had found that the term developing countries "should not be read to mean 'all' developing countries and, accordingly, that paragraph 2(a) did not prohibit preference-granting countries from according different preferences to different sub-categories of GSP beneficiaries" (para. 175). This interpretation of paragraphs 3(c) and 2(a) would entail in many instances, however, that other developing countries suffered the consequences of reduced market access. This interpretation would also mean that the Appellate Body had disregarded Article 3.2 of the DSU and Article IX:2 of the Marrakech Agreement and had acted as a "de facto" legislator, allowing for the establishment of new "sub-categories" of countries, beyond those clearly accepted by the Membership: i.e. developed, developing and least-developed countries. This was not what the Enabling Clause was supposed to mean.

73. Brazil did not think that the Appellate Body had aimed at this outcome. And if this were to be the interpretation the Appellate Body wanted to assert, then it should have been tied to the request for a waiver, as foreseen in Article IX(3) of the Marrakech Agreement, which, once granted, could contribute to attenuate the imbalances created by exclusive programs and schemes. Moreover, the ideal of treating equally "similarly-situated countries", despite the nice-sounding echoes and despite its interpretational difficulties, could only be permitted if other developing countries were not harmed or were, at least, compensated. Otherwise, it was hard to see how the objective of a beneficial system of preferences to developing countries could be attained in the multilateral trading system. It is also hard to conceive of "positive" responses to developmental needs that affected "negatively" several others, without their consent. If the "similarly-situated countries" theory evoked any Aristotelian flavour, it must be recalled that the Greek "distributive justice" applied only in connection to relations of "subordination" and public law, to a situation where a sovereign was present and that was in charge of distributing rights and obligations according to his own criteria. Apparently, this was not the situation envisaged in the WTO. Moreover, neither Aristotle nor the Appellate Body had indicated which criteria were to be used to distinguish and differentiate among similar and dissimilar countries, something, of course, that could only be done multilaterally. Only three categories of countries were recognized by the multilateral framework and the attempt to read into the Agreements new sub-categories would amount to an "affirmative action" of sorts, but one not previously negotiated by Members, unlike the standing S&D provisions.

74. It was true, on the other hand, that the Appellate Body had tried to regulate the concessions of preferences and the designing of programs by means of certain conditions and limits. And it was important to highlight them since they could become crucial in the future. First, the definition of what was a "need" should not be based "merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country" and should, on the contrary, be assessed by an "objective standard", recognized, for example, "in the WTO Agreement or in multilateral instruments adopted by international organizations" (para. 163). Second, "a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant 'development, financial or trade need.' In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences" (para. 164). Third, "in granting such differential tariff treatment [...], preference-granting countries are required, by virtue of the term 'non-

'discriminatory', to ensure that identical treatment is available to all similarly-situated beneficiaries" (para. 173). And fourthly, pursuant to paragraph 3(a) "any differential and more favourable treatment shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties", nor "impose unjustifiable burdens on other Members" (para. 167).

75. With regard to this last "condition", Brazil could neither agree to "unjustifiable" nor to "justifiable" burdens being imposed by developed countries on developing countries. No burdens to developing countries should result from the operation of the GSP. Otherwise that situation would run contrary to the essence of the regime. With relation to the observance of "objective standards", it was not difficult to realize that this was perhaps a necessary condition, but it was not a necessary and sufficient condition. For even if the criteria were strictly objective, a specific program could still be discriminatory and harmful. In fact, by the simple choice of a specific "need" over another one, by the simple "design" given to a program, discrimination and imbalances among developing countries were bound to ensue. The Appellate Body seemed to have overseen this aspect. In any event, only time – or new disputes – would tell the relevance of these "caveats", each one of them being open to flexible interpretation. The only discrimination allowed in the text of the Enabling Clause was the special treatment in favour of least developed countries established in paragraph 2(d). If an additional degree of discrimination were to be "inserted" by jurisprudence into the text of the Enabling Clause, despite the few "caveats", it would amount to usurping the role of negotiators. The history of the negotiation aiming at the creation of the GSP showed that the driving force of the negotiation was the participation of all developing countries in the GSP and the avoidance of any kind of discrimination among them. Thus to accept the Appellate Body's interpretation, without any qualifications, would mean the denial of the very rationale behind the Enabling Clause. Moreover, it would imply the shifting of the burden related to the concession of trade preferences from the developed countries to those developing countries excluded from a GSP scheme. In sum, instead of having a system that should be "generalized" and "non-discriminatory", one would now risk a system that would be "restricted" and highly discriminatory. Instead of having a system that should be "beneficial" to developing countries, one would risk a system that could become, in many instances, deleterious to developing countries, while still beneficial to developed countries. This could not possibly be a desirable systemic outcome. All in all, a more prudent approach would be to attempt to square the findings of the Appellate Body with the ongoing and traditionally accepted rules governing the system of preferences. Thus, the requirements of objective criteria, positive response, impartial characterization of "need", interdiction of causation of barriers or burdens on other developing countries, etc., read together with the established partition of countries in the WTO and the waiver instrument, could lead to an interpretation that would preserve the beneficial aspects of the system. Brazil would follow closely the practical developments of the adopted Reports and hoped that no further barriers or difficulties to developing countries would be created by the administration of present or future regimes, which would add to the ones that they already had to endure in the multilateral trading system.

76. The representative of Thailand said that his country wished to join previous speakers who had expressed their appreciation to the Panel and the Appellate Body in relation to their rulings and recommendations in the case on "European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries" before the DSB for adoption. Thailand welcomed the adoption of the Reports by the DSB at the present meeting. In general terms, the rulings and recommendations were critically important for Members, in particular developing-country Members. However, there were some points of concern that his delegation wished to raise to the DSB at this juncture. Thailand wondered how criteria could objectively be set to describe which developing countries were eligible for tariff preferences under a GSP scheme. In other words, how "preference-granting countries" identified "similarly-situated beneficiaries"? How could one ensure that this kind of selection of beneficiaries would not run against the principle of non-discrimination. The second point of concern to Thailand was the issue of the burden of proof. It was indicated in paragraph 106 of the Appellate Body Report that the fundamental role of the Enabling Clause as well as its contents had opened the

avenue to view the burden of proof in this case as a special approach dictated by the particular circumstances. It had gone one to say in paragraph 114 that "a *complaining* party has to define the parameters within which the *responding* party must make that defence". Even though the following paragraph of the Report indicated clearly that the complaining party had to identify only those provisions of the Enabling Clause with which the scheme was allegedly inconsistent, it was not so clear how this approach of the burden of proof would be applicable in future cases. There were some other points of interest to Thailand, which needed more time to reflect on. His country might wish to raise legal issues argued in this case at other fora as necessary. Thailand was aware that WTO jurisprudence was pretty unique as compared to other jurisprudence pronounced by other international tribunals. It reconfirmed common understanding of Members or sometimes laid down fundamental interpretation of provisions of the Marrakech Agreement and its Annexes. Rulings and recommendations of the Appellate Body would help ensure the credibility of the WTO. His country trusted that panels and the Appellate Body in particular would perform their tasks as envisaged in the DSU.

77. The representative of Malaysia said that her country had noted with interest the Appellate Body Report, which had found that the EC Council Regulation 2501/2001 was inconsistent with Article I:1 of the GATT 1994, and was not justified under paragraph 2(a) of the Enabling Clause. Malaysia wished to thank India, the Philippines, Paraguay and Brazil for rising a number of pertinent issues relating to the application of the "non-discrimination" principle and its impact on the rights of developing countries. The conclusions of the Appellate Body with regard to the term "non-discrimination", i.e., that it did not require that identical tariff preferences be provided to all developing countries and that it should not be interpreted to mean all developing countries, had not taken into account that the only exception provided for in the Enabling Clause, as mentioned by Brazil, was in Article 2(d) of the Enabling Clause. These conclusions had important systemic implications and Malaysia agreed with Brazil that this was an issue of critical concern to all developing countries. Benefits of the GSP were not only limited to tariff concessions given under the scheme, but there were also some implications of being a GSP beneficiary. Hence, the non-discriminatory application of the Enabling Clause in GSP schemes was of paramount importance. Malaysia would examine the Panel Report and the Appellate Body's findings in a more careful manner. In the meantime, Malaysia hoped that all Members would take serious account of the provisions of the Enabling Clause, which had been designed to facilitate and promote developing countries' trade and was not meant to be an impediment to the reduction or elimination of tariffs and other trade restrictions.

78. The representative of Mexico said that he wished to make two points. First, with regard to the burden of proof, Mexico agreed with the United States' position. Second, with regard to the issue of differentiation between developing countries, Mexico agreed with the position expressed by Brazil.

79. The representative of Canada said that he wished to strike a positive note for the Appellate Body Report. First, he noted the recognition by the Appellate Body of the centrality of the Enabling Clause in the protection of the rights and benefits of developing countries. While there was some question about how those benefits might be distributed, there was no doubt about the importance of the Enabling Clause and about the importance of the GSP preferences in the operation of the GATT and the WTO itself. Given that it was the first time the Enabling Clause had been before the Appellate Body, he considered that this was a positive finding by the Appellate Body and a particularly important affirmation. The second point, which had been referred to by some previous speakers, was the absence of reference in the Appellate Body Report to negotiating history as an interpretive tool. Those who had read GATT cases were struck by the almost complete reliance of many of those cases on negotiating history, sometimes to the detriment of the text itself. One might question the extent to which the Appellate Body had decided not to delve into the negotiating history. However, one had to bear in mind that the negotiating history was a supplementary means of interpretation under international law. And so, while one might disagree with the textual analysis and contextual analysis of the Appellate Body in this particular instance, perhaps it should be welcomed

by all that the Appellate Body was, given how many countries had criticized the Appellate Body on this point, paying particular attention to the words of the treaty and had not delved into negotiating history that might or might not be conclusive in most cases.

80. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS246/AB/R and the Panel Report contained in WT/DS246/R, as modified by the Appellate Body Report.

4. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/254)

81. The Chairperson drew attention to document WT/DSB/W/254 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the names contained in document WT/DSB/W/254.

82. The DSB so agreed.

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

(a) Statement by the United States

83. The representative of the United States, speaking under "Other Business", recalled that the DSB had adopted the Reports of the Panel and the Appellate Body in dispute WT/DS213, entitled "United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany". The dispute involved a sunset review of an outstanding countervailing duty order on corrosion-resistant carbon steel flat products from Germany. By and large, the EC's claims had been rejected. However, the panel had made one finding of WTO-inconsistency concerning the countervailing duty order that the United States had not appealed. As a result, the DSB had recommended that the United States take corrective action with respect to this one adverse finding. On 1 April 2004, the United States had revoked the countervailing duty order on corrosion-resistant carbon steel flat products from Germany. The notice of revocation had been published in the April 1 edition of the *Federal Register*, volume 69, page 17,131. By this action, the United States had implemented the recommendations and rulings of the DSB in this dispute.

84. The DSB took note of the statement.

6. Proposed amendments to the Working Procedures for Appellate Review

(a) Statement by the Chairperson

85. The Chairperson, speaking under "Other Business", recalled that, as announced at the outset of the meeting, she wished to make a statement under "Other Business" concerning a communication from the Appellate Body regarding the proposed amendments to the Working Procedures for Appellate Review. She noted that that communication, containing the text of the proposed amendments and the explanation regarding these amendments, had been circulated on 8 April 2004 in document WT/AB/WP/8. It was also available outside the meeting room. As explained in that communication, the Appellate Body was considering certain amendments and improvements to the Working Procedures for Appellate Review, based on its eight years of experience with those Working Procedures. These proposals were separate from, and without prejudice to, any amendments to the Working Procedures that might be needed once the negotiations on the improvements to and clarifications of the DSU had been completed. These proposals related to a number of different issues, including Notices of Appeals, other appeals, and the calculation of deadlines in appeals. She recalled that, under Article 17.9 of the DSU: "Working procedures shall be drawn up by the

Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to Members for their information". The Appellate Body had provided the Director-General and the Chairperson of the DSB with copies of its proposed amendments, and had asked the Chairperson of the DSB to seek the views of Members on these proposed amendments. She also recalled that, in accordance with the decision of the DSB of 19 December 2002, contained in WT/DSB/31, with regard to "Additional Procedures for Consultations Between the Chairperson of the DSB and the WTO Members in Relation to Amendments to the Working Procedures for Appellate Review", "the Chairperson of the DSB shall provide Members with an opportunity to comment on the proposed amendments, including in writing. The Chairperson shall place an item on the agenda of an appropriate DSB meeting in which Members can discuss in that context the proposed amendments".

86. In light of this, she wished to inform delegations that it was her intention to place this matter on the agenda of the next regular DSB meeting scheduled for 19 May in order to enable Members to express their views on the proposed amendments for the record. Subsequently, as provided for in the decision of the DSB of 19 December 2002, she would promptly convey to the Appellate Body the views expressed by Members on the proposed amendments and would request the Appellate Body to take them into account. In addition, she was prepared, if Members so wished, to hold an informal open-ended consultation to provide them with an opportunity to have an informal exchange of views prior to the regular DSB meeting on 19 May. In this regard, she invited delegations to contact her directly on this subject and, with the assistance of the Secretariat, she would arrange for such an informal meeting to be held, if required. She then reminded Members that, in accordance with the decision of the DSB of 19 December 2002, comments on the proposed amendments might also be provided in writing. Indeed, in the light of the technical and detailed nature of the Working Procedures, she believed that it would be particularly useful to have the benefit of written views. To this effect, she invited Members to provide any such comments to her in care of the Council and TNC Division by 26 May 2004. In conclusion, she said that this was her proposed course of action and invited delegations to contact her directly on this subject.

87. The DSB took note of the statement.
