WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/153
24 September 2003

(03-5061)

Dispute Settlement Body
21 and 23 July 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 and 23 July 2003

Chairman: Mr. Shotaro Oshima (Japan)

Subjects discussed: Page

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.17 – WT/DS162/17/Add.17)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.10)

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.10)

(d) Egypt – Definitive anti-dumping measures on steel rebar from Turkey: Status report by Egypt (WT/DS211/7/Add.2)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

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

2. The Chairman drew attention to document WT/DS136/14/Add.17 – WT/DS162/17/Add.17, 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 his country had provided an additional status report in this dispute on 10 July 2003, in accordance with Article 21.6 of the DSU. As noted in the report, legislation repealing the 1916 Act and terminating all pending cases had been introduced in the US Senate on 19 May 2003. Other bills repealing the 1916 Act had been introduced in the House of Representatives on 4 March 2003 and in the Senate on 23 May 2003. The US administration was continuing to work with Congress to achieve further progress in resolving this dispute with the EC and Japan.

4. The representative of the European Communities said that since the introduction of the repealing bills in the Senate two months ago, no progress had been made. The EC recalled that the US failure to meet the implementation deadlines had led EC companies to face claims in three cases. These companies had to bear substantial litigation costs and the threat of a treble damage condemnation as a result of claims brought under a law condemned almost three years ago. Moreover, claims had been brought after the deadline for implementation. The EC had accepted to extend the implementation deadline and to suspend the arbitration on its request for retaliation on the express understanding that the repealing Act would also terminate the pending litigation. Only one of the three bills introduced in Congress provided for the termination of the pending litigation. In the last Congress, the implementation process stalled at this stage and had never materialised. The EC urged the US administration to convey upon Congress the need to repeal the 1916 Anti-Dumping Act

and terminate pending litigation prior to the congressional summer recess. In the absence of such action, the EC would proceed to exercise its WTO rights and would resume the suspended arbitration.

5. The representative of Japan said that one more month had been added to the long period of time following the adoption of the Panel and the Appellate Body Reports in these proceedings, but the United States had not yet implemented the DSB's recommendations and rulings. Japan had repeatedly stated that the United States must have the bills repealing the 1916 Act passed before the summer recess of the current session of the 108th Congress. It was, therefore, extremely disappointing that the Congress was approaching the recess with not much sign of progress. As had been stated by the United States, three bills had indeed been introduced to the Congress. Like the EC, Japan also regretted that two of these bills were without the required effect to terminate the pending cases. In order to prevent damages additional to those already suffered by the respondent Japanese companies, the termination of these cases had to be secured by the retroactive effect. The United States should report to the DSB in more detail, especially on how the three bills and any future bills might be handled in the US Congress, and what the United States was doing for the earliest passage of the repealing bills with the proper retroactive effect. Japan reminded the United States of its right to suspend concessions or other obligations. Her delegation had taken careful note of the statement made by the EC. It was also considering what action it might take.

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.10)

7. The Chairman drew attention to document WT/DS176/11/Add.10 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 his country had provided a status report in this dispute on 10 July, in accordance with Article 21.6 of the DSU. In a communication dated 30 June 2003, the United States and the EC had informed the DSB that they had agreed to extend the reasonable period of time for implementation in this dispute until 31 December 2003. The US administration was continuing to work closely with the US Congress on appropriate statutory measures to resolve this dispute.

9. The representative of the European Communities said that in June 2003, there had been a positive move in this case with the introduction of a bill in the US Congress that would, *inter alia*, repeal Section 211. This repeal was part of a whole scheme of measures that would ensure an effective protection of intellectual property rights both in Cuba and the United States. It reaffirmed the US attachment to ensure adequate protection of intellectual property rights, which should not be affected by a special interest legislation. The EC hoped that this would offer a solution to this dispute to the benefit of all. Against this background, the EC had agreed to give more time to the United States to comply with the DSB's rulings and recommendations. The EC expected the US administration to clearly convey to the US Congress that the extended time-frame should result in full implementation of the DSB's rulings and recommendations.

10. The representative of Cuba said that her country had noted the statements made by the United States and the EC. Cuba was obliged, once again, to express its criticism about the delay by the United States in implementing the DSB's recommendations. Cuba hoped that within the new time-period for implementation, the United States would comply with its obligations and would refrain from undermining the credibility of the dispute settlement system.

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.10)

12. The Chairman drew attention to document WT/DS184/15/Add.10 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 his country had provided a status report in this dispute on 10 July 2003, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress to address the recommendations and rulings of the DSB that had not yet been dealt with. Specifically, the US administration had expressed its support for specific legislative amendments that would implement these recommendations and rulings, and was working for passage of these amendments.

14. The representative of Japan said that her country was concerned that the United States had not shown any evidence to prove that it meant to support the required legislation, although Ambassador Zoellick and Secretary Evans had stated so in their joint letter more than three months ago. Nor did the United States seem to take very seriously its obligation as a WTO Member to faithfully implement the DSB's recommendations and rulings before the end of the first session of the 108th Congress. Japan had been urging the United States to ensure the passage of the necessary legislation before the impending summer break of the US Congress. Appallingly enough, no amendments of the relevant US statute were in sight. Japan's repeated statements had apparently been ignored. Japan requested that the United States heed to Japan's well-warranted concern, have a much keener sense of urgency, and secure the introduction and passage of the relevant legislation as early as possible. The United States must also consult more closely with Japan on the status and contents of the implementation, including any progress on the legislation.

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

(d) Egypt – Definitive anti-dumping measures on steel rebar from Turkey: Status report by Egypt (WT/DS211/7/Add.2)

16. The Chairman drew attention to document WT/DS211/7/Add.2, which contained the status report by Egypt on progress in the implementation of the DSB's recommendations in the case concerning definitive anti-dumping measures on steel rebar from Turkey.

17. The representative of Egypt said that on 24 June 2003 his country had submitted to the DSB its second status report on progress in the implementation of the DSB's recommendations and rulings in the case under consideration. At the present meeting, Egypt wished to inform the DSB that it had already submitted its revised injury assessment and revised dumping assessment to the interested parties. The investigating authorities were now examining the comments received from Turkey. Egypt would continue to work with Turkey to implement the DSB's recommendations and rulings in a satisfactory manner.

18. The representative of Turkey said that his country recognized the efforts of Egypt to comply with the DSB's recommendations. Egypt had acted in good faith by stating that the comments made by Turkey with regard to the revised assessments would be taken into serious consideration. However, he stressed that there was still no tangible resolution to this dispute and that only 10 days were left before the expiry of the reasonable period of time, which was 31 July 2003. Turkey

expected that the comments made and the evidence submitted with regard to dumping margin calculations reported in the revised disclosure of findings would be taken fully into account and that the dumping duties imposed inconsistently with the Anti-Dumping Agreement be revoked before the end of the reasonable period of time.

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

2. Korea – Measures affecting trade in commercial vessels

(a) Request for the establishment of a panel by the European Communities (WT/DS273/2; WT/DS273/3)

20. The Chairman recalled that the DSB had considered this matter at its meeting on 24 June 2003 and had agreed to revert to it. He drew attention to the communications from the European Communities contained in documents WT/DS273/2 and WT/DS273/3 respectively.

21. The representative of the European Communities said that at the 24 June DSB meeting, the EC had explained in detail the reasons for which it was requesting the establishment of a panel on Korean shipbuilding subsidies, therefore, there was no need to repeat them at the present meeting. It was sufficient to say that the EC had exceptionally accepted – against its interpretation of Article 7.4 of the SCM Agreement (and without prejudice of its WTO rights in the future) – to make a second request for the establishment of a panel following an agreement with Korea on the simultaneous establishment of the panel, the initiation of the Annex V procedures and the appointment of the facilitator. On the basis of this agreement, the EC had held extensive consultations with Korea on the appointment of a facilitator. During the consultations the parties had been able to agree that Mr. A. Szepesi be designated as an Annex V facilitator. The EC thanked Mr. Szepesi for acceptance and looked forward to excellent cooperation with him and Korea during the Annex V proceedings. The EC also thanked Korea for its cooperative approach in this difficult process as well as the Chairman of the DSB and the Secretariat for their time and effort devoted to this matter. The EC hoped that both parties would continue to cooperate on all matters related to the Annex V proceedings so as to resolve this dispute as expeditiously as possible. The EC was confident that the DSB would agree, at the present meeting, to appoint Mr. Szepesi, in accordance with the provisions of Annex V of the SCM Agreement.

22. The representative of Korea said that since this item was on the agenda for the second time, his country recognized that the panel would be established at the present meeting. He wished to briefly refer to the statement made by the EC at the present meeting with regard to Article 7.4 of the SCM Agreement. At the 24 June DSB meeting, Korea had presented its interpretation of Article 7.4 and believed that its interpretation was airtight. It remained Korea's firm position that its government had not provided any support that was inconsistent with the SCM Agreement. The main issue in this case was whether actions taken by Korea's financial institutions, into which the government had been forced to inject funds due to a financial crisis, constituted prohibited or actionable subsidies. He reiterated that those actions had been taken on a commercial basis, and that no specific company or industrial sectors had been targeted. While the EC would have Members believe that this dispute was about alleged subsidies to shipbuilders, the core issue was about each Member's continued ability to take the financial measures necessary to respond to a financial crisis. In the wake of the Asian financial crisis, the IMF and the World Bank had provided Korea with emergency bailout loans, and the Korean government had pursued policies that were designed to overcome economic problems. In this process, funds had been injected into the financial sector, resulting in a temporary increase in the government's stake in Korean financial institutions. The re-privatization of commercial banks had been underway for some time now and the Korean government had faithfully abided by the principle

that even under government ownership, the financial institutions shall operate on an exclusively commercial basis.

23. In accordance with its understanding with the IMF, the Korean government had set up a mechanism through which debtors and creditors could make use of the out-of-court workout debt restructuring programme. These restructuring measures had been taken on a commercial basis, and the corporate restructuring programme did not target any specific companies or industrial sectors. The strong performance of Korean shipyards was due to their competitive edge based on efficiency, lower costs of production and the market's devaluation of the Korean currency following the financial crisis. Besides, Korea could not have caused injury or prejudice to the European shipyards, as European and Korean yards largely operated in different market segments. European yards were mainly focused on the market for ships that were smaller in size and higher in value, whereas Korean shipyards produced larger vessels, a market segment in which European shipyards had not recently been involved. Korea believed the panel would clarify all the issues and arrive at the correct findings and conclusions in this dispute.

24. With regard to the designation of the DSB representative under Annex V of the SCM Agreement, Korea said that, since the 24 June DSB meeting it had worked with the EC on this matter and had reached an agreement. Korea hoped that the decision to designate the Annex V representative would be taken at the present meeting. Korea also wished to take this occasion to express its appreciation to the Chairman and the Secretariat for assisting Korea and the EC in reaching an agreement in this regard. At the same time, Korea wished to make clear that its agreement to participate in the Annex V procedures was without prejudice to its basic position that measures taken by Korea in restructuring its financial and corporate sector did not constitute support that was inconsistent with Korea's WTO obligations.

25. He recalled that at the 24 June DSB meeting, Japan had expressed its intention to participate in this dispute as a third party and had requested access to the information developed under Annex V of the SCM Agreement. While Korea understood that third parties might wish to have access to such information, Annex V did not grant them this right. Paragraph 5 of Annex V provided that the information obtained during the Annex V process shall be submitted to the panel, in accordance with the provisions of Part X of the SCM Agreement which simply referred to the DSU. Under the DSU, third-party rights to information were limited to the first submissions of the parties to the dispute. Nothing in the DSU nor in Annex V of the SCM Agreement envisaged third-party access to the information gathered during the Annex V process. In the Indonesia – Autos case, third parties had not been granted access to the information developed under Annex V.

26. With regard to the issue of third-country markets, in its communication dated 10 July 2003 and contained in WT/DS273/3, the EC had identified Japan and China as third-country Members within the meaning of Annex V of the SCM Agreement. Korea was disturbed by the fact that the EC had withheld this information until just 10 days prior to the establishment of the panel. This late notification had limited Korea's ability to develop its own questions pertaining to those third-country Members. More importantly, Korea was seriously concerned that the EC's panel request failed to identify adequately either the specific type of serious prejudice under Article 6.3 of the SCM Agreement that it alleged had been suffered by EC interests, or the markets in which it alleged such serious prejudice occurred. All the EC had done was to identify Japan and China as third-country markets for the purposes of Annex V. This was a very different matter than identifying the markets in which serious prejudice had allegedly occurred. Korea believed that the EC had fallen short of meeting its requirements under Article 6.2 of the DSU, and noted that this failure continued to seriously limit Korea's ability to defend itself. In this regard, Korea reserved all its rights under the DSU and the SCM Agreement.

27. The representative of Japan said that, as her delegation had already stated at the 24 June DSB meeting and as had been pointed out by Korea, Japan would participate as a third party in these proceedings. With regard to the procedures under Annex V of the SCM Agreement, Japan reiterated its request for any information gathered thereunder to be provided to third parties to this dispute. With regard to the issue raised by Korea, it was true that there was no specific reference to such provision of information to third parties under Annex V. However, as Japan had pointed out at the 24 June DSB meeting, it was essential for third parties to fully develop their arguments so that they could fully participate in these proceedings as third parties with substantial interest in this case. Japan had been a party to the Indonesia – Autos case, but had not invoked the Annex V proceedings. Therefore, Japan was not sure what kind of considerations had been taken into account at that time when it had been decided not to provide such information to third parties. Japan believed that the parties could still agree during the organizational meeting or in other fora to provide third parties with information necessary for them to fully participate in the proceedings. Japan wished to reiterate its request that Korea reconsider this issue and would pursue this matter further once the panel had been established and an Annex V representative had been designated.

28. Japan also noted the communication from the EC contained in WT/DS273/3, which read as follows: "the European Communities intends to address questions under the Annex V procedure to the following third-country Members: Japan and China". She recalled that at the 24 June DSB meeting, the EC in response to Korea's question had stated that it intended to designate Japan as a third-country Member under Annex V of the SCM Agreement. Japan then had requested an official, written communication from the EC to that effect. It was, therefore, rather unfortunate that Japan had only become aware of the EC's communication after it had been circulated to Members. It was true that Annex V did not provide for any specific, precise procedures to be followed for the designation of third-country Members, notification of the organisation responsible for the administration of these procedures, presentation of questions, and so forth. However, its should be noted that paragraph 1 of Annex V provided that "Every Member shall cooperate in the development of evidence." In addition, the last sentence of paragraph 3 of that Annex read as follows: "if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government." Therefore, Japan would be bearing legal obligation as a third-country Member, which could be more than just provision of information, because it had been designated as such by the EC. This raised a systemic concern, at least from the point of view of Japan, as to what kind of procedures should be devised for the application of Annex V in order to balance legitimate rights and interests of the parties to the dispute, third parties to the dispute, and third-country Members. Since the Annex V procedure had actually been used only once in the past, this issue remained to be addressed. In this regard, Japan wished to recall two provisions of Annex V. First, paragraph 3 stated that the collection of information "should be administered in such a way as not to impose an unreasonable burden on the third-country Member". Second, paragraph 4 stated that "the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties". Japan looked forward to being informed of, or if necessary being consulted on, the exact procedures to be followed in the information-gathering process in this particular case. Japan, of course, would do its best to cooperate with an Annex V representative and the parties.

29. The representative of the United States said that he wished to refer to one point raised by previous speakers and recalled that when this matter had been considered at the 24 June DSB meeting, some delegations had suggested that third parties should be entitled to participate in the procedures under Annex V of the SCM Agreement. The United States could not endorse participation in the Annex V process by third parties and in this instance that would include the United States. As his country had explained in the context of another dispute, Annex V did not contemplate participation by third parties in that process nor did it contemplate third parties having access to information that was compiled in that process. As stated by Korea, in the Indonesia – Autos dispute the information

gathered had not been provided to third parties. The United States believed that that was the appropriate approach.

30. The representative of Korea said that he wished to briefly respond to Japan's expectations to have access to the information developed under the Annex V procedures. He said that in his previous statement he made clear enough that the scope of third-party rights to information was limited to the first submission of the parties to the dispute. Korea did not see any reason for adopting a broader interpretation on third-party rights for information in this particular case. Presumably, sensitive information would be involved in this process. With regard to Japan's statement about the need to ensure the balance of rights of parties to the dispute, third parties and third countries in the meaning of Annex V, he noted that paragraph 3 specified that "such a Member is not expected to make a marker or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member." Therefore, in providing information there was no specific criteria to be met by third countries.

31. The representative of Japan said that one should distinguish between the participation in the Annex V information-gathering process and the provision of information gathered thereunder to third parties to the dispute. Japan was obliged to participate in the information-gathering process as it had been designated by the EC as a third-country Member. With regard to the provision of information to third parties, she noted that Japan regarded this information to be important in order to be able to participate in the Panel proceedings. Japan was aware that there was no specific provision to allow third parties to the dispute access to the information gathered under Annex V. However, given the nature of the dispute, Japan believed that the parties could agree that third parties be provided adequate information gathered thereunder. With regard to the elements contained in the statement made earlier by Japan which had been quoted by Korea, her delegation would wish to distinguish the two issues, namely, the access to the information gathered under Annex V and the procedures to be followed in the information-gathering process. The latter was a broader question of what kind of procedures would be necessary for notification, presentation of questions, responding to questions, etc. for the benefit of all the Members concerned, including the parties, third parties and third-country Members, as was demonstrated by the issue of not getting an advance copy of the communication by the EC before its circulation to all Members. Japan, as a third-country Member, was obliged to comply with the request by the DSB representative and the parties to provide information. Therefore, this was a legitimate question that the third-country Member should be able to ask in this context.

32. The representative of Brazil said that, as had already been stated at the 24 June DSB meeting, his country had systemic and concrete interests in the proper functioning of the Annex V procedure. Brazil was glad to see that the EC and Korea had been able to agree on a name of a representative and that the Annex V procedure would now follow its proper course. Brazil recalled that paragraph 1 of Annex V required that "Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraph 4 through 6 of Article 7." Brazil hoped that the EC and Korea would continue to make progress in the utilization of Annex V and that any unresolved matters in this dispute could be satisfactorily worked out. This could show to the Membership that if Members cooperated, the Annex V procedure could be helpful in the development of evidence.

33. The representative of Korea said that Japan had raised the question of the scope of third-country Members rights in the Annex V procedure and had referred to some possible mechanisms under which third-country Members might have access to information or participate in the Annex V procedure. Korea understood Japan's concern, but believed that a part of this concern was due to what had been done by the EC. Therefore, Korea did not feel responsible nor had an obligation to alleviate Japan's concerns in this regard. However, it was not the task of the DSB nor a facilitator or a panel to make a ruling on these broad issues, but more for the negotiating table on rules.

34. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Articles 4.4 and 7.4 of the SCM Agreement and Article 6 of the DSU with standard terms of reference.

35. The representatives of China, Chinese Taipei, Japan, Mexico, Norway and the United States reserved their third-party rights to participate in the Panel's proceedings.

36. The Chairman said that, with regard to the issue of the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement, which the EC had requested to be initiated pursuant to paragraph 2 of that Annex, he wished to propose that the DSB agree, as requested by the European Communities in document WT/DS273/3, to initiate the procedures under paragraph 2 of Annex V of the SCM Agreement.

37. It was so agreed.

38. The Chairman further stated that as Members were aware, the EC had also requested the DSB to designate a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement. As had been indicated at the 24 June DSB meeting, the EC had held consultations with Korea on the question of the designation of such a representative. As Members were aware, the parties to the dispute had now reached a common view regarding this matter. He had also offered all other Members an opportunity to consult on this appointment and had heard no objection. He, therefore, proposed that the DSB appoint this representative at the present meeting. Accordingly, he proposed that the DSB designate Mr. Andras Szepesi as a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement.

39. It was so agreed.

40. On behalf of the DSB, the Chairman thanked Mr. Szepesi for his willingness to undertake this task. He recalled that under Annex V of the SCM Agreement, the information-gathering process should be completed within 60 days. In view of the shortness of this deadline, he suggested that Mr. Szepesi meet with the parties as soon as possible to establish a timetable, together with any working procedures necessary for completion of this task.

41. The DSB took note of the statement.

3. United States – Measures affecting the cross-border supply of gambling and betting services

(a) Request for the establishment of a panel by Antigua and Barbuda (WT/DS285/2)

42. The Chairman recalled that the DSB had considered this matter at its meeting on 24 June 2003 and had agreed to revert to it. He drew attention to the communication from Antigua and Barbuda contained in document WT/DS285/2.

43. The representative of Antigua and Barbuda said that his country was disappointed that since the last time the DSB had met on 24 June, the United States had not indicated a willingness to recognise the validity of the compliant and to settle this dispute. His country greatly valued its relations with the United States and would have preferred not to have a dispute at all. But, his government was very mindful of its responsibility to its people to maintain their jobs and to defend its small and vulnerable economy in a highly competitive world. In the circumstances, Antigua and Barbuda was obliged to continue to seek the establishment of a panel to adjudicate the dispute. His government wished to make it clear that since the meeting of the DSB on 24 June, careful

consideration had been given to the remarks made by the United States on that occasion. One of the observations that had been made was that the US ban on cross-border gambling was intended to protect its citizens, and particularly children, from risks related to betting. At the present meeting, he wished to make two responses to this.

44. First, underage gambling was prohibited by Antigua and Barbuda, and the prohibition was strictly enforced by an independent statutory Commission which had legally defined Internet gaming entities as financial institutions. Internet gaming entities were subject to heavy fines and imprisonment for offences, which included money laundering, terrorism financing, fraud and other breaches of the law such as underage gambling. His country had explained this to the United States during GATS Article 23 consultations held with the United States. During the consultations, his country had offered to implement any proposals that would strengthen its regulatory process even further. Second, the United States knew very well that the GATS rules did not prevent it from reasonably regulating an industry to address a legitimate public interest. The GATS rules did, however, prevent the United States from regulating in a discriminatory and trade-distortive manner. The United States had also stated that cross-border gambling and betting services were prohibited under US law "from domestic and foreign service suppliers alike". But, he wished to point out that a ban on the cross-border supply of services had a very different effect depending on whether one was inside or outside the borders of the United States. The GATS sought to create equal conditions of competition for domestic and foreign service suppliers. In this context, it was not a reasonable argument to contend that a measure prohibiting cross-border supply had an equal effect on foreign and domestic service suppliers. After all, the US domestic service suppliers were not crossing any borders when they supplied the US market to the exclusion of others who were outside US borders.

45. The United States further stated that "cross-border gambling and betting services are not within the scope of the US specific market access commitments under the GATS". During the GATS Article 23 consultations, Antigua and Barbuda had provided the United States with a detailed oral and written explanation of the legal basis for its interpretation of the US Schedule. It had received no explanation from the United States of its legal position, other than the flat denial that "cross border gambling and betting services were not within the scope" of its "specific market access commitments under the GATS". His country had also not received any explanation as to why its interpretation could be wrong.

46. Finally, the United States had raised a number of procedural issues and had stated that the Annex to the panel request by Antigua and Barbuda contained: first, certain items that did not qualify as "measures"; second, certain measures that had not been included in the consultation request; and third, measures that did not relate to cross-border gambling and betting. Antigua and Barbuda wished to point out that, in its Report in the FSC case, the Appellate Body had wisely held that: "The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." The Appellate Body had also found that the purpose of Article 6.2 of the DSU was to inform the defending party of the complaint so as to allow it to defend itself. US legislation on the cross-border supply of gaming services was complex and opaque. It appeared that, even inside the United States, different authorities had taken different views on the precise interpretation of some of the specific rules. In this dispute, however, the United States agreed with Antigua and Barbuda that the United States maintained a blanket prohibition on the cross-border supply of gaming services. The United States had repeated that very clearly at the 24 June DSB meeting. This blanket ban was precisely what his country was complaining about. In this respect his country found it difficult to see how the United States could have difficulties in understanding what was at issue in this dispute. Nonetheless, Antigua and Barbuda was willing to try to answer any specific questions that the United States might have, just as it would welcome a US detailed and written explanation of what it did not understand about its panel request. In the meantime, his country had to, once again, respectfully ask the DSB to establish a panel pursuant to Article 6 of the DSU.

47. The representative of the United States said that, as indicated at the 24 June DSB meeting, his country was disappointed that consultations had failed to resolve this dispute. It was very clear that cross-border gambling and betting services were not within the scope of US specific market access commitments under the GATS. It was also clear that these services were prohibited under US law – from domestic and foreign service suppliers alike. As explained at that previous meeting, these services presented psychological dangers to some segments of society, as well as creating serious social problems and law enforcement difficulties. The United States had also previously noted the particular deficiencies in this panel request. They included: (i) reference to a number of items that did not constitute "measures" and could not properly be included within the scope of a panel request; (ii) reference to several measures that appeared not to have been included in the 1 April 2003 consultation request; and (iii) reference to a number of measures that were unrelated to cross-border gambling and betting. The United States recognized that despite these deficiencies, a panel would be established at the present meeting in response to Antigua and Barbuda's request. The United States was confident that, in addition to making findings sustaining these procedural deficiencies, a panel would reject the allegations raised by Antigua and Barbuda, and would confirm that the US measures were consistent with the GATS.

48. 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.

49. The representatives of Canada, Chinese Taipei, the European Communities and Mexico reserved their third-party rights to participate in the Panel's proceedings.

4. Australia – Certain measures affecting the importation of fresh fruit and vegetables

(a) Request for the establishment of a panel by the Philippines (WT/DS270/5/Rev.1)

50. The Chairman drew attention to the communication from the Philippines contained in document WT/DS270/5/Rev.1.

51. The representative of the Philippines said that his country had consistently raised concerns regarding Australia's import measures, in particular on fresh fruit and vegetables including fresh bananas, fresh plantains and fresh papayas. These measures had effectively prevented access of the Philippines exporters of these products into the Australian market. Despite continued and persistent efforts, including bilateral talks and exchanges of information, the products in question continued to face unreasonable restrictions. Therefore, in accordance with Article 4 of the DSU, his country had requested consultations with Australia to discuss these as well as other related issues and concerns. These consultations, which had been held on 15 November 2002, had unfortunately failed to resolve the dispute and, thus, the Philippines had to request the establishment of a panel.

52. The representative of Australia said that his country was disappointed with the decision by the Philippines to proceed with a request for the establishment of a panel. As Australia had indicated to the Philippines throughout its ongoing discussions, Australia’s quarantine system was fully WTO consistent. Australia was confident that the dispute settlement process would reach the same conclusion, if the Philippines continued to pursue this matter. While it was the right of every WTO Member to use the dispute settlement procedures, it was unfortunate that the Philippines considered it necessary to use these procedures to seek to resolve concerns which could be addressed more constructively through bilateral mechanisms. Australia remained open to further consultations with the Philippines. Given these circumstances, Australia could not agree to the establishment of a panel at the present meeting.

53. Australia would like to take this opportunity to raise its serious concerns, which it expected would also be shared by other Members, about the specific approach taken by the Philippines in

framing its panel request. The Philippines appeared to be interested in making a broad systemic challenge to Australia's quarantine regime, rather than contesting the WTO-consistency of import conditions contained in specific SPS measures. Such a challenge would strike at the fundamental right of WTO Members to have quarantine systems providing for the WTO-consistent application of measures to achieve the level of SPS protection deemed appropriate to protect human, animal or plant life or health within their territory. Many WTO Members maintained approaches to quarantine which were either similar to Australia's system, or had similar elements. Australia expected they would share its serious concerns about the implications of a challenge to the fundamental right of WTO Members to maintain an appropriate quarantine regime. Given the broad and all encompassing nature of the Philippines' panel request, as well as its lack of specificity in relation to any particular fruit or vegetable product, Australia had strong doubts about the consistency of the request with the requirements of Article 6.2 of the DSU. Australia had previously raised with the Philippines related concerns with the lack of specificity in its request for consultations. At this stage, his country was continuing to examine these issues, but wished to take this early opportunity to signal its concerns and to reserve its WTO rights in this regard.

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

5. European Communities – Export subsidies on sugar

(a) Request for the establishment of a panel by Australia (WT/DS265/21)

(b) Request for the establishment of a panel by Brazil (WT/DS266/21)

(c) Request for the establishment of a panel by Thailand (WT/DS283/2)

55. The Chairman proposed that the three sub-items to which he had just referred be considered together. First, he drew attention to the communication from Australia contained in document WT/DS265/21.

56. The representative of Australia said that his country had joined with Brazil and Thailand in seeking at the present meeting the establishment of a panel to consider its concerns regarding the EC sugar export subsidies. The details of Australia's request were set out in document WT/DS265/21. However, given the number of misrepresentations and factual inaccuracies in some official statements concerning Australia's request, his delegation wished to set out clearly, at the present meeting, what Australia's request was about and what it was not about.

57. He first wished to outline was this complaint was about. This request for a panel concerned the application of the WTO treaty rules to the EC sugar regime in relation to subsidies on sugar exported by the EC. It concerned the existing WTO export subsidy obligations that the EC owed to Australia, which Australia paid for in the Uruguay Round. Australia exported around 80 per cent of its sugar production and Australian sugar producers were entitled to hold a legitimate expectation that Australia would protect its WTO treaty rights. The measures at issue constituted direct and indirect subsidies on the export of EC sugar, which Australia considered were inconsistent with the EC's WTO export subsidy obligations. The export subsidies were provided to EC sugar producers under a regime whose design, construction and application were expressly for the purposes of remunerating the EC sugar industry.[1] As the Commission itself had noted, it was a closed regime.[2] The facts were straightforward: (i) the EC system of export subsidies on sugar was tried – and found wanting –

[1] Paragraph (2) of Council Regulation (EC) No 1260/2001 on the Common Organisation of the Markets in the Sugar Sector.

[2] Evidence by Falkenberg, EU Commission official, to House of Commons Select Committee on International Development.

under prior GATT rules, but the EC had not made any adjustments to its regime to bring it into GATT-conformity; (ii) as noted by Commissioner Fischler, the EC sugar regime had kept its fundamental elements virtually unchanged for the past thirty years[3]; (iii) as an outcome of the Uruguay Round, strengthened disciplines on agricultural export subsidies now applied to all WTO Members; (iv) in accordance with its obligations under the WTO Agreement on Agriculture, the EC – like all other WTO Members – was required to limit its budgetary outlays for export subsidies and the quantities benefiting from such subsidies; (v) the EC budgetary outlays for export subsidies on sugar and the quantities benefiting from such subsidies were in excess of those limits[4]; (vi) the EC had neither sought – nor received – a waiver for non-observance of its WTO obligations in respect of export subsidies on sugar.

58. A simple examination of the factual aspects of the EC sugar regime made it clear that the EC did not intend to deliver on its WTO obligations in the sugar sector. The EC regime ensured that most surplus-to-consumption sugar produced in its member States was always exported, through a combination of direct and indirect export subsidies and a mandatory requirement to export all surplus to quota sugar. The EC sugar regime delivered a structural surplus of over 6 million tonnes – well in excess of its WTO export subsidy obligations.[5] The regime ensured the neutralization of domestic competition from imports under WTO tariff quota bindings, by including the so-called "equivalent" of imports from the ACP and India in the quantities of EC-produced sugar eligible for direct export subsidies. The EC sugar produced in excess of quota – currently over 3 million tonnes – was prohibited from entering the domestic supply chain and must be exported.

59. He then outlined what Australia's request was not about. Contrary to what had been said in official statements from the EC and elsewhere, the complaint was not about EC preferential access arrangements. Australia had given assurances that it would not challenge the preferential arrangements that the EC accorded to some ACP sugar exporters. As was clear from its panel request, Australia honoured those assurances. No one could accuse Australia of bad faith in that regard. Any claim to the contrary was a smokescreen designed to deflect the debate from the central issue of the EC's non-observance of its export subsidy obligations in the sugar sector. There was nothing in Australia's complaint that would affect the capacity of the EC to deliver on its treaty obligations to developing countries, but the EC has refused to provide assurances that it would continue to honour those commitments. The EC Commission had not elaborated on its unfounded assertion that a legitimate WTO complaint about the subsidies that the EC granted to its sugar exporters would hurt developing countries.[6] Was the EC suggesting that the cost of implementation of its own WTO and other treaty obligations must be met by other countries, in addition to the price that other WTO members had already paid in negotiating strengthened WTO rules, many of them of significant benefit to the EC? All WTO Members should be rightly concerned about the implications for EC observance of its WTO and other treaty obligations – as well as the value of any of the EC's negotiating offers in the Doha Round.

60. In concluding, he said that the EC's export subsidies on sugar were clearly in excess of its WTO obligations to limit such subsidies. Australia's consultations with the EC in November 2002 had been characterized by a refusal on the part of the EC to provide factual information on the EC sugar regime, including information which the EC had itself commissioned. It was regrettable that the EC had refused to respond to requests of a factual nature as part of the dispute settlement

[3] Speech by Commissioner Fischler to 50th CEFS Congress, Vienna, 16 June 2003.

[4] By the EC's own estimates, EC direct export subsidies on sugar have ranged between €1 – €1.6 billion a year over the period 1997-2000. EC sugar exports are now of the order 6 million tonnes.

[5] Average annual domestic consumption is significantly lower (less than 13 million tonnes) than the quantities of EC sugar eligible for direct domestic and export subsidies under quota guarantees to member States (in total around 15 million tonnes).

[6] Commission press release of 10 July 2003.

consultations and also in the context of WTO transparency provisions. In accordance with its rights under the DSU and other WTO Agreements, Australia, therefore, requested the establishment of a panel to examine the claims contained in document WT/DS265/21.

61. The Chairman drew attention to the communication from Brazil contained in document WT/DS266/21.

62. The representative of Brazil said that his country requested the establishment of a panel to examine the EC sugar regime, the Common Organization of the Markets in the Sugar Sector. This regime was characterized by import quotas, high tariffs, high domestic intervention prices and export subsidies. It grossly distorted world trade in sugar. During the Uruguay Round, the EC had agreed to a number of limitations in relation to this regime. Most notably, in accordance with the Agreement on Agriculture, the EC had been committed to limit its export subsidies, both as to quantity and as to budgetary outlays. The EC's own notifications to the Committee on Agriculture admitted that the EC's subsidized exports of sugar had exceeded those commitments. Brazil had tried to resolve this difficulty in discussions with the EC. On 21 and 22 November 2002, consultations had been held with a view to resolving the dispute. Unfortunately, the consultations had failed to reach a mutually satisfactory solution. Thus, Brazil had no alternative, but to request the establishment of a panel. Brazil drew Members' attention to document WT/DS266/21, dated 9 July 2003, which contained the panel request to examine the conformity of certain aspects of the EC sugar regime with WTO rules. His delegation believed that it was important that Members had a proper understanding of this dispute. Therefore, Brazil would like to take this opportunity to clarify what this dispute was about, and what it was not about. This dispute was about the observance and implementation of the obligations that the EC had undertaken during the Uruguay Round. It referred to the lack of fulfilment by the EC of commitments already agreed upon, and in force since 1995. It was not about the agricultural negotiations currently underway in the Doha Round. This dispute was about the export subsidization of sugar provided by the EC in excess of its reduction commitments. It was not about the right of the EC to export or re-export sugar within its reduction commitment levels, or to export sugar without export subsidies. This dispute was about the provision of export subsidies in violation of the Agreement on Agriculture and the SCM Agreement. It was most definitely not about the preferential import arrangements for sugar from a number of ACP countries and other beneficiaries, or the trade preferences that the EC accorded to those countries pursuant to the waiver granted by Ministers in the context of the Doha Conference with regard to the "ACP-EC Partnership Agreement". He recalled that Brazil had supported then, and continued to support, that waiver.

63. He said that it was necessary to be absolutely clear on this issue: if any changes were to be made to the conditions of access of ACP sugar to the EC market, these changes would result from a unilateral decision of the EC. In plain words, they would result from a decision of the EC not to pay for the development aid it claimed to extend to some ACP countries, who held a 94 per cent share of all the EC imports. In Brazil's view, the EC sugar regime, as it currently operated was incompatible with the EC's multilateral commitments and caused serious harm to Brazilian sugar producers. It was the responsibility of the EC to comply with its obligations under the WTO and, while observing them, provide any aid it desired to developing country Members, including ACP countries. Therefore, while the question for the panel was whether the EC's subsidized exports of sugar had exceeded its Uruguay Round commitments, as a result of consultations and other statements made, Brazil anticipated that the panel would be asked to focus on two aspects of the EC sugar regime. First, the payments on the so-called C sugar to enable it to be produced and exported at prices below its total cost of production. These payments were financed by virtue of the high prices that the EC regime secured for growers and processors of A and B sugar quotas. These were export subsidies within the meaning of Article 9 of the Agreement on Agriculture, and were subject to reduction commitments. Second, the export subsidies the EC provided to an amount of white sugar ostensibly equivalent to the quantity, of raw sugar that it imported under its preferential import arrangements. This amount was reported by the EC to be approximately 1.6 million tonnes annually. Brazil had no quarrel with the preferential

imports. As he had noted, Brazil supported the waiver that permitted them. Brazil objected, however, to the EC's unjustifiable exclusion of these subsidies from the calculation of the total amount of export subsidies that it provided for sugar. The total amount of sugar thus subsidized by the EC substantially exceeded its export subsidy reduction commitment levels. As such, these exports constituted a violation of the EC's obligations under Articles 3.3, 8, 9.1 (a) and (c), or, alternatively, Article 10.1 of the Agreement on Agriculture, as well as other provisions of the covered agreements, including Article 3 of the SCM Agreement.

64. The Chairman drew attention to the communication from Thailand contained in document WT/DS283/2.

65. The representative of Thailand said that on 14 March 2003, her country had requested consultations with the EC concerning certain subsidies provided by the EC in the sugar sector. In that request, Thailand noted that it was concerned about export subsidies granted by the EC under its Council Regulation (EC) No. 1260/2001 of 19 June 2001, and other relevant legislation. Thailand was concerned that under the EC regime, the export subsidies on sugar classified as C-sugar. In failing to notify these subsidies to the WTO, the EC violated its obligations under the Agreement on Agriculture. Thailand also expressed its concern with the EC's provision of export subsidies to an amount of sugar that the EC claimed was equivalent to the amount of sugar imported under the EC preferential import arrangements. Thailand and the EC had held consultations in Geneva on 8 April 2003. Those consultations had failed to resolve the matter. Accordingly, Thailand requested that the DSB establish a panel to consider the matter as set out in its request for the establishment of a panel contained in document WT/DS283/2.

66. Thailand had significant trade interests in the sugar sector. Together with Australia and Brazil, it was among the world's most competitive exporters of sugar: Thailand's share of world white sugar exports was about 6 per cent of total exports. Thailand's national development depended mainly on exports, of which sugar exports formed an essential component. The sugar industry employed almost 1.5 million workers. It was Thailand's goal to boost the incomes received by sugar producers. The subsidies granted by the EC to its sugar exports were an impediment to Thailand's development of its sugar sector. It was well documented that the EC routinely produced more sugar than it could consume. Under the EC regime, sugar in excess of requirements had to be exported. Thailand submitted that it was profitable for EC sugar exporters to export this sugar because they benefited from illegal and WTO-inconsistent export subsidies provided by the EC.

67. As well as having a substantial interest in the sugar sector, Thailand as a WTO Member had a systemic interest in the observance of WTO rules, and was concerned about appropriate interpretations of the WTO's subsidy disciplines. Thailand was particularly concerned about the use that developed countries appeared to be making of export subsidy schemes that encouraged production in excess of domestic consumption, and guaranteed the export of excess production. Thailand was concerned that such practices circumvented WTO rules, and resulted in situations where exports from developing countries were not able to compete with subsidized exports from developed countries. Thailand, therefore, had both substantial trade and systemic interests in the EC's sugar regime. At the time that Thailand had requested consultations with the EC, there were several aspects of the EC's sugar regime that were of concern to her country. Thailand was, however, mindful of Article 3.7 of the DSU which called upon Members to exercise judgement as to whether action would be fruitful. Accordingly, Thailand had taken the decision to challenge only the export subsidies granted under the EC sugar regime. Thailand reserved its rights to bring claims relating to national treatment and other claims on another occasion. Thailand was aware that various ACP states that enjoyed preferential access to the EC's market under the Sugar Protocol to the Cotonou Agreement had expressed their dissatisfaction with Thailand's exercise of its rights under the DSU. Thailand wished to reassure these WTO Members that its challenge of the EC export subsidy schemes was not intended to affect their preferential import arrangements with the EC. Thailand emphasized that it

challenged only the export subsidies that the EC provided to exports of sugar. This dispute concerned the EC's failure to abide by its reduction commitments under the Agreement on Agriculture, and to adhere to the disciplines of the SCM Agreement. Thailand, therefore, did not seek to prevent the imports of preferential sugar to the EC.

68. Thailand also wished to emphasize that this dispute was not linked, in any way, to the ongoing preparations for the upcoming Fifth Session of the WTO Ministerial Conference that was scheduled to be held in Cancun in September 2003. The issues that Thailand raised in its request related to the undertakings and commitments made by the EC during the Uruguay Round. It was the implementation of the EC's obligations under the Uruguay Round Agreements that Thailand sought to ensure. Finally, Thailand wished to endorse the statements made by Australia and Brazil, who had joined Thailand in requesting that panels be established to consider claims relating to the EC's sugar regime. Thailand wished to confirm, that although the three requests presented to the DSB at the present meeting had been differently worded, the three WTO Members, Australia, Brazil and Thailand, made substantially the same claims. Thailand, therefore, joined Brazil and Australia in requesting that the DSB establish a single panel to consider the matters raised in those requests.

69. The representative of the European Communities said that the EC wished to express its deep regret and surprise over the requests for the establishment of a panel presented by Australia, Brazil and Thailand. Panel requests at this juncture were difficult to reconcile with the Doha Development Agenda negotiations on agriculture. The EC was totally convinced of the WTO consistency of its sugar regime. The EC was acting in full conformity with its WTO commitments and schedule of concessions and invited Australia, Brazil and Thailand to similarly respect the rules agreed upon in the Uruguay Round. He noted that EC exports had remained stable for many years and could not be blamed for low prices on the world sugar market. By contrast, Brazil had dramatically increased its sugar exports from 1.6 million tonnes in the early 1990s to over 11 million tonnes in the current year. The EC was deeply disappointed that Australia, Brazil and Thailand had chosen to ignore that the EC sugar regime had been granting preferential access to the EC market to ACP countries for decades. More recently, the EC "Everything but Arms" initiative had started the full liberalization of trade in sugar with the LDCs. These Panel requests were introducing a major factor of instability for many sugar-dependant developing countries as they were de facto attacking the mechanisms that allow the ACP countries and the LDCs to benefit from preferential access. The EC would appeal to Australia, Brazil and Thailand to reflect very carefully once more upon their course of action which might hamper efforts by the EC and other WTO Members to address the developmental needs of developing countries. Nevertheless, if Australia, Brazil and Thailand remained committed to pursuing this regrettable action, the EC, whilst opposing the establishment of the panel at this meeting, would vigorously defend its interests and those of all ACP and LDCs beneficiary countries in the framework of the WTO dispute settlement system.

70. The representative of Mauritius, speaking on behalf of the ACP sugar supplying states, said that since the Ministerial spokesman for sugar was chairing the 8th ACP Ministerial Conference on Sugar in Fiji, he had been instructed to make a statement on behalf of the ACP sugar supplying states signatories to the Sugar Protocol, namely: Barbados, Belize, Côte d'lvoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, the Republic of Congo, St Kitts & Nevis, Swaziland, Zambia and Zimbabwe. The decision by Australia, Brazil and Thailand to request a panel at this stage with regard to the EC Common Market Organisation of Sugar was rather disappointing. The ACP states who were suppliers of sugar under the Sugar Protocol, which incorporated long-standing trading arrangements, had repeatedly been assured by Australia and Brazil that they would not take steps in their dispute with the EC which would directly or indirectly affect the interest of the ACP countries concerned. It now appeared that, despite those assurances which had been made at the highest political level, the concerns of these ACP states, most of whom were vulnerable LDCs, landlocked and small island States, and mostly single commodity producers/exporters, had been ignored completely. This was very unfortunate and it was equally a big surprise as the conditions of ACP

preferential access to the EC market were well-known to all Members involved in the Uruguay Round negotiations.

71. The steps now being followed by Australia, Brazil and Thailand large multi-commodity producers/exporters were a further demonstration of the use of legal rules in the context of the WTO to further marginalize the interest of the small and vulnerable economies. This was against both the spirit and the letter of WTO Agreements. Furthermore, the challenge could deny the LDCs the benefits which they could expect from the EC's "Everything but Arms" (EBA) initiative. He regretted that the ACP submission to all the parties in this dispute that the challenge, if successful, would directly affect the lives of hundreds of thousands of poor farmers and would lead to the destruction of their livelihood, had fallen on deaf ears. One could wonder about the significance which some competitive WTO Members accorded to the development needs of vulnerable Members, especially at a time when Members were engaged in the Doha Development Agenda negotiations. The ACP sugar supplying states, in their consultations with both Australia and Brazil, had stressed the importance of demonstrating goodwill in addressing their concerns in the context of the current WTO negotiations in Agriculture in Geneva and in the context of the Fifth WTO Ministerial Conference in Cancun (Mexico). However, their plea had again fallen on deaf ears.

72. To have a full grasp of the issues involved, he said that it would be useful to recall the conditions that had brought about the preferential trade agreements in sugar and equally to underscore the specificities of those ACP states concerned by these agreements. He also wished to point out the strengths of those challenging them and to the significant strides they had made since 1975, in terms of market shares. The Sugar Protocol had been concluded in 1975 as a successor to the Commonwealth Sugar Agreement of 1951. In the early seventies, when the United Kingdom had started negotiating its accession to the Treaty of Rome, the developing countries of the Commonwealth as well as the United Kingdom had strongly urged the EC to take on board the commitments of the United Kingdom under the Commonwealth Sugar Agreement. Consequently, the EC had taken on board the obligations of the United Kingdom and Protocol 22 of the Act of Accession of the United Kingdom to the Treaty of Rome unequivocally stated that "The Community will have as its firm purpose the safeguarding of the interests of all the countries referred to in this Protocol whose economies depend to a considerable extent on the export of primary products and particularly of sugar". The UK sugar obligations had been grouped together with those of other EC member States at the inception of the Sugar Protocol. Owing to its status as a highly industrialized developed country, Australia's sugar quota had not been carried forward. However, the interests of those products which were important to Australia, namely, wool, dairy products and sheep meat had been taken on board. Under the Sugar Protocol, the ACP countries were given the triple guarantee of price, access and indefinite duration. These three elements had provided the fundamental premises for economic development in ACP sugar supplying States. The same guarantees were enjoyed by India under a separate agreement for some 10,000 tonnes. Under these two unique North-South trade accords, the ACP sugar-supplying countries and India accounted for a total of about 1.3 million tonnes of EC imports. In 2001, the EC had also come with the EBA initiative, whereby the access of 49 LDCs had been facilitated, through increasing quotas in the first instance and then via duty and quota – free access as from 2009. Brazil also had a preferential quota, secured in the context of the accession negotiations of Finland to the EC. To enable the EC to fulfil its obligations, the Sugar Protocol had become an integral part of the EC Common Organisation of the Market in the Sugar Sector, also known as the sugar regime. The sugar exports of the ACP sugar-supplying states under the Sugar Protocol did not affect the balance of interests established between the various stakeholders under the EC's sugar regime. All the elements of the sugar regime were interlinked: if you attack one, the whole system would be destabilized and the orderly management of the system would be upset. Therefore, any assertion that an attack was on a part of the regime and not on the whole, was obviously erroneous. The EC had, in the context of the Uruguay Round, made a certain number of commitments in respect of market access, domestic support and export competition which had the overall effect of giving substance to the undertaking of 1975 at multilateral level. The EC complied

with its historical, traditional, legal and moral obligations. The Sugar Protocol arrangements had been known to the then GATT and subsequently WTO for decades and positively endorsed over time.

73. The arguments raised by Brazil and Australia in their request for consultations questioned the balance of concessions reached at the conclusion of the Uruguay Round. This balance of concessions was clear at the time and had been agreed by all. Australia, Brazil and Thailand were now seeking to go back on what had been agreed. A single undertaking had been agreed in 1994 and countries were now engaged in negotiations, which would lead to that single undertaking. The attitude of these three countries trying to unravel what had been agreed in 1994 was in this context a matter of very serious concern for the ACP states. The stability and predictability procured by the three fundamental guarantees of the Sugar Protocol provided the necessary impetus for economic development. The stable and predictable earnings from sugar exports under the Protocol had made up, to a certain extent, for the loss of foreign direct investments into the ACP states and had also laid down the basis for industrialization and diversification into other sectors.

74. The ACP exports to the EC under the Sugar Protocol had remained unchanged since 1975 i.e. 1.3 million tonnes. In comparison, Brazilian exports to world market had grown from some 1.7 million tonnes in 1975 to a forecasted 13.5 million tonnes in 2003. In the case of Australia, exports to world market had increased from some 2 million tonnes in 1975 to 3.7 million tonnes in 2002. Thailand had witnessed similar growth. These figures required no further comments. Brazil had tremendous scope to increase production and exports and its sugar policies had been conducive to such expansion. Moreover, the ethanol/sugar mix, the related policies to shift cane from ethanol to sugar and vice-versa in the light of market circumstances, the substantial currency depreciation, economies of scale and natural endowments had resulted in making Brazil the most competitive sugar producing country in the world. The optimum production conditions that applied in Brazil were such that it could export some 12.5 million tonnes in 1999 at a time when the world market price was estimated at 6.27 cents/lb, the lowest level in the past decade. Indeed, Brazil, controlling more than a third of world trade, was a pre-eminent exporter, with the unique capacity to be a price-setter.

75. By contrast, all were price takers and price followers. Australia had a comprehensive sugar policy which provided direct and indirect subsidies to the sugar industry. Only recently, Australia had provided a package equivalent to $A 150 million to support its sugar producers. Australia was fully aware as to why its sugar industry was facing problems since 1998. Australia and Thailand were no doubt aware that Brazil could, within a short-time span, substantially step up its export, drive prices down and crowd them out of markets. This had nothing to do with the points made in the panel request. He wished to make it clear, that his motivation was not to cast aspersions on whatever policies Australia, Brazil or Thailand had chosen to boost their production and exports. The message he was trying to convey was that the ACP states for example, St. Kitts and Nevis with its annual exports of 15,000 tonnes of sugar, were just world apart from Australia, Brazil and Thailand. Unlike Brazil, the ACP states could never have the pretension of becoming world-class multi-commodity exporters. Australia was a large multi-commodity exporter and a developed country and, therefore, the issue of comparison did not even rise. Because of all these reasons and because of the leadership role that Brazil played in the developing world, it was surprising when, a few years ago, difficulties had been raised in respect of preferential access for soluble coffee for some countries. To date, it was even more difficult to understand this attempt to undermine the conditions of access of vulnerable ACP countries into the EC market, especially after the Banana case had already brought to the fore the vulnerability of smaller countries such as the ACP sugar-supplying states. Many ACP states had made the argument about their vulnerability over and over again in the agriculture negotiations. An understanding had been shown on this glaring difference between production conditions in vulnerable countries and large multi-commodity exporters. The ACP countries were convinced that Australia, Brazil and Thailand, which were world leaders in the export of so many commodities and primary products, could not be insensitive to the conditions of vulnerability that permeate the ACP sugar producers. Surely they could not underestimate what the negative impact of engaging into a dispute

would have on ACP countries. The uncertainty that this could provoke would discourage reform, dissuade investments into the LDCs, beneficiaries of the EBA initiative, and lay the ground for a difficult conclusion of the agriculture negotiations.

76. The ACP states questioned how the complaints by Brazil and Australia could be compatible with statements made by them that their actions were not meant to undermine ACP preferences and benefits. For ACP countries a concrete expression of their assurances would be a definitive end of this procedure. They believed that the Doha Development Round was the appropriate forum to address, on the one hand, the concerns of Australia, Brazil and Thailand and, on the other hand, the concerns of the preference-receiving countries. Accordingly, they were reiterating their call to these countries to bring forward their concerns in the ongoing agricultural negotiations, where collectively countries would come up with an equitable and balanced outcome that reasonably satisfied all. However, they wished to point out that the current negotiating proposals of Australia, Brazil and Thailand were so radical that they entertained the worst fear about their impact on ACP preferences. In this regard also, Australia, Brazil and Thailand should give the ACP states an undertaking commensurate with their assurances on preferences. The ACP countries concerned were determined to defend their vital trade interests, wondered whether the same WTO rules and disciplines should continue to apply to larger competitive developing countries, such as Brazil and Thailand, on the one hand, and small economics and vulnerable small island developing countries, on the other hand. The ACP countries would participate in the Ministerial Conference in Cancun with this development in mind and would bring home the point that there were no permanent friends or allies, only permanent interests. The ACP countries would take appropriate actions and decisions in Cancun to protect their interests.

77. The representative of Australia said that in suggesting that this was a de facto attack on the policy under which the EC extended preferences to some countries, the EC seemed to be claiming that preferential access for developing countries must be contingent on the EC's capacity to subsidize the export of more than three times as much sugar than it imported. Clearly there was no reason why, in the event of a WTO finding against the EC, the preferences currently accorded to ACP countries by the EC could not continue to be honoured, if the EC really wished to do so. If the EC had given the ACP countries a guarantee that preferences would be extended indefinitely, Australia were sure the EC would honour the guarantee. The three complainants were not insensitive to the concerns of ACP sugar suppliers. But the answer lay with the EC not the three complainants. The issue could be clarified here and now if the EC was prepared to give an unambiguous undertaking that in the event the WTO found against the EC on export subsidies, the EC would continue to honour its undertakings on preferential access. The equity of the problem was graphically underlined in a recent report of the British House of Commons International Development Committee which stated that, "… although it costs $660 to produce a tonne of white sugar in the EC compared with around $280 in Brazil, Colombia, Guatemala, Malawi and Zambia, EC producers have a 40 per cent share of the white sugar export market".

78. The representative of Brazil said that his delegation wished to be associated with the statement made by Australia. He recalled that the panel requests under consideration were against the EC and not against the ACP countries. Brazil regretted that the ACP countries had decided to intervene at this stage in such an unwarranted way against Brazil and its trade policies. Once the panel were to rule in favour of Brazil, the concerns of the ACP countries would be addressed through actions to be taken by the EC. Brazil did not hold the key to the future of the sugar production in the ACP countries, but the EC did. He underlined that the biggest sugar exporter in the world was the EC, not Brazil. He said that his previous statement referred to all the concerns raised in the statement by Mauritius and that all these concerns had been taken care of. Brazil wished to reiterate the assurances given to the ACP countries that it did not intend to create any direct or indirect harm to their production. The key was not in the hands of Brazil but in the hands of the EC and the attitude it would take in relation to this panel request. Brazil hoped that threats against it and the arguments

about the Doha negotiations, that had nothing to do with this panel request, would be reconsidered by the ACP countries.

79. The representative of Thailand said that, in response to the comments made by Mauritius, her delegation wished to state that Thailand, as a developing country, was always sympathetic to the problems faced by other developing countries. It fully shared the needs of developing countries for foreign earnings. First, Thailand did not object to the preferential treatment granted by the EC to some ACP countries. However, as already stated, Thailand was also a developing country that was not only indebted to the IMF but its per capita income was less than US$2,000. Thailand did not understand why it should bear the trade distorting consequences caused by the EC sugar regime. The multilateral trading system was supposed to be a rules-based system, rules which applied to all. The EC could not use trade preferences it granted to some developing countries as an excuse for not abiding by its WTO obligations to the detriment of other developing countries. Thailand was sure that Members did not need to be reminded that the EC had also had a scheme struck down as being WTO-inconsistent, which, according to the EC and the recipients of that scheme, was meant to benefit developing countries. The damage being caused by the EC's illegal and WTO-inconsistent subsidies was such that Thailand had been left with no other option but to seek recourse to the DSU. Her country had attempted to settle this matter with the EC, but it had not been successful. Thailand wished to reassure the ACP countries that it did not oppose the preferential import arrangements as long as they were consistent with the WTO Agreements. Thailand believed that the ACP countries could work with the EC to ensure mutually advantages arrangements that complied with the EC's WTO obligations.

80. The representative of the European Communities said that his delegation had noted the statements made. The EC had no indications that Australia, Brazil and Thailand would not pursue their panel requests at the next meeting and, under those conditions, the EC was not prepared to enter into any dialogue at this stage, but would make its case before the panel.

81. The DSB took note of the statements and agreed to revert to these matters.

6. United States – Rules of origin for textiles and apparel products

(a) Report of the Panel (WT/DS243/R and Corr.1)

82. The Chairman recalled that at its meeting on 24 June 2002, the DSB had established a Panel to examine the complaint by India. The Report of the Panel contained in WT/DS243/R and Corr.1 had been circulated on 20 June 2003 as an unrestricted document, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. He noted that the Panel Report was before the DSB for adoption at the request of the United States. He said that this adoption procedure was without prejudice to the rights of Members to express their views on the Panel Report.

83. The representative of the United States said that his country was pleased with the outcome of this dispute and wished to thank the members of the Panel and the Secretariat for their hard work on this matter. The United States welcomed the Panel's findings that the US rules of origin at issue in the dispute were not inconsistent with its obligations under the Agreement on Rules of Origin. As the United States maintained from the outset, the US rules were not discriminatory and did not distort or disrupt international trade. The Report was very cogent and well-reasoned, and had ably dealt with the extensive and difficult issues before the Panel. In particular, the United States appreciated the careful approach taken by the Panel to the many novel legal issues it faced. This was the first dispute involving the Agreement on Rules of Origin, and the United States commended the Panel for focusing on its task of resolving the dispute, and addressing only those issues necessary for this purpose. The United States requested that the Report of the Panel be adopted. It, once again, wished to thank the Panel and Secretariat for their efforts.

84. The representative of India said that he wished to express his country's disappointment with this fundamentally flawed Panel Report. India regretted that this Report did not meet the high standards that Members had come to expect from WTO panels. As noted in Article 11 of the DSU "the function of panel is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement, and make such other findings as will assist the DSB in making recommendations or in giving the ruling provided for in the covered agreements." This Panel Report did not assist the DSB. This was the first time the Agreement on Rules of Origin (ARO) was interpreted by a panel, and India had looked to the Panel for its interpretations of key provisions in the ARO. Instead of making clear legal interpretations of the provisions at issue, the Panel had couched its analyses *in arguendo* and had made many of its interpretations in the same vein. It had then made its finding of fact based on those interpretations that it had made for the sake of argument. India believed that this Panel Report should not be adopted. The approach of the Panel was unhelpful not just to India, but to WTO Members as a whole. It was difficult for India to appeal a panel report, which was based largely on interpretations made *in arguendo*. India believed that in the interest of maintaining the credibility of the dispute settlement system, the approach adopted by this Panel should not be emulated by future panels.

85. This dispute concerned the rules of origin, which the United States applied to textile and apparel products under Section 334 of the Uruguay Round Agreement Act, subsequent modifications made by section 405 of the Trade and Development Act of 2000, and the implementing regulations. India had challenged these measures under Article 2 of the ARO. The Report was circulated to Members on 20 June 2003. India considered the whole Panel Report to be fundamentally flawed. Nevertheless, there were a few particularly egregious aspects in the Panel Report to which India would like to draw the attention of the DSB. India noted the following specific concerns with the Panel Report. First, in paragraph 6.43, the Panel stated, "... we believe that interpreting the term 'trade objectives' as suggested by India is consistent with the objective of Article 2(b). In our view, Article 2(b) is intended to ensure that rules of origin are used to implement and support trade policy instruments, rather than to substitute for, or to supplement, the intended effect of trade policy instruments." India's claim was that Section 334 brought more items under quota, thus strengthening the impact of the quota regime, which had been put in place to protect the (US) domestic industry, and had, therefore, showed that the US rules of origin were being used in pursuit of the trade objective of protecting the domestic textile industry. However, the Panel stated, in paragraph 6.84 that: "using rules of origin which render a quota regime more restrictive may be consistent with using rules of origin to implement and support such a regime." India considered that this statement was not correct. Moreover, India noted that this statement by the Panel was inconsistent with the test that it had set out itself to determine whether a rule of origin was used to pursue a trade objective, the test that a rule of origin used to supplement a trade policy instrument by making it more restrictive would be used to pursue a trade objective.

86. Second, the Panel had incorrectly viewed Article 2(d) of the ARO as requiring that the obligation that rules of origin could not discriminate between Members must only apply to goods that were the same. By finding that the product scope of the non-discrimination obligation was limited to discrimination on the same good, the Panel had essentially deprived this provision of any meaning. The ordinary meaning of "the good concerned" in Article 2(d) was that the good was "affected" by or "involved" in the practice that was regulated by that provision, namely the discriminatory treatment between Members. However, the Panel's interpretation that Article 2(d) applied only to the "same good" meant, if such an interpretation was followed in the future, that this provision would have a narrower definition of the non-discrimination standard than that contained in similar non-discrimination provisions in other WTO Agreements. As a result, the Panel's conclusion appeared to mean that, under Article 2(d), Members might "discriminate" between other Members on

the basis of goods that were "like", "directly competitive" or "substitutable". The drafters of the ARO in no way intended to thus limit the effectiveness of Article 2(d).

87. Third, another major weakness in the Panel Report was the methodology employed to assess whether the US measures were in violation of Article 2(c) of the ARO. In accordance with GATT and WTO jurisprudence, the Panel should have assessed the WTO-consistency of the measure based on a "conduct-oriented approach". This required that Members refrained from adopting and maintaining rules of origin which established conditions of competition with restrictive, disruptive or distorting effects on international trade. According to this "conduct-oriented approach", the incentives and disincentives created by the rules of origin themselves and not their impact on the marketplace was the decisive factor in determining their WTO-consistency. The immediate impact of a rule of origin was to change the investment and other business plans of producers and investors engaged in international trade. Given that market conditions constantly changed and that rules of origin were only one of many factors that determined trade flows, a Member could not foresee, with any degree of accuracy, how producers and traders would react to a new rule of origin. Members controlled and foresaw only the conditions of competition they imposed. Yet the Panel had ignored all this, essentially finding that Article 2(c) regulated not only the rules of origin adopted by Members, but rather the reaction of producers and traders to those rules. There was simply no basis for such an interpretation in accordance with the jurisprudence of the WTO. If, as the Panel had assumed, one had to examine the trade impact of a rule of origin in order to assess its WTO-consistency, then a complaint could not be brought against a rule of origin immediately upon its adoption, but only after several years, after its trade impact had become apparent. Clearly this requirement to wait two or three years to bring a dispute settlement proceeding was nowhere found in the text of the ARO.

88. Fourth, the Panel had erred in its interpretation of the terms "on international trade" in Article 2(c). India had argued that its trade was adversely affected by the challenged US measures. However, the Panel was not convinced that "demonstrating an adverse effect on one Member's trade would always and necessarily be sufficient" to demonstrate a violation of this provision. This was not in accordance with the ordinary meaning of the word "international". The New Oxford Dictionary of English defined "international" as "existing, occurring or carried on between two or more nations". Needless to say, India and the United States were two such nations that carried on trade. Furthermore, the Panel's interpretation was not borne out by any other GATT or WTO case interpreting provisions with similar wording. For example, Article XX of GATT 1994, the SPS and the TBT Agreements all employed the terms "on international trade", but their provisions had never been interpreted to require showing effects on more than one Member's trade.

89. India was also concerned that the Panel had failed to give the parties an opportunity to comment on the evidence it had sought on its own initiative without the knowledge of the parties. In paragraph 6.73, in rebutting India's assertion that, to India's knowledge, no other country in the world used the fabric formation rule, the Panel noted, *en passant* that "within the framework of the harmonization work programme, a significant number of those Members expressing a view on this issue have indicated support for the fabric formation rule for flat textile goods." First, it was inappropriate for a panel to examine the negotiating positions of Members in order to ascertain the WTO-consistency of a challenged measure. Second, the Panel had not given the parties an opportunity to comment on the information that it had researched on its own. More importantly, as mentioned before, this was the first time the Agreement on Rules of Origin had been interpreted by a Panel. As such, the level of evidence required to discharge the burden of proof of the complaining party was not as clear as it was in other more well-established GATT provisions. India fully accepted that, as the complainant in this dispute, it had the burden of proof. Throughout the Panel proceeding, India stated that it did not consider it necessary to provide trade data as a result of its reliance on the "conduct-oriented approach". If the conduct-oriented approach had been properly applied, then India believed it would have met its burden of proof. Despite the fact that the Panel had asked over 70 questions to the parties and third parties in this dispute, the Panel had never once specifically

requested India to provide the trade data that it believed was necessary to demonstrate the adverse trade effects as set out in Article 2(c). Only when the Panel Report had been issued, India had learned that the Panel had consistently found that India had failed to provide the necessary evidence. India considered that if the Panel considered the trade data was necessary, then it should have availed itself of the vehicle of asking questions of the parties or, indeed, of its discretion under Article 13 to seek the information that it considered necessary. As the Appellate Body had noted in Canada - Measures Affecting the Export of Civilian Aircraft, ".... a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a prima facie basis. *A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a prima facie case or defence*. … We have concluded that a panel has broad legal authority to request information from a Member that is a party to a dispute, and that a party so requested has a legal duty to provide such information."[7]

90. Finally, India was concerned that the Panel had ignored the well-established principle of burden of proof applicable in WTO cases by holding India to a higher standard than that of the United States, when it was asserting a fact. The applicable burden of proof had been enunciated by the Appellate Body in the case on United States – Wool Shirts and Blouses: "In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[8] The Panel had clearly held India to this standard, rejecting India's claims because of India's alleged failure to meet the required burden of proof. In this regard, the Panel had noted that India had not established that the measures at issue created restrictive effects on international trade because India had not provided any evidence or data regarding: (i) which countries were under quota in the United States with respect to relevant downstream goods (e.g., cotton bed linen); (ii) which countries were important suppliers of the relevant upstream goods (e.g., cotton fabric); and (iii) the price and quality of the upstream goods made by those countries and their production capacity. However, the Panel had not applied the same standard to the United States when it had "asserted facts" or "asserted the affirmative of a particular defence". For example, the Panel had accepted – at face value – the US assertion that at the time the rules of origin had been implemented, and thereafter, six out of the top ten world exporters of cotton fabrics accounting for 50 per cent in world trade in cotton fabric were countries that were not subject to quota on fabric or bed linen in the United States. The Panel had relied on this "fact" in determining that "the evidence and argument adduced by India do not support the conclusion that the fabric formation rule necessarily, or in fact, bring more imports of made-up articles under quota in the United States" by observing that origin could have shifted to those six countries that were not under quota. However, as the Panel had noted in footnote 199, "the United States has not, however, provided any evidence in support of its statement".

91. The Panel had had a task – admittedly a difficult one – to accomplish in this dispute. However, the Panel had failed in its task for several reasons. It had adopted an interpretation of Article 2 which acknowledged exclusively the discretion of a Member to determine the use of its rules

[7] Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, paras. 192 and 197, respectively.

[8] Appellate Body Report, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, page 14.

of origin, without drawing the line at an abuse of rules of origin. Second, the Panel had adopted an interpretation of the non-discrimination provision of Article 2(d) of the ARO that narrowed the scope of this provision as compared to other non-discrimination provisions in the WTO Agreement, in particular Article 1 of GATT 1994. Third, it had avoided making clear legal interpretations by couching its interpretations *in arguendo* and then making findings of fact based on these interpretations. Finally, the Panel had failed to seek the information from India that it considered so necessary for the proper evaluation of this dispute. Given the failure of the Panel to accomplish these tasks, it did not appear that its Report formed the proper basis for an appeal. These were complex issues, which, India believed were of grave concern to Members. India hoped that the debate amongst Members would focus on these issues, both with a view to address clearly the issues relating to burden of proof and the evidence required to meet as well as to the application of rules of interpretation. There was a need to address them effectively in the appropriate fora in order to develop a thorough and balanced interpretation of the relevant provisions in the ARO.

92. The representative of the Philippines said that while his country fully respected the Panel's decision in this case, it could not but share India's disappointment regarding the outcome of the Panel's deliberations and wished to be associated with the concerns raised by India. As a third party to this dispute, given the circumstances, there was fairly limited scope to what the Philippines could do in terms of subsequent action, and in this context, it was constrained to merely notifying from its perspective some of the Panel's decisions which it found unfortunate and had serious systemic concerns for Members. Generally, the Panel appeared to have set the standard of evidence required to be provided by the complainant to prove an inconsistency with Article 2 of the Agreement on Rules of Origin at such an inordinately high level that it was doubtful whether any other outcome could have been possible. Furthermore, while the Panel might have validly observed that Article 2 provided the rules as to what a Member should not do during the transition period that the Harmonized Work Programme was being negotiated, rather than what a Member should do, the Panel, in interpreting the scope of what the Member should not do in such a stultifying fashion, had virtually condoned an overly expansive scope of measures that a Member could undertake during this transition period. By doing so, it would not surprise the Philippines to find certain Members encouraged to further prolong the ongoing negotiations on the Harmonized Work Programme given the practically unlimited ambit they had now in the interim period.

93. In interpreting Article 2(b) of the ARO, while the Panel had recognized the relevance of the approach established by the Appellate Body in both the *Japan - Alcoholic Beverages* and *Chile – Alcoholic Beverages* in ascertaining the true objectives of a measure through an analysis of its design, architecture and structure, the Panel nonetheless had not appeared to have genuinely applied this test in examining the consistency of Section 334 of the US URAA with Article 2(b). Rather, the Panel seemed to put weight on the fact that the United States was not the only country which used the fabric formation rule and had further noted with interest that within the framework of the HWP, a significant number of Members had indicated support for fabric formation rule for flat textile goods. With regard to the latter point, the Philippines understood on the basis of India's statement that the Panel had independently sought this information on its own initiative, without however affording the parties opportunity to comment on the information thus obtained. The Philippines was uncertain whether this approach undertaken by the Panel in this instance was appropriate. In particular, where the approach seemed to be selectively applied, which would be demonstrated later. Moreover, again rather than going deeply into the design, architecture and structure of Section 334, the Panel appeared to have chosen to accord more importance to the effects of the fabric formation rule and in this respect, noted India's non-provision of evidence and/or data regarding India's assertion that "the fabric formation rule had resulted in a range of textile products being subjected to the strict quotas of [India] [developing countries], whereas previous to Section 334, these products would not have been attributable and not subject to quota of this country".

94. Without acknowledging that the priority given by the Panel to this approach was appropriate, the Philippines wondered whether the Panel could at the very least have requested India to provide this supporting information in the context of more than 70 questions it had propounded to India in the course of the Panel's proceedings, given that the Panel had been inclined to accord that much importance to this data, and was generally not satisfied with the initial supporting information provided by India to buttress its assertion. On the other hand, the Panel noted that it readily accepted a contrary US assertion even though the United States did not provide any evidence in support of its statement (footnote 199). However, it was disconcerting to read in paragraph 6.84 of the Panel Report that "even if India had established to the Panel's satisfaction that under the fabric formation rule, more imports would be under quota in the United States, this would only prove that there would be more restrained imports than under the pre-section 334 rules of origin. This circumstance would not prove however that the fabric formation rule was being used as an instrument to protect the US textile industry." This, along with other subsequent statements of the Panel[9] seemed to ignore the fact that domestic policies were not formulated in a vacuum, but rather with concrete trade objectives in mind. However, more egregiously, the Panel seemed to imply that, even if India had provided the necessary factual evidence suggested by the Panel as critical, it would not have sufficed to meet the Panel's standard to prove inconsistency with Article 2(b). In analysing the second US measure at issue, i.e., Section 405's consistency with Article 2(b), the Panel had again appeared to have disregarded the "design, architecture and structure" test. Instead, the Panel had examined the intentions of the EC and the United States in entering the settlement agreement as later enacted in section 405. The Panel had further stated that "even if section 405 had the practical effect of favouring goods imported from the European Communities over competitive goods imported from other Members, that effect might be incidental rather than intentional. In other words .... the mere effect of favouring EC imports over imports from other Members [does not] in itself justify the inference that creating such an effect is an objective pursued by the US". Again, this statement by the Panel seemed to assume that such policies were drawn up in a vacuum without the benefit of a clear trade objective in mind, which as negotiators were aware, and as simple reality dictated, was simply not the case. It was likewise curious to note the statement made by the Panel in paragraph 6.113 of its Report that "there is no evidence that the EC requested the US to create exceptions from the fabric formation rule so that it could enjoy an advantage, competitive or otherwise, *vis-à-vis* other Members." And yet two paragraphs down, in paragraph 6.115, the Panel had accepted that the United States had been "persuaded [by the EC] that it would be appropriate to amend section 334 and return to the DP2 (dyeing, printing plus two other finishing processes) rule for the [relevant] products."

95. The foregoing suggested that, to borrow the Panel's favoured opening line, "even if" the United States and the EC had every right to settle their bilateral trade dispute, it could not be ignored that the intention thereof was to de facto favour imports of certain goods from the EC, *vis-à-vis* closely related, if not essentially similar goods from other Members. Regarding the Panel's interpretation of Article 2(c), specifically that the phrase "international trade" should be construed as referring beyond the trade effects suffered by a Member, again "even if" this were appropriate, it was worth noting that, among others, the Philippines, as a third party, had stated that its trade with the United States was being affected by the US rules of origin effected in 1996. India had incorporated by reference the Philippines' submission in India's own submission and yet the Panel seemed to have largely ignored these submissions which alluded to effects on international trade beyond that suffered by one Member: i.e. India. Indeed, this perhaps lent credence to the need to enhance third-party rights being discussed in the context of the review of the DSU. Likewise, the Philippines wished to add its voice of concern that where the Panel had found that the data was indispensable for proving India's

[9] Paragraph 6.94 – "Even assuming that the fabric formation rule rendered relevant US textile quotas more restrictive, India has failed to establish that any restrictive effects of the fabric formation rule are not incidental to the pursuit of legitimate objectives."

case, at the same time, it had been reluctant to ask the same of India in the context of more than 70 questions it had provided to India in the proceedings.

96. Finally, in interpreting Article 2(d), the Panel's conclusion that Article 2(d) applied only to the same goods meant that this provision now contained a narrow conception of the non-discrimination standard. Indeed, the Panel's conclusion appeared to imply that, under Article 2(d), Members might discriminate between other Members on the basis of goods that were "like", "directly competitive", or "substitutable", but not between the goods that were closely related or were the "same". While the Philippines were in a way frustrated by the choice of the directly affected Member not to appeal the case, at the same time, it was cognisant of the wisdom behind the decision. Members should take careful note of the Panel's decision in this case and duly consider it for what it was, and see that decision as unusual rather than setting the norm or a precedent.

97. The representative of China said that his country had participated in this dispute as a third party. China was disappointed at the conclusion of the Panel. There were several aspects about the Panel's approach and its finding that might be of concern to WTO Members with respect to the Agreement on Rules of Origin. China wished to draw attention to the Panel's finding concerning the interpretation of "the good concerned" in Article 2(d) of the Agreement on Rules of Origin. There, the Panel had interpreted that Article 2(d) only applied to goods that were the "same", but not the "like", "directly competitive" or "substitutable" goods. He questioned whether this interpretation could lead to a narrow definition of the non-discrimination standard than that contained in similar non-discrimination provision on other WTO Agreements if it was followed in the future. To China, it was clear that Article 2(d) of Agreement on Rules of Origin should apply to all Members equally, and any distinction with regard to application this section among WTO Members would violate the obligation under the WTO Agreements.

98. The DSB took note of the statements and adopted the Panel Report contained in WT/DS243/R and Corr.1.

7. Appointment of Appellate Body members

99. The Chairman recalled that at the informal DSB meeting on 16 July 2003, he had informed Members of his intention to ask the DSB to take a decision on certain matters relating to the process leading up to an eventual decision on four positions on the Appellate Body. He also recalled that on 10 December 2003, Mr. James Bacchus' second and final term of office as Appellate Body Member would expire. On the same date, Mr. Yasuhei Taniguchi's first term of office would also expire. In addition, on 31 May 2004, the first terms of office of two other Appellate Body Members, Messrs. Georges Abi-Saab and A.V. Ganesan, would expire. As provided for under Article 17.3 of the DSU, "The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. …". He further recalled that under Article 17.2 of the DSU "The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once." The reappointment of Appellate Body Members for a second term of office was not automatic and required consideration by, and a formal decision of, the DSB. In the past, the DSB had renewed the terms of office of five Appellate Body Members.[10] In fact, the DSB had always reappointed Appellate Body Members who wished to serve a second term. It was, therefore, for the DSB to take action to ensure that the impending expiry of the terms of Appellate

[10]In 1997, the DSB renewed the term of office of three Appellate Body Members (Ehlermann; Feliciano; and Lacarté Muró); in 1999, the DSB renewed the term of office of two Appellate Body Members (Bacchus; and Beeby). In two cases, Appellate Body Members have not wished to serve a second term (El-Naggar; and Matsushita).

Body Members did not disrupt the smooth and continuous functioning of the Appellate Body. In making this proposal, he had fully taken into consideration this important requirement.

100. This year, the DSB had to appoint at least one new person to the Appellate Body to replace Mr. Bacchus, whose second term of office would expire on 10 December. The DSB must also consider what decision to take on the positions currently held by the three other Appellate Body Members who were eligible to serve a second term of office, under Article 17.2 of the DSU. These Appellate Body Members were Messrs. Taniguchi, Abi-Saab and Ganesan. All three gentlemen had indicated that they would welcome the opportunity to serve on the Appellate Body for a second term. The term of office of Mr. Taniguchi would expire on 10 December 2003 and the DSB must, therefore, take a decision on the position he currently held in the coming months. The terms of office of Messrs. Abi-Saab and Ganesan would not expire until 31 May 2004. Although the DSB could theoretically take a decision on these two positions early in 2004, he wished to suggest that it would be more efficient for the DSB to deal with these positions together with the two other positions for which the terms of office would expire on 10 December 2003 (the positions currently held by Messrs Bacchus and Taniguchi), all as part of the same process. The decision of the DSB regarding the positions currently held by Messrs. Abi-Saab and Ganesan would not, of course, take effect until 1 June 2004. Given all of these circumstances, he hoped that, at the present meeting, the DSB would take a decision on several matters. As explained in the informal meeting held on 16 July he wished to propose that the DSB agree on the following five points: (i) to launch, as from the date of the present meeting the process for selecting a new Appellate Body Member to replace Mr. Bacchus, and also the process leading up to a decision on the positions held by Messrs. Taniguchi, Abi-Saab and Ganesan; (ii) with respect to the process for selecting a new Appellate Body Member to replace Mr. Bacchus, that the DSB follow the procedures set out in the decision of the DSB dated 10 February 1995 (WT/DSB/1), and, in accordance with them, agree to establish a selection committee consisting of the Director-General and the 2003 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPs Council and the DSB; (iii) with respect to this process of selecting a new Appellate Body Member to replace Mr. Bacchus, that the closing date for the nomination of candidates by delegations be Friday, 5 September 2003, and that the selection committee make its recommendation to the DSB by 24 October 2003; (iv) that the decisions on the four positions in the Appellate Body be taken by the DSB at its meeting on 7 November; and (v) with regard to the positions currently held by Messrs. Taniguchi, Abi-Saab and Ganesan, that he carry out consultations with delegations, over the next three weeks, with a view to informing the DSB, by 15 August 2003, of the results of these consultations.

101. The representative of the United States said that his country wished to thank the Chairman for all his efforts to set up a process for Members to follow over the next few months. The United States agreed with the Chairman that it would be most efficient to take a decision with respect to all four of the Appellate Body positions at the same time. The United States also agreed that the schedule and procedures proposed by the Chairman offered an appropriate means of going forward.

102. The representative of the European Communities said that the EC agreed with the Chairman's proposal.

103. The representative of Egypt said that his country welcomed the Chairman's initiative to start the process of informal consultations to appoint or re-appoint Appellate Body members. Egypt fully supported the Chairman's efforts in this regard.

104. The representative of Chile said that his country supported the Chairman's proposal and thanked the Chairman for having taken into account some of Chile's ideas on this subject.

105. The representative of Japan said that her country fully supported the Chairman's proposal.

106. The representative of India said that his country wished to express support for the Chairman's proposal.

107. The DSB took note of the statements and agreed to the Chairman's proposal.

108. The Chairman invited any delegations with views on the positions currently held by Messrs. Taniguchi, Abi-Saab and Ganesan to contact him before 8 August 2003 so as to ensure that their views were considered. He would inform the DSB by, at the latest, 15 August, of the results of these consultations. If necessary, the DSB could take a decision on the process to be used in dealing with these three positions in mid-August. He looked forward to receiving delegation's views on these issues.

109. The DSB took note of the statement.

8. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/235)

110. The Chairman drew attention to document WT/DSB/W/235 which contained an additional name proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/235.

111. The DSB so agreed.

9. United States – Countervailing measures concerning certain products from the European Communities

(a) Statement by the United States

112. The representative of the United States, speaking under "Other Business", said that the United States wished to inform the DSB of developments in connection with the US implementation in the so-called "privatization" dispute (DS212). On 23 June 2003, the US Department of Commerce, after receiving and analysing public comments, had published a notice of modifications to Commerce's privatization methodology. The notice could be found in volume 68 of the US Federal Register, the Monday 23 June edition, beginning on page 37,125. For those Members interested in reviewing it, the notice could be obtained in electronic form on the website for the US Government Printing Office. The notice announced a modification in Commerce's privatization methodology so as to render the application of that methodology consistent with the provisions of the SCM Agreement, as clarified by the Appellate Body in its Report, WT/DS212/AB/R. The new methodology had been applied from 30 June 2003. The US Department of Commerce stated in the notice that it would rely on a "baseline presumption" that non-recurring subsidies could benefit a firm over a period of time. This baseline presumption could be rebutted by a demonstration that, during the period of time over which subsidies were allocated, a privatization had occurred in which the Government had sold its ownership of all or substantially all of a company or its assets, retaining no controlling interest in the company or its assets, and the sale was an arm's-length transaction for fair market value. The notice then elaborated on the factors that Commerce would consider in determining whether the requisite demonstration had been made. If it had, Commerce would presume that pre-privatization subsidies had been extinguished and were no longer countervailable. The Appellate Body had found that while an arm's-length, fair market value privatization created a presumption that prior subsidies had been extinguished, this presumption was rebuttable. Accordingly, the Federal Register notice had set forth a non-exhaustive list of factors that Commerce would examine for purposes of determining whether a company continued to benefit from prior subsidies, notwithstanding its privatization in an arm's-length, fair market value transaction.

113. The representative of the European Communities thanked the United States for its statement on this important case. The EC was still studying the new methodology adopted by the US Department of Commerce. The EC had a number of concerns with respect to the draft methodology and not all of these concerns had been satisfactorily taken into account in the final methodology adopted by the US Department of Commerce on 23 June 2003. The EC had also raised a number of concerns with respect to the application of this methodology to the 12 CVD measures covered by this case. These 12 CVD measures had to be brought into conformity with the United States' WTO obligations before 8 November 2003. The EC and its member States were fully co-operating with the Department of Commerce's current "Section 129" revision of these 12 CVD measures, and would draw the appropriate conclusions at the end of this process. At that time, the EC would be in a position to give a full assessment of the measures taken by the US to comply with the DSB rulings in this dispute.

114. The representative of Mexico said that his country was also examining the new methodology. Given that the previous methodology had been condemned as such – and not only in relation to the 12 measures identified by the EC – as being inconsistent with WTO rules, Mexico would follow with interest developments regarding the countervailing duties applied to Mexico on the basis of the previous methodology.

115. The DSB took note of the statements.