WORLD TRADE ORGANIZATION

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Dispute Settlement Body
23 July 1998

MINUTES OF MEETING

Held in the Centre William Rappard
on 23 July 1998

Acting Chairman: Mr. Celso Lafer (Brazil)

Subjects discussed: Page

Opening the meeting, Mr. W. Lavorel, Deputy Director-General, said that since the Chairman of the DSB, Amb. K. Morjane was absent from Geneva, he wished to propose that Amb.

C. Lafer (Brazil) be elected as an interim Chairman for the present meeting, as agreed by the DSB on 22 June.

The DSB so agreed.

Prior to the adoption of the agenda, an item concerning the adoption of the Panel Report on "Australia – Measures Affecting Importation of Salmon" was removed from the proposed agenda since Australia had appealed this Report on 22 July 1998.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) Canada - Certain measures concerning periodicals: Status report by Canada (WT/DS31/9/Add.3)

(b) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/17)

The Chairman recalled that Article 21.6 of the DSU required that, "Unless the DSB decides otherwise, the issue of implementation of the recommendations of rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the two sub-items be considered separately. He then drew attention to document WT/DS31/9/Add.3 which contained Canada's fourth status report regarding its progress in the implementation of the DSB's recommendations.

The representative of Canada said that her Government was pleased to present its fourth status report on the implementation of the DSB's recommendations in the case of "Canada – Certain Measures Concerning Periodicals". She wished to inform the DSB that between the submission of the status report and the present meeting, the issues referred to in the report had already been discussed at the highest levels. Canada's Ministers would announce shortly how they planned to implement the WTO decision.

The representative of the United States said that as indicated at the DSB meeting on 22 June, her country was increasingly concerned as to whether Canada intended to meet its commitment to bring its measures regarding periodicals into compliance with its WTO obligations. The United States had repeatedly requested - this was the fifth such a request - a detailed status report from Canada with regard to the actions it intended to take to implement the DSB's recommendations. Canada had consistently refused to inform the United States what measures it intended to take or what measures were under consideration. She noted that 13 months had elapsed since the circulation of the Appellate Body Report and the12-month period for compliance had already passed. While the United States had not received any information from Canada, certain reports had indicated that decisions had been made which would be announced in less than two weeks. Some had even specified an announcement date of 1 August or earlier.

Her delegation urged Canada not to wait until the last minute to provide an outcome which the United States could not accept. Her country remained open to dialogue on how Canada would comply with its WTO obligations. This would help the United States to avoid misunderstandings and avert a needless continuation of this dispute. Since little time remained, her delegation strongly

urged Canada to provide the United States and other Members with meaningful information and consult promptly with interested Members.

The representative of the European Communities said that with the lapse of 12 months Canada had not yet indicated how it would implement the DSB's recommendations although any decision would have to pass through the legislation by the end of October. He noted the statements made at the DSB meetings which had criticised Canada for making slow progress and for being vague but there had been no prolonged press campaign with statements in various newspapers. He drew attention to the fact that in the Banana case[1], the EC had been found to be in violation of the WTO Agreement in Autumn 1997, and had made its proposal in January 1998. Since then the EC had regularly been criticised - in the press amongst others - even before its formal decisions had been taken. He wished to make this comparison since the two issues had been placed under this same agenda item.

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

The Chairman drew attention to document WT/DS27/17 which contained the first status report by the European Communities on its progress in the implementation of the DSB's recommendations with regard to its banana import regime.

The representative of the European Communities said that in accordance with its obligation under Article 21.6 of the DSU, and in addition to its status report, the Community was pleased to provide further details regarding its steps towards implementing the DSB's recommendations. A number of important provisions of the common market organization for bananas established by Regulation 404/93 had been deemed to be inconsistent with WTO obligations, in particular the system of import licenses, the allocation of the tariff quota and other aspects of the Framework Agreement, including the granting of export licences in signatory countries, and certain provisions relating to traditional imports from the ACP countries. The 2.2 million tonnes tariff quota and both the in-quota and non-quota tariff rates which had been bound in the GATT, the preferential treatment for traditional and non-traditional imports from the ACP countries and the aid scheme for the EC producers had not been questioned.

In its status report, the Communities had stated that the Council had taken the decision, in principle, to amend the external trade provisions of the current EC banana regime. Procedures were now being completed for the finalization of amendments to Council Regulation 404/93. The main elements of the regime as amended would be as follows: (i) maintenance of the GATT-bound tariff quota of 2.2 million tonnes at a rate of 75 ECU/tonne; (ii) creation of an additional autonomous tariff quota of 353,000 tonnes also at a rate of 75 ECU/tonne; (iii) the tariff quotas to be allocated among substantial supplier countries in conformity with Article XIII of GATT 1994. The Communities would enter into negotiations regarding shares with the four countries concerned. The balance not allocated would be available to other suppliers. The totality of these quotas would represent access at a special rate for all suppliers. The Community believed that in practice the volumes would be taken by the MFN suppliers because it was unlikely that the ACP suppliers would be competitive at the implied prices; (iv) maintenance of duty-free imports of traditional bananas from the ACP countries up to a global volume of 857,700 tonnes. As stated by the Appellate Body in paragraphs 172-178 of its Report, the EC was legally obliged to respect this volume in order to ensure continued access of ACP countries to its market in accordance with

[1] Panel and the Appellate Body Reports on "European Communities – Regime for the Importation, Sale and Distribution of Bananas"(WT/DS27).

Protocol 5 of the Fourth Lomé Convention with a tariff preference for non-traditional ACP bananas of 200 ECU/tonne outside the tariff quota; (v) duty-free access to the quotas of 2.2 million and 353,000 tonnes for non-traditional ACP bananas; and (vi) abolition of the existing import licensing system and introduction of a new WTO-compatible system. The text amending Regulation 404/93 would be published in the Official Journal of the European Communities before entering into force and he expected this publication shortly. The amendment would enter into force three days after its publication and would apply from 1 January 1999. With respect to paragraph 3 of the status report which stated that: "both regulations will enter into force in the following weeks", he explained that the first decision would enter into force very shortly once it had been published but the second regulation concerning the licensing system was not yet ready.

The representative of Honduras, speaking also on behalf of Ecuador, Guatemala, Mexico, Panama and the United States, said that on 10 July, the EC status report regarding the measures taken by the Community with respect to its banana regime had been circulated in accordance with Article 21.6 of the DSU. This report stated that the EC had made significant progress toward implementing the DSB's recommendations. In the view of the six countries, this report was vaguely worded and had not contained details of the EC's measures provided to its trading partners. At the previous meetings of the DSB, the six countries had explained their concerns about the EC's proposal. Based on sources other than the status report there was little difference between the EC's proposal and the EC Agriculture Council's decision. The six countries considered that the measures taken by the Community were primarily cosmetic, leaving in place a regime that would perpetuate the same discrimination already found to be inconsistent with the WTO Agreement.

As indicated at the previous meetings, these measures restricted bananas from the ACP countries in a different and much more favorable way than from Latin American countries. Furthermore, the EC Agriculture Council had decided to allocate import licenses in a way that would perpetuate the unfair and WTO-inconsistent distribution of licenses to the European and ACP companies that had received licences during the period in which the current regime was in place. Since January 1998 when the European Commission had approved this proposal, the six countries had made their views known to the EC's officials. He regretted that rather than entering into substantive dialogue with the parties concerned, the Community had simply asserted that the new regime was WTO-consistent. Since the Community maintained that the new regime was WTO-consistent and the six countries were confident that the EC's measures were not, he asked whether the Community was prepared at the present meeting or at the next DSB meeting to reconvene the original panel in order to resolve this issue. Without prejudice to its rights under Article 22 of the DSU, if the Community was unwilling at the present meeting to reconvene the panel, the six countries wished to reserve their rights under Article 21.5 of the DSU to resolve this problem at a later date, with a view to obtaining full compliance by the end of the reasonable period of time.

The representative of Colombia thanked the Community for its report concerning the steps to be taken to modify its banana import regime. This was an important issue since, in addition to its inherent complexity, 40 Members had been affected. For this reason, and because the DSU was the cornerstone of a system of rights and obligations, Colombia believed that the recommendations of the Panel and the Appellate Body should be strictly implemented. In practice, this was not without problems since due to the complexity of this case a number of ambiguities had complicated the interpretation and implementation of the DSB's recommendations. The modifications approved by the EC Council of Ministers had reflected a significant effort to alter the regime in order to bring it into compliance with the WTO regulations. He wished to stress two points. First, the regime recognized that the EC had an obligation towards substantial suppliers to administer tariff-rate quota through the allocation of country quotas to suppliers with a substantial interest. The Commission

had a negotiating mandate and had already indicated its intention to apply the criteria laid down in Article XIII, i.e, to grant country quotas to suppliers with a substantial interest on the basis of trade volume during the most recent period for which trade statistics were available. Furthermore, the agreed modifications reiterated the commitment contained in the EC Schedule of Commitments to apply a tariff-rate quota for an initial volume of 2.2 million tonnes at 75 ECU/tonne, a volume which under paragraph 1 of the Banana Framework Agreement would increase with the growth in demand resulting from the EC enlargement as it had taken place with the accession of Austria, Finland and Sweden in 1995, leading to an increase in volume of 353,000 tonnes with regard to which the 75 ECU/tonne tariff would also apply. If the original panel was reconvened under Article 21.5 in order to settle the disagreement regarding the consistency with the WTO Agreement of the measures taken to comply with the DSB's recommendations, Colombia would wish to participate therein as an interested third party.

The representative of Brazil noted that as indicated in paragraph 2 of the EC's status report and as stated by the EC representative, the EC Council had authorized the Commission to open negotiations in order to seek agreement with respect to the allocation of shares in the EC banana tariff rate quotas. Brazil which had not participated in this dispute, was the world's second largest producer of bananas with an annual production of bananas amounting to six million tonnes. He therefore wished to indicate that his country looked forward to discuss with the Community the details of this negotiation in order to protect its trade interests.

The representative of Costa Rica said that his delegation noted the EC's status report which it would examine carefully. His Government attached the highest importance to the dispute settlement mechanism. He underlined the need for the DSB's recommendations to be strictly respected by all Members. Costa Rica hoped that the Community would modify its banana import regime so that by 1 January 1999 this regime would be compatible with the WTO rules. His country hoped that its rights under the WTO Agreement would be strictly respected by the Community.

The representative of the European Community said that the Community's status report had been criticized for being too vaguely worded. He drew attention to the fact that the details of the EC's proposal and the Council's discussion had appeared in the press and believed that there had been no lack of transparency in this case. Another criticism directed at the Community was that its measures were basically cosmetic. He underlined that the Community had discussed this matter during the past five months. With regard to the argument concerning perpetuation of an unfair and WTO-inconsistent distribution of licenses, no details had yet been promulgated and the Council had decided on the reference period. He believed that every reference period had its defects and advantages. The Community had chosen a three-year period which was standard WTO practice. This was the recent period for which full data was available. If the Community had chosen an earlier or later period, criticism would remain as being periods with distorted trade. He therefore asked what should be the reference period.

The six countries had expressed their regret that the Community had not entered into substantive discussions with the Members concerned. He clarified that the Community had held substantive discussions in Brussels with a number of Members on a number of occasions regarding the banana regime. With regard to the assertions concerning the consistency of the regime, the Community believed that this regime was consistent with the WTO Agreement while the six countries had maintained the opposite view. This issue could be resolved in accordance with the provisions of Article 21.5 of the DSU. His delegation was not in a position at the present meeting

to respond to the request made by the six countries concerning recourse to the original panel in order to resolve this disagreement.

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

2. Korea – Definitive safeguard measure on imports of certain dairy products

(a) Request for the establishment of a panel by the European Communities (WT/DS98/4)

The Chairman recalled that the DSB had considered this matter at its meeting on 22 June and had agreed to revert to it. He drew attention to the communication from the European Communities contained in document WT/DS98/4.

The representative of the European Communities said that the Community had serious concerns about Korea's measure and had therefore requested the establishment of a panel to examine this matter. The Community believed that the Agreement on Safeguards had been violated by findings of serious injury and causal link not supported by sufficient evidence, the absence of price analysis, incorrect calculation of the quota, the delay in consultations and inadequate WTO notifications. The measure had an effect on its trade and the Community was also concerned about systemic implications, namely that all countries should correctly implement the rules of the Agreement on Safeguards. Since there had been no change in circumstances to enable the Communities to change its position, his delegation reiterated its request for the establishment of a panel.

The representative of Korea said that his delegation continued to believe that its safeguard measure on imports of certain dairy products was in conformity with its WTO obligations. However, he recognized that in accordance with the provisions of Article 6 of the DSU, a panel with standard terms of reference would be established at the present meeting. His country was prepared to defend its safeguard measure before the panel.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

The United States reserved its third-party rights to participate in the Panel proceedings.

3. United States - Tax treatment for "Foreign Sales Corporations"

(a) Request for the establishment of a panel by the European Communities (WT/DS108/2)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS108/2.

The representative of the European Communities said that the issue of Foreign Sales Corporations (FSC) had been controversial for a long time. The FSC legislation had been developed in the aftermath of the DISC panel[2] and had entered into force on 1 January 1985. Prior to this, several contacts had taken place between the Community and the United States on the FSC bill. On 8 November 1983, the Community had expressed concerns to the USTR, in particular

[2] The Panel on the US tax legislation on Domestic International Sales Corporations, BISD 23S/98.

including the following: (i) the FSC was an explicit export-designed instrument which was at variance with the understanding adopted in the GATT on this matter in November 1981; (ii) the "administrative pricing rules" had not borne any relationship to the economic process outside the United States; (iii) in practice, the FSC scheme would lead to a tax exemption of a part of the profits of the parent company on its activities in the United States.

Since the bill had been adopted in 1984, the Community had requested consultations with the United States in accordance with Article XXII of GATT 1947. These consultations, joined by seven other countries, had been held on 26 March 1985 but no mutually satisfactory solution had been found. Many of the concerns raised at that time were still relevant. Although the Community was concerned about this issue it was patient. Currently, the Community was increasingly concerned about the effects of the FSC system since it had become clear that its importance had increased. According to the Treasury report of November 1997, from 1987 to 1992, FSC exports had doubled from US$ 84 billion to US$ 152 billion. FSC net income had also doubled over the same period. Furthermore, the FSC system had been extended to new areas such as agriculture and software manufacturing. As a result, the US software manufacturers were expected to save about US$ 600 million in taxes over the next five years from having become eligible under the FSC scheme in September 1997. The importance of the FSC system for the US industry had been further underlined in a letter from a number of US trade associations sent to Ms. Ch. Barshefsky of the USTR on 4 December 1997.

The Community considered this measure, and its increasing importance, with great concern. After a long and thorough investigation, the Community had decided to seek recourse under the WTO system. Three rounds of consultations with the United States had failed to settle the matter and the Community had no other option but to request the establishment of a panel. Given the history of the bilateral and multilateral discussions of this matter, the Community's concerns were well known to the United States. As set out in its request for a panel, the exemption of a portion of the FSC income related to exports constituted export subsidies in violation of Article 3.1(a) and (b) of the Agreement on Subsidies and Countervailing Measures (SCM). Furthermore, the FSC legislation violated the commitments under Article 8 of the Agreement on Agriculture. The argument that the FSC programme had generated an export subsidy was well supported by the recent report published by the Treasury Department. In chapter 3 of this report "the FSC programme encourages exports by reducing the tax rate on export income". Therefore, the Community requested that a panel be established to examine the compatibility of the FSC legislation with the WTO-obligations of the United States.

The representative of the United States said that 26 years ago, the Community had initiated a dispute against the DISC tax law. After a long process, a GATT panel had found that the tax system of three member States of the EC and the DISC provisions of the US Internal Revenue Code had constituted export subsidies. The panel report had been adopted with the Council's understanding in December 1981. That understanding had established several principles regarding the application of subsidy rules to income tax system which had now been reflected in the SCM Agreement.

In 1984, the US Congress had enacted the FSC law as a replacement for the DISC. In doing so, it had expressly designed the FSC to conform to the principles contained in the 1981 understanding. At present, 14 years after the FSC had been enacted, the Community had discovered that there was a problem with the FSC that warranted the invocation of the dispute settlement provisions. There was no legal problem with the FSC since it was consistent with the

WTO rules. However, the United States would address this issue in detail before the panel once it had been established.

There was no commercial problem with the FSC that warranted the establishment of a panel. If the FSC did confer a subsidy, the amount of any such subsidy was *de minimis* under the WTO subsidy valuation rules. Assuming a sales price of US$ 100, any FSC tax savings would amount to 93 cents -- or less than 1 percent -- calculated on an average of all FSC sales. Moreover, an elimination of the FSC would only reduce the value of US exports by three-tenths of one percent. The meant that the FSC had a barely perceptible effect, if any, on trade. In the three rounds of consultations, the United States had repeatedly asked the Community to provide an example of how the FSC provisions had adversely affected the EC's commercial interests. No single example had ever been provided. The Community had claimed that the use of FSC had increased in recent years but this had simply kept pace with the overall increase in the US exports over the past decade. While the Community had referred to large absolute numbers it had ignored the fact that these numbers were small in relative terms when considered in the context of the world's largest economy. The EC's reactivation of a dispute that the United States considered to have been resolved long time ago was legally unwarranted, commercially unjustified and unlikely to prove helpful to the multilateral trading system or to the US relationship with the EC and its member States. Therefore, the United States was not in a position to agree to the establishment of a panel at the present meeting.

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

4. Argentina – Safeguard measures on imports of footwear

(a) Request for the establishment of a panel by the European Communities (WT/DS121/3)

The Chairman recalled that the DSB had considered this matter at its meeting on 22 June and had agreed to revert to it. He drew attention to the communication from the European Communities contained in document WT/DS121/3.

The representative of the European Communities said that since the DSB meeting on 22 June when this item had been on the agenda no further developments had taken place to allow the Community to reconsider its request. The Community remained very concerned by this abuse of the safeguard instruments for protectionist purposes. The provisional measures had been imposed without meeting the threshold of "critical circumstances" as set out in the Agreement on Safeguards. The findings of serious injury caused by increased imports had not been supported by sufficient evidence. In particular, imports had decreased in recent years, no price analysis had been conducted and Mercosur imports had been excluded from the measures but at the same time included in the injury analysis. The Community maintained its request for the establishment of a panel since it remained convinced that the safeguard measures imposed by Argentina were in violation of the Agreement on Safeguards.

The representative of Argentina said that his delegation did not accept the EC's assertion that the safeguard measures were abusive and protectionist in their objective. The measures had been taken in conformity with the provisions of the Agreement on Safeguards. Argentina considered it inappropriate to make assertions that had not contributed to a legal discussion at the present meeting. His country recognized the EC's right under Article 6.1 of the DSU concerning the establishment of a panel at the present meeting. However, he regretted that the Community had

decided to bring the issue to the dispute settlement mechanism which in commercial terms involved a very small volume of trade. He regretted this decision not only because it would mean the cost of a panel to examine the issue of imports of footwear which represented 0.4 percent of total Argentina's imports, which was a very small figure. He regretted that this course of action would affect the possibilities of finding a negotiated solution with other trading partners with considerably greater shares in the Argentine footwear market. Argentina believed that its investigation and the safeguard measures were consistent with the WTO Agreement. Some of the EC's repeated arguments could be refuted by reading the minutes of the meetings of the Committee on Safeguards concerning evidence of a 157 per cent increase in imports over the period under examination. Since the Community had decided to maintain its request for the establishment of a panel Argentina would await the results of the panel process.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

Brazil, Indonesia, Paraguay, the United States and Uruguay reserved their third-party rights to participate in the Panel proceedings.

5. Brazil – Export financing programme for aircraft

(a) Request for the establishment of a panel by Canada (WT/DS46/5)

The Chairman drew attention to the communication from Canada in document WT/DS46/5 which contained its request for the establishment of a panel pursuant to Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM).

The representative of Canada said that over two years ago, his country had requested consultations with Brazil pursuant to Article 4 of the SCM Agreement regarding certain export subsidies granted under the PROEX.[3] Following the initial consultations in July 1996, Canada and Brazil had pursued various avenues to resolve this dispute. In January 1998, special Envoys had been appointed by the Prime Minister of Canada and the President of Brazil to recommend the basis for a bilateral accord on trade in regional aircraft. Negotiations had followed the receipt of the Envoys' report in April. In May and July, both countries had made considerable efforts towards a solution by exchanging various proposals. While both countries had reserved their rights to request panels by 10 July, Brazil had not made any counterproposal by 9 July. Unfortunately, Brazil had been advised that in Canada's view there had been no sufficient progress from its previous proposal to warrant delaying its request for the establishment of a panel at the present meeting.

While these efforts had been proceeding during the past two years, the damage caused by the PROEX to the international regional aircraft market and to the Canadian aerospace industry had been increasing. The PROEX payments had resulted in below-market financing rates for Brazilian aircraft, reducing the financial costs by more than US$ 2 million per aircraft. The budget for the PROEX programme had been increased by more than 50 per cent per year since 1996 and it now stood at well over US $ 1 billion. Brazil had also taken steps to ensure that disbursements kept pace with the growth of the budget. In the first quarter of 1998, approved transactions under the PROEX more than doubled. Canada had assured Brazil that it remained open to working towards a negotiated solution in this traditionally difficult area of international trade. Nevertheless, it had now become urgent for Canada to obtain a ruling from a WTO panel that the PROEX was an export

[3] Programa de Financiamento às Exportações

subsidy and that the practice should be terminated. For this reason, his country sought the establishment of a panel pursuant to Article XXIII of GATT 1994 and Articles 4 and 6 of the DSU. Canada requested that a panel be established pursuant to Articles 4 and 30 of the SCM Agreement.

The representative of Brazil said that for about two years, Canada and Brazil had consulted on the question of support of their respective civil aircraft industries. Consultations had been held on the basis of the reciprocal requests made by both countries under the DSU provisions. Unfortunately, these consultations had failed to produce a mutually agreed solution. Earlier in 1998, in an additional effort to resolve this issue, the President of Brazil and the Prime Minister of Canada had appointed two special Envoys to review the matter and to make recommendations. Based on these recommendations, Canada and Brazil had engaged in further discussions. However, this effort had not resolved the issue and therefore, the parties had decided to seek the establishment of panels.

This issue concerned Canada's request for the establishment of a panel to examine the use of PROEX by a private aircraft manufacturer of Brazil(EMBRAER). Brazil was confident that its PROEX programme was fully consistent with its WTO obligations and believed that this would also be found by the panel. Brazil was firmly convinced that Canada had requested the establishment of a panel because EMBRAER had proved to be able to compete fairly in a high-technology global market. It seemed that the established producer in Canada was concerned about the arrival of an effective competitor from a developing country. He noted that this competitor from a developing country was receiving WTO-consistent support to finance its exports. By contrast, many subsidies provided by Canada went far beyond export credits to include billions of dollars in production subsidies. Developing countries did not have the resources to provide benefits of this kind or magnitude to their producers. As long as developed countries continued to subsidize the development and production of high technology products, developing countries would be at a serious disadvantage. Brazil was convinced that a panel which would be requested under the next agenda item would find these subsidies to be inconsistent with Canada's WTO obligations. It was also confident that a panel established to examine the PROEX would find this programme consistent with Brazil's WTO obligations. He regretted that this dispute had reached this point but hoped that continued consultations in parallel with the panel process would enable the parties to find a mutually acceptable solution.

The DSB took note of the statements and agreed to establish a panel in accordance with the accelerated procedures pursuant to Article 4.4 of the SCM Agreement with standard terms of reference.

The United States reserved its third-party rights to participate in the Panel proceedings.

The Chairman said that other delegations wishing to reserve their third-party rights should do so through a written communication within the next five days after this meeting.

6. Canada – Measures affecting the export of civilian aircraft

(a) Request for the establishment of a panel by Brazil (WT/DS70/2)

The Chairman drew attention to the communication from Brazil in document WT/DS70/2 which contained its request for the establishment of a panel pursuant to Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM).

The representative of Brazil said that under the previous agenda item he had recalled that Canada and Brazil had held extensive consultations on the question of support to their civil aircraft industries and that these consultations had not resulted in a mutually acceptable solution. He had also mentioned that Brazil believed that certain subsidies granted by the Canadian Government or its provinces to support the export of civilian aircraft were inconsistent with its WTO obligations and had distorted the international market for that product. The difficulties of a developing-country producer of high-technology products would increase under conditions that a government of a developed country was determined to subsidize its own industry. This situation was faced by the EMBRAER, a private Brazilian aircraft manufacturer. Canada granted or maintained an extensive array of subsidies to its civil aircraft industry which were inconsistent with its obligations under Article 3.1(a) and 3.2 of the SCM Agreement since they were contingent in law whether solely or as one of several conditions, upon export performance. Therefore, pursuant to Article 4.4 of the SCM Agreement and Article 6 of the DSU, Brazil requested the immediate establishment of a panel with standard terms of reference contained in Article 7 of the DSU. It also requested that the panel consider and find that the following measures maintained by Canada or its provinces were inconsistent with the requirements of Article 3.1(a) and 3.2 of the SCM Agreement and require that they be terminated without delay pursuant to Article 4 of the SCM Agreement: (i) financing and loan guarantees provided by the Export Development Corporation, including equity infusions into corporations established to facilitate the export of civil aircraft; (ii) support provided to the civil aircraft industry by the Canada Account; (iii) funds provided to the civil aircraft industry by Technology Partnership Canada and predecessor programmes; (iv) sale by the Ontario Aerospace Corporation, an agency or instrument of the Government of the Province of Ontario, of a 49 per cent interest in a civil aircraft manufacturer to another civil aircraft manufacturer on other than commercial terms; (v) benefits provided under the Canada-Quebec Subsidiary Agreement in Industrial Development; (vi) benefits provided by the Government of Quebec under the Societé de Développement Industriel du Quebec.

In January 1997, Brazil had informed the DSB that in the first six months after the first consultations had been held, Canada had made three very large grants to its aircraft producers and its suppliers: (i) US$ 87 million in October 1996; (ii) US$ 57 million in December 1996; and (iii) US$ 147 million in January 1997. However, this was just the tip of the iceberg. Economists had calculated that in recent years the amount of subsidies granted to the Canadian producers by the Government and its provinces exceeded US$ 5 billion. It was extremely difficult for companies in developing countries to succeed when faced with subsidies of this magnitude since they had no realistic hope of obtaining similar support. The publicly stated Canadian policy with regard to the aerospace industry was "to see that Canada moves into fourth place ahead of Japan and Germany by the year 2000".[4] Canada had apparently decided to reach this goal by providing massive not always transparent subsidies and by attempting to stifle competition from a developing country. As had been pointed out under the previous agenda item, Brazil regretted that the dispute had reached this point and hoped that continued consultations in parallel with the panel process would enable the parties to reach a mutually acceptable solution.

The representative of Canada noted Brazil's request for a panel. In Canada's view, this request for the establishment of a panel on the Canadian programmes was a direct response to Canada's request for a panel to examine the PROEX. Canada did not believe that this request was founded on any evidence of inconsistency of Canadian programmes with Article 3 of the SCM Agreement and was confident that a panel would find the Canadian programmes to be consistent

[4] Industry Canada News Release of 17 December 1996.

with the SCM Agreement. Canada acknowledged that pursuant to Article 4 of the SCM Agreement, Brazil had a right to the immediate establishment of a panel. It also intended to ask the panel to address its concerns in the course of the dispute settlement process, namely that in Canada's view, Brazil's request included some items on which consultations had never been requested and it did not provide the detailed information required under Article 6.2 of the DSU.

The DSB took note of the statements and agreed to establish a panel in accordance with the accelerated procedures pursuant to Article 4.4 of the SCM Agreement with standard terms of reference.

The United States reserved its third-party rights to participate in the Panel proceedings.

The Chairman said that other delegations wishing to reserve their third-party rights should do so through a written communication within the next five days after the meeting.

7. Indonesia – Certain measures affecting the automobile industry

(a) Report of the Panel (WT/DS54/R-WT/DS55/R-WT/DS59/R-WT/DS64/R and Corr.2)

The Chairman recalled that at its meeting on 12 June 1997, the DSB had agreed to establish a single panel to examine the complaints by Japan and the European Communities. Subsequently, at its meeting on 30 July 1997, the DSB had agreed to establish a panel to examine the complaint by the United States pertaining to the same matter. At that meeting the DSB had also agreed that the panel established on 12 June 1997 to examine the complaints by Japan and the European Communities would also examine the US complaint. The Report of the Panel had been circulated on 2 July 1998 as an unrestricted document and was now before the DSB for adoption. The Chairman noted that in accordance with Article 16.4 of the DSU this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

The representative of Indonesia expressed her country's regret that the Panel had not accepted many arguments made by Indonesia, and had concluded that Indonesia's customs duty and sales tax benefits linked to the local content requirements for imported parts and components used in finished automobiles were not consistent with its obligations under the WTO Agreement. However, the Panel had accepted that Indonesia's measure in this respect did not violate Articles 3, 20 and 65.5 of the TRIPS Agreement. The Panel had also confirmed that Indonesia had not violated Article 28.2 of the SCM Agreement. Although it disagreed with certain conclusions of the Panel, Indonesia did not consider that requesting an appeal would be appropriate, in particular in the light of its IMF commitments and the subsequent termination of the National Car Programme. For these reasons, Indonesia had decided not to appeal the Report and had recognized that the Panel Report would be adopted at the present meeting. The implications of the Panel Report were presently under careful examination by her authorities. Indonesia intended to fully comply with its obligations to implement the Panel's recommendations. Her delegation would provide the DSB with more details regarding its implementation plans in accordance with the provisions of Article 21.3 of the DSU within the required time-limit. However, instead of making a statement at a DSB meeting as provided for in Article 21.3 of the DSU, Indonesia would inform the DSB of its intentions through a letter to the DSB Chairman for circulation to the DSB members. Although Indonesia was disappointed with the Panel's findings and did not accept some aspects of these findings it appreciated the efforts made by the members of the Panel and the Secretariat during the

proceedings. She believed that their time and efforts had enabled the rule-based WTO system to work.

The representative of Japan welcomed the Panel's conclusions that Indonesia's measures under the National Car Programme were inconsistent with its WTO obligations. He noted with satisfaction that the Panel had agreed with most of the points raised by Japan in the proceedings and had recommended that Indonesia bring its measures into conformity with the WTO Agreement. Japan considered that the Panel's findings and conclusions were appropriate, based on objective assessment of the facts, largely supported by sound reasoning. Therefore, Japan requested that the DSB adopt the Panel Report at the present meeting and urged Indonesia to comply fully and promptly with the Panel's recommendations. He drew attention to Article 21 of the DSU which stated that "... prompt compliance with recommendations ..... of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

Although Indonesia contended that it had terminated its National Car Programme, the status of this Programme remained unclear, including the treatment of automobiles already imported or produced but not yet sold as well as any benefits already provided to PT Timor under this Programme. Japan looked forward to Indonesia' s information about the timing and manner in which the Panel's recommendations would be implemented. In this context, he welcomed that Indonesia had stated that it would fully comply with the recommendations. Japan was ready to discuss with Indonesia any necessary ways and means to secure a positive solution to this dispute in a timely manner in accordance with the DSU provisions. Japan had no objections as to the method chosen by Indonesia to inform the DSB of its intentions regarding implementation through a letter to the DSB Chairman for circulation to the DSB members. He reiterated its concerns about the delay in the adoption of the Panel Report due to technical problems related to translations. Japan considered that this issue should be taken up in the DSU review. He expressed appreciation to the members of the Panel and the Secretariat for their time and effort devoted to this case.

The representative of the European Communities welcomed the Panel Report on Indonesian investment measures affecting the automobile industry. The Panel had supported the EC's arguments that the Indonesian National Car Programme by providing duties and tax incentives to national producers, or to a specific foreign producers, had infringed several provisions of the WTO Agreement. In particular, the Indonesian investment scheme had infringed Articles I and III of GATT 1994, Article 2 of the TRIMs Agreement and as a result of specific subsidies had caused serious prejudice to the EC's interest within the meaning of Article 5 of the SCM Agreement. In the view of the Community, the Panel Report had constituted a useful precedent and had helped to clarify fundamental legal questions on the relation between different WTO agreements. It had also shed light on the scope and application of the TRIMs Agreement. The Community welcomed this precedent and hoped that it would lead other Members to bring their investment schemes into conformity with the WTO rules. The Community looked forward to receiving a written statement on the implementation of the Panel's recommendations. Like Japan, the Community had some concerns about the continuing effects of the Programme even if it had been abolished. He requested that the DSB adopt the Panel Report at the present meeting.

The representative of the United States thanked the members of the Panel and the Secretariat for its work. The United States believed that in addition to correctly finding that Indonesia's measures were inconsistent with its obligations under several provisions of the WTO Agreements, the Panel Report had made an important contribution to the jurisprudence of the multilateral trading system. First, the Panel had rejected Indonesia's arguments that there was a conflict between the SCM Agreement and other provisions of the WTO agreements, namely that the

SCM Agreement overrode, and excused Indonesia from, obligations under other WTO provisions. With respect to the TRIMs Agreement, the Panel had recognized that this Agreement was a "fully-fledged agreement in the WTO system". In addition, the Panel had rejected several arguments that would have narrowed the scope of the TRIMs Agreement such as that the TRIMs Agreement was limited to measures taken specifically in relation to foreign investment.

With respect to the issue of like products, in considering the US and EC claims of serious prejudice under the SCM Agreement, the Panel had correctly found that an unassembled passenger car could be considered a like product to a finished passenger car. Although the Panel's findings on this point seemed obvious and consistent with commercial realities, certain Members had argued, in other contexts, for a strained and narrow interpretation of like products that would preclude unassembled and assembled products from being regarded as like products. She hoped that the Panel's findings would put such arguments to rest. She wished to draw attention to these few important aspects and regretted that the Report also contained some findings that the United States believed were in error. She wished to point out one such error which her country considered particularly disturbing. In addressing the US claim under the TRIPS Agreement with respect to Indonesia's National Car Programme, the Panel had relied heavily on its conclusions that it was permissible for a government to confer a benefit on condition of a foreign company's relinquishment of the rights afforded under the TRIPS Agreement. For example, in discussing the US claim under Article 20 of the TRIPS Agreement, the Panel had stated that such a scheme did not amount to the imposition of a requirement within the meaning of Article 20.

In the United States' view, the Panel's conclusions on this point were incorrect, short and devoid of any detailed analysis or discussion of precedent. In particular, the Panel had failed to discuss the GATT and WTO precedents supporting the proposition that there was a requirement in situations where a company had voluntarily accepted conditions in order to receive a benefit. Had the outcome been different with respect to other US claims regarding the National Car Programme, the United States would have appealed this aspect of the Panel's findings. However, in light of other findings regarding the National Car Programme, as well as the events in Indonesia over the last several months, the United States was disinclined to initiate a process that would only prolong this matter and hoped that future panels would recognize that this particular aspect of the Report had been flawed and should be disregarded. The United States was well aware of the current economic problems of Indonesia and hoped that these problems would be solved shortly. While the adoption and implementation of the Panel Report would not solve these problems it would constitute one step in the right direction. Therefore, while her country disagreed with certain aspects of the Report it also supported the adoption of the Report. In the light of the statement made by Indonesia, the United States would accept a procedure under which Indonesia would provide a letter to the DSB stating its intentions on implementation by 22 August, provided that the parties first confirmed in writing bilaterally their agreement as if a meeting had been held under Article 21.3 of the DSU and that in the absence of such an agreement, a meeting would have to be held pursuant to Article 21.3 of the DSU.

The representative of Canada said that his country had examined the Panel Report with great interest and had recognized the rigorous and comprehensive manner of the Panel in dealing with this case. The Panel had raised the question of cumulative interpretation of the obligations contained in the WTO agreements. The question of the overlap between the GATT and the GATS had arisen in the past and would arise in the future. Therefore, Canada believed that this was an issue which should be considered by all Members.

The DSB took note of the statements and adopted the Panel Report contained in WT/DS54/R-WT/DS55/R-WT/DS59/-WT/DS64/R and Corr.2.

8. European Communities – Measures affecting the importation of certain poultry products

(a) Report of the Appellate Body(WT/DS69/AB/R) and Report of the Panel (WT/DS69/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS69/6 transmitting the Appellate Body Report in "European Communities – Measures Affecting the Importation of Certain Poultry Products", which had been circulated in document WT/DS69/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 WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He drew attention to Article 17.14 of the DSU which provided 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 view on an Appellate Body report".

The representative of Brazil thanked the members of the Panel, the division of the Appellate Body, the WTO Secretariat and the Appellate Body Secretariat for their work. Although the adoption of the Reports would be automatic, he wished to express Brazil's willingness to accept the adoption of both Reports. This underlined Brazil's commitment and the importance it attached to the dispute settlement rules. He did not consider it necessary to reiterate the arguments made by Brazil before the Panel and the Appellate Body. These arguments were contained in the Reports and could be consulted by Members. The findings, conclusions and recommendations of the Panel as modified by the Appellate Body were also clear. His delegation considered that would be more useful to highlight some aspects of this case that might be of interest to other Members as part of GATT/WTO practice or new WTO legal acquis.

The reasons for which Brazil had brought this case to the dispute settlement mechanism was two-fold. First, this dispute had originated in negotiations related to compensation. Second, it concerned two major export products of Brazil, namely oilseeds and poultry meat. These sectors represented 12 per cent of total Brazilian exports in 1997. Brazil considered that the problem of compensation was linked to examination of how a bilateral agreement had been implemented and how this related to the operation of Articles XXVIII and XIII of GATT 1994. The Panel and the Appellate Body had not accepted Brazil's arguments concerning the nature of the tariff-rate quota for poultry meat negotiated with the EC as part of a compensation package for withdrawal of concessions in oilseeds. The Panel and the Appellate Body had not agreed with Brazil's interpretation of the terms of the bilateral agreement and had not found that Brazil had proved that there were different ways of implementing tariff-rate quotas without violating Articles XXVIII and XIII of GATT 1994. The examples of GATT practice related to what Brazil had stated had not been found relevant. While Brazil had not agreed with all the findings related to this issue - because it still believed that it had not received the negotiated compensation - it wished to underline certain aspects of the Reports that deserved reflection.

The Appellate Body had stated the primacy of the schedules of tariff concessions for purposes of determining rights and obligations of Members. It had also stated that bilateral

agreements in which such concessions had been first made might only serve as a supplementary means of interpretation of the Schedules and were outside of the GATT/WTO Agreements. Brazil considered that this finding had underlined the dangers of maintaining practices such as bilateral understandings and gentlemen's agreements in relation to tariff concessions. All interpretations should be clearly stated in the Schedule. This finding had also made it clear that there was no bilateral compensation package and that compensation was for all Members as well as non-Members.

In the examination of Brazil's claim on the allocation of the tariff-rate quota to non-Members, the Panel had referred to the Banana III panel[5] and had limited its comment to recalling that in that case the Panel "did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted". In other words, the door was left open for those who wished to include a non-Member in the allocation of the tariff-rate quota. As a result of this loose finding of the Panel, contained in footnote 140 of its Report, the Appellate Body had deemed that Brazil's claim was outside the scope of the appeal. The Appellate Body considered that the Panel had not made a finding on the issue of allocation to non-Members and as a result this issue could not have been examined. At this stage it was not appropriate to argue how and why this had happened. However, no decision had been taken on this issue and a non-Member would continue to benefit from a tariff-rate quota resulting from compensation negotiated between Members.

He wished to draw attention to another issue related to the EC's import licensing regime applicable to the tariff-rate quota for poultry meat. The Panel and the Appellate Body had found that Brazil had not met the burden of proof regarding its claims that the administration of the licences for poultry had not been transparent and had distorted trade. He did not consider it useful to reiterate Brazil's arguments on this issue and would only make three comments. First, both Reports together with the Banana III panel report had provided a clear view of the rights and obligations of Members under the Licensing Agreement. All Members should now have realistic expectations of the scope and binding force of the Agreement. The Community with its licensing practice which had withstood the test of this dispute should also bear this in mind in the course of its current investigation of the licensing practices of another Member for certain leather products.

The second point related to the important finding of the Appellate Body that the administration of import licences could distort trade outside the tariff-rate quota. The Appellate Body had not been convinced by Brazil that speculation in licences, granting of licences in uneconomic quantities and the lack of transparency had distorted trade for exports of poultry outside the quota. However, he noted with satisfaction that the Appellate Body had shared Brazil's position that the scope of the provisions of Articles 1.2 and 3.2 of the Licensing Agreement " refers to *any* trade distortions ... and is not necessarily limited to that part of the trade to which the licensing procedures themselves apply".[6] It was regrettable, that the Appellate Body had considered that the Panel had not addressed this specific issue and had not made any findings thereon.

He drew Members' attention to the views of the Appellate Body concerning the limits of government's responsibility in ensuring transparency of trade involving both in-quota and out-of-quota trade. These views on the interpretation of Article X of GATT 1994 contained in paragraph 114 could be useful for future discussions relating to the operation of tariff-rate quotas.

Brazil was concerned about the examination of its claim under Article 11 of the DSU. He noted with satisfaction that the Appellate Body had recognized that Brazil had not claimed that the

[5] WT/DS27/R
[6] WT/DS69/ AB/R, para. 120

Panel had incurred an "egregious error" nor had it accused the Panel of acting in bad faith. Brazil's appeal under Article 11 of the DSU, which had been viewed by the Appellate Body as related to judicial economy, had been limited to its position that the Panel had not considered all the elements that should have been considered. Brazil recognized the Appellate Body's wish that Article11 of the DSU not be abused or become a permanent element of all cases. However, it would further reflect on the implications of this interpretation of Article 11 of the DSU. Another point related to paragraph 135 of the Appellate Body Report, namely that apart from its right to exercise judicial economy the panel had "the discretion to address only those arguments it deems necessary to resolve a particular claim". Brazil hoped that future panels would pay attention to the statement of the Appellate Body that in order to exercise economy in terms of examination of arguments, the panel should make it clear in its report that it "has reasonably considered a claim".

With regard to the issues related to the recommendations of the Panel and the Appellate Body, he said that the Panel and the Appellate Body had rejected all but two of the claims made by Brazil. One related to the lack of notification by the EC of its licensing rules for in-quota imports of poultry meat. The other related to the representative price used by the EC in connection with the application of the special safeguard for poultry products. Brazil expected that since the Community was now aware that the Licensing Agreement applied to tariff-rate quotas it would promptly notify its licensing rules for poultry meat.

The recommendations of the Appellate Body which were important required more attention. The Panel had made a finding concerning the interpretation of the "price at which imports .... may enter the customs territory" contained in Article 5.1(b) of the Agreement on Agriculture. This finding had been reversed by the Appellate Body. Brazil's views on the interpretation of the special safeguard contained in Article 5 of the Agreement on Agriculture could be summarized in the same way as the Appellate Body had done in paragraph 141 of its Report. In that paragraph, which by WTO standards could be considered humorous, the Appellate Body had stated: " Brazil, as the exporting Member, endorses the Panel's findings that the relevant import price in Article 5.1(b) of the Agreement on Agriculture is the c.i.f. price plus ordinary duties. This is not surprising. This would limit the instances in which the European Communities could impose additional safeguard duties. In contrast, the European Communities, as the importing Member, is of the view that the relevant import price in Article 5.1(b) is the c.i.f. price without ordinary customs duties. This view increases the opportunities for an importing Member to impose additional safeguard duties". Members were aware that Brazil attached importance to the liberalization of the agricultural sector and how it viewed the exceptional measures contained in the Agreement. His country hoped that this unique mechanism as described by the Appellate Body would be used only as far as special circumstances required its application.

While the Appellate Body had reversed a finding that was favourable to Brazil it had made a finding and a recommendation on another aspect of the EC's operation of the special safeguard for poultry products. The Panel had exercised judicial economy and had chosen not to make a finding on the compliance of the EC's representative price with Article 5.5 of the Agreement on Agriculture. Nevertheless, as a result of its reversal of the Panel's ruling on Article 5.1(b), the Appellate Body had found that it had been required to complete its analysis of the EC's practice in relation to the application of the special safeguard. This entailed an examination of the compatibility of the EC's representative price with Article 5.5 of the Agreement on Agriculture. Brazil's views on the operation of the representative price created by the EC could be summarized in the words of the Appellate Body: "There is no authority in the text of Article 5.5 for a Member to use any alternative to the c.i.f. import price, shipment-by-shipment, in the calculation of the

additional duties imposed under this special safeguard mechanism".[7] In paragraph 172(i) of its Report, the Appellate Body had concluded that "the representative price used in certain cases by the EC in calculating the additional safeguard duties is inconsistent with Article 5.5 of the Agreement on Agriculture". It had recommended that the DSB request the EC to bring this measure into conformity with its obligations under the Agreement on Agriculture. Although the majority of its objectives in this dispute had not been met, Brazil believed that this recommendation was an important step towards bringing the agricultural sector under the WTO disciplines. He added that the representative price was not unique to the poultry meat sector.

With regard to the EC's obligation to state its intentions in respect of implementation of the DSB's recommendations since the 30-day period would expire in August, Brazil had agreed with the Community that in order to avoid a special meeting of the DSB in the summer recess, the Community would state its intentions by means of a letter to be circulated within the time-period provided for in Article 21 of the DSU. With regard to Brazil's expectation that the EC would promptly, if not immediately, comply with the DSB's recommendations, Brazil looked forward to receiving the EC's proposal on when and how it intended to comply with the rulings on the representative price. Brazil was ready to consult with the Community on this matter. Brazil hoped that since all that was required was the amendment of a Commission's regulation, implementation would not be made more complicated than necessary.

The representative of the European Communities expressed satisfaction with the Appellate Body Report in the case in which both Brazil and the Community had appealed the Panel Report. The Appellate Body had confirmed the Panel's findings that Brazil's allegations of incompatibility of the EC's import regime for poultry products with Articles II, III, X, XIII and XXVIII of GATT 1994 and Article 4 of the Agreement on Agriculture, Articles 1 and 3 of the Agreement on Import Licensing Procedures were without foundation except with regard to the notification rules under the Licensing Agreement. This was merely a technical omission since the Community had communicated full information on the relevant licensing procedures to the Committee on Agriculture.

The Community noted with satisfaction that the Appellate Body had fully recognized the validity of its arguments concerning the proper interpretation of Article 5.1(b) of the Agreement on Agriculture with regard to special safeguard measures. As a result, the Appellate Body had reversed the Panel's findings on this point and in paragraph 153 of its Report had determined that the "price at which imports… may enter the customs territory…. as interpreted on the basis of the c.i.f. import price in Article 5.1(b) of the Agreement on Agriculture must be interpreted as the c.i.f. import price not including ordinary customs duties". The Appellate Body had rightly observed that had the interpretation of the Panel been followed, "the provisions of Article 5.1(b) would not be operational in many cases".

The Appellate Body had made a determination on the conformity with Article 5.5 of the Agreement on Agriculture of the EC's system of representative price for the application to poultry imports of the additional duty resulting from the application of the special safeguard. Under current EC's provisions, a representative price based on the average c.i.f. price was used for the determination of such additional duty. The importer was however always free to request the determination of the additional duty on the price of the shipment if the price of the shipment was higher than the representative price thus leading to a lower additional duty. In practice, the

[7] WT/DS69/AB/R, para. 165.

representative price was in general higher than the actual shipment price and thus more advantageous for importers, so much that few importers opted to use the price of the shipment.

Notwithstanding the obvious advantage to the exporting country derived from the application of a lower additional duty, the Appellate Body had ruled that the importing country was obliged under Article 5 of the Agreement on Agriculture to use the price of the shipment to calculate the additional duty. Even, if this would have resulted in a higher additional duty than that which would have resulted from the use of a representative price. The Community was concerned that this finding of the Appellate Body might be interpreted as being contrary to a basic principle of the WTO according to which more favourable treatment than that envisaged in a Member's concessions was always possible. The EC was convinced that this had not been the intended result of this finding.

The EC was concerned that the Appellate Body had made a determination on this point which neither Brazil nor the EC had appealed in accordance with Article 16 of the DSU and Rules 20 and 21 of the Working Procedures of the Appellate Body and although the Panel had held that Brazil had failed to show in what manner the Community had violated Article 5.5 Brazil, had not appealed this finding. In the Banana case, the Appellate Body had seemed to take a stricter view. Brazil was concerned with what appeared to be an inconsistency in this practice and hoped that the Appellate Body would clarify this question in future cases. With regard to the EC's intentions with respect to implementation, as stated by Brazil, the parties to the dispute had agreed that the Community would submit a letter to the Chairman of the DSB in order to avoid convening a special meeting of the DSB in August.

The representative of Colombia thanked Brazil for its comments and observations on certain aspects of the Panel and the Appellate Body Reports. She wished to place on record Colombia's view on one issue regarding the conclusions of the Panel and the Appellate Body on the treatment of non-Members under Article XIII of GATT 1994. In paragraph 106 of its Report, the Appellate Body had stated that: "the calculation of shares must be based on the total imports of the products in question - whether these imports originate from Members or non-Members. Otherwise, it would not be possible to comply with the requirements in the chapeau of Article XIII:2". Colombia had reservations regarding this line of reasoning. If the requirements of Article XIII:2 and the rights of Members were to be respected, it would be necessary to enquire in each case how the total quota volume had been calculated. One of several situations might arise, for example: (i) the quota volume reflected total imports over a specified period; (ii) the quota volume only reflected total MFN imports, whether or not from WTO Members; (iii) the quota volume only reflected total MFN imports from WTO Members; or (iv) the quota volume only reflected total MFN imports without including imports subject to tariff preferences as for example in the case of the quota for banana imports into the EC.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS69/AB/R and the Panel Report in WT/DS69/R as modified by the Appellate Body Report.

9. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/80)

The Chairman drew attention to document WT/DSB/W/80 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/80.

The DSB so agreed.

10. Review of the DSU

(a) Statement by the Chairman

The Chairman recalled that in the light of the consultations held on 22 June, the Chairman of the DSB, Ambassador Morjane, had prepared a revised draft statement concerning procedures for the review of the DSU. Subsequently, on 26 June, this revised draft statement had been faxed to Members for comments. At the present meeting, he wished to inform the DSB that no objections had been received regarding this revised text. Therefore, as suggested by the Chairman of the DSB, he wished to read out this text, which was also available in the room:

> "Following discussions concerning arrangements for the Review of the DSU, the following approach is suggested:
>
> "1. Delegations are invited to continue to submit informal suggestions concerning issues to be taken up in the DSU Review, preferably by no later than the end of July, on the understanding that Members may submit further suggestions if they so wish in the course of the Review. Substantive discussions on suggestions submitted by Members will begin late September – early October 1998.
>
> "2. The Secretariat is requested to prepare a compilation of suggestions from Members before the commencement of the substantive discussions indicated above. This compilation will also include statistical data prepared by the Secretariat on dispute settlement cases. Other possible inputs from the Secretariat may be requested at a later stage.
>
> "3. The Appellate Body will be invited to provide views on an informal basis regarding the operational aspects of DSU procedures based on its experience. Members may decide, if they so wish, to request further views from the Appellate Body as the review exercise proceeds.
>
> "4. It has been generally considered useful to organize a seminar, or regional symposia, including the participation of academics, to carry out a broad exchange of views on the dispute settlement process in the WTO. Members will decide, if possible no later than end of July, on the feasibility of holding such a seminar, or alternatively regional symposia, in the Autumn. The feasibility of such event(s) will depend, inter alia, on the availability of adequate funds. At the same time, decisions on the modalities, the venue and participation would be taken.
>
> "5. It is understood that the DSU review is an exercise to be conducted by Members exclusively on the basis of their suggestions."

He also wished to inform the DSB that the Chairman of the DSB had carried out informal contacts with individual delegations on the possibility of organizing a seminar on dispute settlement. He would continue to carry out such contacts upon his return.

The DSB took note of the statement.

11. Turkey – Restrictions on imports of textile and clothing products

(a) Statement by the European Communities

The representative of the European Communities, speaking under "Other Business", drew attention to the discussion that had taken place at the DSB meeting held on 13 March 1998, with regard to India's request for a panel on Turkey's restrictions on imports of textile and clothing products. He wished to revert to this issue because in the course of the long discussion serious problems had been raised. The issue was complicated and not many delegations had been in a position to immediately understand the situation. The solution that had been found was that of a normal procedure, namely that following the second request by India a panel had been established to examine this matter. The Community was not a party to this dispute and had been refused to become a joint defendant or to be associated with the defence and it considered that the status of third party was not appropriate. He therefore wished to ask the Secretariat to provide a response to the legal questions raised by the Community at the DSB meeting on 13 March since it was not in a position to raise these questions before the Panel.

The Chairman said that he would convey this request to the DSB Chairman as well as to the Secretariat.

The representative of India said that he did not fully understand the points raised by the Community and he did not have before him the relevant document referred to by the EC representative. Therefore, his delegation wished to reserve its position with regard to the issue raised by the Community at the present meeting.

The representative of the United States said that her delegation wished to know the questions raised at the DSB meeting held on 13 March as referred to by the Community at the present meeting.

The representative of the European Communities said that in the interest of judicial economy, he wished to refer Members to five specific questions of legal and political nature which had been fully reflected in the minutes of the meeting contained in WT/DSB/M/43 on page 4. He reiterated that he sought some advice since the Community had not been involved in the Panel proceeding.

The Chairman drew attention to document WT/DSB/M/43 and said that on page 5 of that document it had been stated that the Chairman might also consider it appropriate to hold informal consultations with interested parties regarding these questions. He said that he would convey this point to the DSB Chairman to enable Members to consider this matter.

The representative of India said that in his understanding the Community had sought a response from the Secretariat but had not asked for consultations to seek such a response. He noted that this was not the stand taken in other Committees.

The representative of Mexico said that it was not very clear whether the Secretariat, the DSB or Members should reply to the questions raised by the Community or whether the Community had sought a legal opinion. He appreciated the statement by the Chairman that interested parties could consult on this issue because otherwise there was a need to clarify who should reply to these questions and on what basis.

The Chairman said that for the purposes of judicial economy the DSB should take note of the statements made at the present meeting and revert to this matter if necessary to examine the minutes of the meeting and to have a precise view of the issues raised at DSB meeting on 13 March as well as at the present meeting.

The DSB took note of the statements.

12. Next meeting of the DSB

The Chairman, speaking under "Other Business", announced that the next regular meeting of the DSB would be held on 22 September. He drew attention to the fact that the Panel Report on "Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico" had been circulated on 19 June in document WT/DS60/R. In accordance with Article 16.4 of the DSU "... within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report". He noted that the 60-day period in this case would expire on 18 August. Therefore, if a request to convene a DSB meeting within that time-period would be made such a meeting would be held accordingly.

The representative of Mexico said that in the context of Article 16.4 of the DSU footnote 7 to that Article was relevant and should also be mentioned for the record.

The Chairman drew attention to footnote 7 of Article 16.4 of the DSU which read as follows: "If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose".

The representative of Mexico asked whether there was a requirement to make a request to this effect. He noted that the Chairman had just announced that the next regular meeting of the DSB would be held in September, he therefore wished to know how this footnote would affect this earlier announcement.

The Chairman said that he recognized that this was a complex issue of interpretation which he was not in a position to clarify at the present meeting.

The representative of the European Communities said that it would be difficult to attend a meeting in August and therefore he wished the Chairman to confirm that if a meeting would be convened this would only be for the specific purpose of Article 16.4 of the DSU.

The Chairman said that he would inform Amb. Morjane of the EC's request. With regard to the question raised by Mexico, he said that the Secretariat did not have the authority to convene a meeting of the DSB without a Member's request to that effect. The issue of enabling the Secretariat

to *ex officio* include items on the agenda had been the subject of different interpretations by Members.

The representative of India recalled that at the DSB meeting on 22 June, a similar case had been discussed and the same point had been raised by Thailand and India. The representative of the Secretariat had indicated that consultations had been held on this matter in 1995 and that some decisions had been taken at that time. India had pointed out that if a decision taken by Members was in contradiction with the DSU provisions this matter should be resolved as soon as possible and no later than December 1998 before the completion of the DSU review.

The representative of Guatemala said that in his delegation's understanding the announcement made by the Chairman was to ensure that the 60-day period for the adoption of the Panel Report be observed and to inform Members that this time-period would expire on 18 August.

The representative of Mexico said that the Secretariat's opinion was not legally binding. It was his understanding that Guatemala believed that it could file its appeal until 18 August, if it so wished. If he were to follow the Secretariat's opinion on what would be the best for Mexico he would request a special meeting to be held at the latest on 18 August. He underlined that he fully shared the view expressed by Guatemala.

Mr. Barthel-Rosa, Secretary of the DSB , said that he wished to clarify one point raised by Mexico. It was not an opinion of the Secretariat that prevented such initiatives. The WTO operated on the basis of consensus. In 1995, the Secretariat had identified this potential difficulty and had convened informal consultations on this matter. At that time, Members could not agree that the Secretariat should take the initiative of placing an item on the agenda if it were not requested by a Member. Since there had been no consensus on this matter, the Secretariat had no choice but not to take an initiative. It could only do so if there was a concensus in the DSB which would give the Secretariat the authority.

The representative of Thailand wished to reiterate his country's position stated at the DSB meeting on 22 June that there was automaticity in the provisions of Article 16.4 of the DSU which implied that there was no need to request a meeting of the DSB. It was Thailand's understanding that the practice on this matter was due to convenience and should not be considered as a legal obligation. Furthermore, the practice should not override the language of Article 16.4 of the DSU.

The representative of Mexico said that it could be stated that consultations had been held and Members had not been able to agree by consensus that the Secretariat could not include an item on the agenda. However, it was not appropriate to interpret that one way or the other as there was no consensus.

The representative of Guatemala said that as long as the 60-day period had not elapsed his delegation considered that its rights would be preserved.

The Chairman said that this issue related to important concerns and as such should be addressed in the DSU review.

The representative of Mexico said that from the first statement made by Guatemala he had understood that Guatemala had time until 18 August to appeal. However, from the second statement he had understood that this time-limit was not defined until the request for a DSB meeting was made. He therefore sought clarification whether 18 August was the deadline for appeal.

The representative of Guatemala confirmed that 18 August was the deadline for appeal.

The DSB took note of the statements.