WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/68
20 October 1999

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Dispute Settlement Body
22 and 24 September 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 and 24 September 1999[1]

Chairman: Mr. Nobutoshi Akao (Japan)

Subjects discussed: Page

[1] This meeting of the DSB was adjourned.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.1)

(b) United States – Import prohibition of certain shrimp and shrimp products: Status report by the United States (WT/DS58/15/Add.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 two sub-items be considered separately.

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities

The Chairman drew attention to document WT/DS27/51/Add.1 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

The representative of the European Communities said that in accordance with Article 21.6 of the DSU, the EC had circulated a status report on its implementation in the Bananas case. Due to the holiday period, the report, which was short, had indicated that an update of the situation would be provided in the statement at the present meeting. At the 26 July DSB meeting, the EC had been criticized for not putting in place a new system, spending instead too much time consulting with all the interested parties. He recalled that in January 1999, when the EC had amended its banana regime, and during the discussion at the end of 1998 on the proper application of the Article 21.5 procedure, the EC had been criticized for not consulting with all the parties concerned. The EC intended to develop a new WTO-consistent system based on the recommendations of the Article 21.5 Panel and the Arbitrators, which would also be accepted by the main parties concerned, in particular Ecuador. For this reason, the EC had held intensive consultations with Ecuador, the other major Central and Latin American suppliers, the United States, the ACP countries and the main trade operators. In an effort to make a proposal which would not be subject to further challenges, the EC had made contacts and had held consultations with delegations at the end of July. Further meetings had been held in Brussels in the month of August. The consultations had demonstrated that there continued to be a wide divergence of views not only as to what solution would best suit the interests of the various parties, but also as to the WTO-consistency of the options proposed by the EC. The majority of the parties had a strong preference for a tariff quota system. However, no agreement had been found on the management of such a system, including the distribution of import licenses. The United States had, for example, suggested that the distribution of licenses should be based on a historical reference period prior to 1993 while Ecuador had insisted on a recent period.

The EC's priority was to ensure that such a system would meet its international commitments and would enable the parties to avoid a new dispute. This had become more important now than earlier when the EC had thought that it would be able to resolve this matter. At this stage, there was no agreement on a system which would meet internationally acceptable objectives and enable the parties to avoid further disputes. If this divergence of views continued, the EC would have no other option, but to adopt a system based on tariffs only. However, this would imply negotiations under Article XXVIII of GATT 1994. As he had pointed out earlier, this was not the option preferred by the majority of the parties. A report on this matter had been submitted to the Council of Ministers under the previous Commission. The Council of Ministers had urged the new Commission to continue efforts to find an acceptable solution. There was no fixed date for the final decision. The new

Commission would now have to take up this matter in the light of the current situation, and would try to find a solution as soon as possible. The sanctions applied on its exports put the EC under great pressure to move forward rapidly. The existing differences amongst the parties made the EC's task very difficult. The new Commission would try to take a decision as soon as possible, but it might be obliged to move to a tariff solution. He urged all the parties concerned to work closely and intensively in the next few weeks in order to find an acceptable solution.

The representative of Ecuador noted the status report and the statement by the EC indicating the actions taken by the Commission to reform its banana import regime. It was clear that the EC had not yet complied with the DSB's recommendations and wished to prolong the dispute beyond a time-period not provided for in the DSU. This problem should be examined by the DSB since the EC had already prolonged the period for implementation by additional nine months beyond the reasonable period of time. Ecuador believed that the purpose of this additional time was to maintain in force the measure, which continued to penalize exports of bananas from Ecuador and the other Latin American countries. The EC continued to justify its delay by stating that the other Members involved in the matter were not in agreement or that they were not putting forward a joint solution. It was normal to have some disagreements in the positions since the parties to the dispute were pursuing their respective interests. This however should not be an excuse for the EC not to comply with its WTO obligations. A proposal by the EC should form the basis for negotiations during which the interests and rights of the parties concerned could be recognized and discussed.

The representative of Colombia said that her delegations wished to make two comments with regard to the status report and the statement by the EC. First, the EC had indicated that the parties would prefer a tariff quota system. She underlined that such a system should reflect market access opportunities. Second, Colombia would be willing to consider a tariff system provided that the level of tariffs was commercially viable. It was not appropriate to create another trade restriction by the imposition of prohibitive tariffs.

The representative of Panama wished to echo the comments made by Colombia. He recalled that the EC had stated that it was not possible to find a solution because the parties concerned were not in a position to reach an agreement. He did not believe that it was not possible to find a WTO-consistent solution. In the past, the parties to the dispute had indicated to the Commission that they wished a WTO-consistent solution, which would allow fair market participation. Specific examples had been provided as to how this could be achieved in a manner consistent with the WTO provisions. The differences among the parties should not prevent the EC from finding a solution. If a WTO-consistent solution was proposed, such a solution could not be challenged. The problem was that the EC was trying to find a solution which would not be WTO-consistent. If the EC maintained this approach, it would continue to prompt divergent positions. He hoped that internal consultations in the Commission would be concluded shortly and that this would result in a WTO-consistent solution.

The representative of Guatemala said that his delegation wished to make comments on the status report and the statement by the EC, and in particular on the proposal submitted by the Commission to the Council of Ministers on 8 September 1999. Guatemala believed that the Commission's proposal did no more than to transfer on the complainants a responsibility which rested with the EC. The task of finding a suitable way of ensuring that the EC's banana import regime complied with the Panel's rulings and recommendations did not lie with the complainants. Guatemala had used every opportunity to convey its concerns to the Commission. He regretted that the EC had not adequately reflected these concerns. He wished to draw attention to some important issues. Every Member which had made recourse to the dispute settlement system was entitled to expect that its rights would be restored. It was unacceptable that there should be any attempt to reproduce or replicate the situation which had given rise to the claim, either through solutions which would make it necessary to extend the Lomé waiver or through renegotiation of bound tariffs. With regard to the Lomé waiver, account should be taken of the fact that the Appellate Body had condemned the

extensive use made by the EC of the exemption in place. To continue speaking of an exemption or derogation from WTO obligations was a total negation of the binding effects of the system. Furthermore, the objectives of the dispute settlement system would not be met by means of tariff quota options which would be administered in a discriminatory manner or any other option, which would pass on to the complainants the cost of maintaining or improving access for preferential suppliers by means of a new tariff. As indicated in press reports, a new tariff could be three or four times higher than the bound tariff. Guatemala wished that due account would be taken of the interests of all the countries which had made the claim, collectively and individually. He believed that Members should consider whether, in the light of the proposed solutions put forward in the banana dispute, their countries would be prepared to continue their participation in the WTO dispute settlement proceedings. It was now up to the EC to restore Members' confidence in the system.

The representative of Honduras said that her country wished to express concerns about the status report and the statement by the EC which reflected the report recently submitted to the EC Council of Ministers. The reasonable period of time granted to the EC to comply with the rulings and recommendations of the Panel and the Appellate Body had expired nine months ago. However, instead of proposing an acceptable solution, an attempt was being made to put in place a new regime which would produce the same adverse effects as those under the previous system. Latin American suppliers had to bear the cost of the EC preference system. Her country's decision to participate in the Bananas case had been considered as a possible way to halt the negative effects on its economy. It was not expected that the ruling in this case would be evaded by means of a new exemption. Given that the complaint had been lodged four years ago and that the EC import regime had been challenged seven years ago, a solution which would involve an exemption could undermine the credibility of the system. The Commission was suggesting that its member States should disregard the legitimate objective of the dispute settlement system. For its part, Honduras had since urged not to accept any initiative which would prejudice the binding nature of past rulings by means of an exemption. At the time the complaint was lodged, Honduras had not expected that this process might lead to renegotiation of the bound tariff. Penalizing Honduras, an efficient supplier, by applying a tariff level at which its bananas were no longer competitive could not be justified. This could upset the balance of commitments and concessions frustrating the legitimate expectations of Honduras.

As long as the EC continued to seek ways of maintaining the effects of its illegal regime it would not be in a position to find a solution compatible with the letter and the spirit of the WTO Agreement. With regard to a tariff-only regime, Honduras considered that if a new tariff was fixed at a prohibitive level that would be contrary to its interests. There should be no increase in the bound tariff which was already higher than the average tariff imposed after the national regimes of the EC member States had been eliminated. With regard to the various tariff quota options, Honduras preferred a global tariff quota based on the bound tariff with increases in the quota size in line with increased consumption and the accession of new member States. There would be no need for a discriminatory licensing system. Honduras wished to reiterate its steadfast conviction that the interests of the WTO would be undermined, if a Member was able to evade compliance with the DSB's recommendations. Honduras hoped that the EC member States would be able to make a positive contribution to the credibility of the multilateral trading system.

The representative of the United States said that her delegation appreciated the status report and the statement by the EC on its efforts to comply with the WTO rulings in the bananas case. It also appreciated that the EC had been working hard in its consultations with the various interested parties. The United States had consulted closely with the EC and had presented several WTO-consistent ways for the implementation of a tariff-rate quota. The United States had suggested two types of WTO-consistent licensing systems, and was willing to consider other licensing systems that would completely remove the discrimination inherent in the EC's past and current licensing systems. The United States had suggested a tariff only solution and had provided a detailed analysis of an appropriate level for a single tariff, which would be consistent with WTO provisions. Drawn

from the EC's regulations on imports of maize, the United States had also offered a solution to restore to Latin American bananas the growing non-discriminatory access available before the introduction of the single market. At the same time, the ACP countries would be afforded the access they long experienced in their traditional markets. While the United States recognized the EC's difficulties in developing a WTO-consistent solution, it believed that the EC did not have to satisfy all the Members involved in the dispute, nor all of the EC's domestic interests protected by the banana regime. The EC's obligation was to comply with WTO rulings. The United States remained open to discuss other WTO-consistent solutions to be put forward by the EC. However, it was up to the EC to find a way to comply with its WTO obligations. The United States noted the Commission's report of 8 September 1999 to the EC member States, which highlighted the main problems of the tariff quota system raised by the United States. Her country welcomed the Commission's recognition of this problem. However, the report had only highlighted problems and did not resolve the dispute which was the goal of the United States. It was noted in the Commission's report that a tariff only solution appeared to be the only means of resolving this dispute. The United States considered that a tariff only system was one possible solution provided that the level was consistent with the WTO provisions.

The representative of Mexico said that his country believed there was no need to ensure an agreement among the parties for a WTO-consistent solution. The Commission's report to the EC member States of 8 September 1999 had indicated that all Latin American countries and the operators wished to maintain a tariff quota system in order to protect their export earnings. He clarified that Mexico would prefer a single tariff solution provided that an appropriate level of tariffs was determined. From the technical and legal point of view, this would be the simplest solution. Mexico noted that the EC had stated that it had an interest in finding a solution to the Bananas dispute as soon as possible. He noted that this matter had been under discussion for a number of years and thus far no improvements had been made.

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

(b) United States – Import prohibition of certain shrimp and shrimp products: Status report by the United States

The Chairman drew attention to document WT/DS58/15/Add.1 which contained the second status report by the United States on its progress in the implementation of the DSB's recommendations with regard to the import prohibition of certain shrimp and shrimp products.

The representative of the United States said that in accordance with Article 21.6 of the DSU, her country had submitted its second status report on the implementation in this case. She wished to reiterate that, as the report made clear, the US process was open and provided opportunities for input from all interested parties. As noted in the report, the US implementation in this case had several distinct elements. In its first report, the United States had advised the DSB that on 8 July 1999, the US Department of State had issued revisions to its guidelines implementing the Shrimp/Turtle law. The revised guidelines, in accordance with the recommendations and rulings of the DSB were intended to: (i) introduce greater flexibility in considering the comparability of foreign programmes and US programme; and (ii) elaborate a timetable and procedures for certification decisions, including an expedited timetable to apply in 1999 only. These changes would increase the transparency and predictability of the certification process and would afford foreign governments seeking certification a greater degree of due process. Following the issuance of the revised guidelines, Pakistan had asked the United States to send a team of technical experts to Pakistan for the purpose of reassessing the operations of its shrimp fleet for possible certification and to assist with the development of a comprehensive turtle excluder devices (TEDs) programme. The United States

welcomed this development and had informed Pakistan that it had assembled such a team and that the team was ready to visit Pakistan at the first mutually convenient time. To date, the US State Department had not received any further requests from other governments for action under the revised guidelines, but stood ready to consider all requests. The United States was also continuing its efforts to launch the negotiation of an agreement with the governments of the Indian Ocean region on the protection of sea turtles in that region. To that end, the US Government had actively participated in the Second ASEAN Symposium and Work Shop on Sea Turtle Conservation and Biology, held in Malaysia on 15-17 July 1999. The United States was pleased to report that the Symposium had concluded with the adoption of the Sabah Declaration, which called for "the negotiation and implementation of a wider regional agreement for the conservation and management of marine turtle populations and their habitats throughout the Indo-Pacific and Indian Ocean region." In what the United States hoped would be the next step towards such negotiations, Australia had offered to host a follow-up meeting in October. She recalled that the United States was ready to offered technical training in the design, construction, installation and operation of TEDs to any country upon request. Any government wishing to receive such training could request so in writing, through diplomatic channels. The United States would make every effort to meet such requests. In this connection the United States welcomed the request for technical assistance from Pakistan. She noted that Thailand had also sought further technical assistance concerning the design, construction, installation and use of TEDs and had asked to send a team to the US National Marine Fisheries Services laboratory in Mississippi. The United States was actively working to arrange this visit. Her country was making continuing progress in meeting its implementation commitment and appreciated the constructive input it had received from the parties to the dispute.

The representative of Thailand wished to express her country's appreciation for the efforts made so far by the United States to implement the DSB's recommendations and rulings in this case. In accordance with the Appellate Body's report adopted by the DSB on 6 November 1998, the US shrimp embargo violated Article XI of the GATT 1994 and was not justified under Article XX of GATT 1994. The Appellate Body had recommended that the DSB request the United States to bring its measure into conformity with its obligations under GATT 1994. It still remained to be seen whether the United States would comply with these rulings and recommendations. Thailand would continue to follow closely the implementation and, should the need arise, would take appropriate action.

The representative of Australia said that his country continued to have two immediate access concerns - products from Spencer Gulf and the Northern prawn fishery – which Australia was seeking to address. Australia was keen to clarify the potential for these fisheries to export to the United States at the earliest possible opportunity. More broadly, Australia would continue to work with the four complainants – Thailand, Malaysia, India and Pakistan – in attempts to resolve aspects of the US implementation that continued to be of concern. In particular, the intention of the United States to maintain an import ban that enforced a unilaterally determined environmental standard. Australia remained convinced that, if real progress was to be achieved, cooperation and dialogue would be more appropriate avenues to pursue than trade-restrictive measures. The US status report referred to a meeting to be held in Australia in October to be hosted by the Australian Government. He wished to clarify that this meeting had no formal connection to any previous seminars, workshops or meetings on marine turtle conservation. It was an attempt, for the first time, to draw the existing body of scientific knowledge on marine turtles into a conservation policy and management context for the entire Indian Ocean region. To this end, the Australian Government had invited marine turtle policy and management practitioners from the region to come to Perth, Western Australia, in October to share experiences and examine the potential for region wide action to identify, address and reduce threats to marine turtle populations, particularly those species already known to be endangered.

The representative of Malaysia wished to reiterate his country's position expressed at the 26 July DSB meeting, namely, that in order to give effect to the Appellate Body's decision, the import

prohibition should be lifted immediately. Malaysia urged the United States to do so in order to be able to comply with the rulings and recommendations of the Appellate Body. Malaysia also wished to reserve its right to revert to this matter at the appropriate time and forum.

The representative of India said that his country continued to believe that the United States should lift its import prohibition immediately in order to bring its measures into full compliance with the rulings and recommendations of the Appellate Body. India would closely watch the situation and wished to reserve its rights to revert to this issue, if necessary.

The representative of Pakistan said that, like Thailand, Malaysia and India, his country also wished to reserve its right to revert to this issue at a later date.

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

2. Guatemala – Definitive anti-dumping measure on grey portland cement from Mexico

(a) Request for the establishment of a panel by Mexico (WT/DS156/2)

The Chairman recalled that at its meeting on 26 July, the DSB had considered this matter and had agreed to revert to it. He drew attention to the communication from Mexico contained in document WT/DS156/2 and to the corrigendum to the English version contained in WT/DS156/2/Corr.1.

The representative of Mexico said that his country was submitting its second request for the establishment of a panel to examine this matter. It was therefore expected that such a panel would be established at the present meeting. He recalled that an earlier panel[2], which had considered Guatemala's anti-dumping investigation, had determined that Guatemala violated several provisions of GATT and the Anti-Dumping Agreement. However, the Appellate Body without examining the merit of the case had reversed the Panel's conclusions and had stated that Mexico's request did not comply with the conditions required for the establishment of a panel. Mexico hoped that this time the matter would be resolved as soon as possible.

The representative of Guatemala said that his delegation noted the statement by Mexico at the present meeting as well as the statement made the 26 July DSB meeting. As stated at the 26 July meeting, in conducting the anti-dumping investigation, Guatemala had adhered to the provisions of the Anti-Dumping Agreement and the GATT 1994. However, considering the conciliatory spirit of the WTO Agreement and the fact that the consultation phase was aimed at resolving disputes, and should not be used to emphasize the contentious nature of the relationship between the parties on a subject that could be resolved without recourse to the dispute settlement system, Guatemala, during the consultations held on 23 February 1999, had clearly informed Mexico of its readiness to bring this dispute to an end on a basis which would provide legal certainty for both parties. Guatemala regretted that Mexico had not examined its proposal and that, contrary to the offer made, it had not given a reply to the compromise proposed in the consultations. Guatemala considered that Mexico's request for the establishment of a panel was invalid since the definitive anti-dumping measure that was the subject of the request was also under examination by a Guatemalan tribunal. As stated by Guatemala at the 26 July meeting, this element should be carefully considered by the DSB. One could not ensure legal certainty if the same dispute was being examined simultaneously by two fora as the risk of contradictory rulings would make compliance impossible. He reiterated that Guatemala opposed the establishment of the panel requested by Mexico since there were no legal grounds for the request.

[2] WT/DS60.

The representative of the Dominican Republic said that her delegation supported the statement made by Guatemala. Whatever the details of this case, her country believed that dispute settlement cases should not be conducted in parallel. A case should not be heard in the WTO if it was before the domestic court.

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

The representatives of the European Communities, Honduras and the United States reserved their third-party rights to participate in the Panel's proceeding.

3. Canada – Term of patent protection

(a) Request for the establishment of a panel by the United States (WT/DS170/2)

The Chairman recalled that the DSB had considered this matter at its 26 July meeting and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS170/2.

The representative of the United States recalled that at the 26 July DSB meeting, her delegation had stated that her country was confident that the results of a panel proceeding in this case were not in doubt. Canada's Patent Act was inconsistent with its obligations under the TRIPS Agreement. The Patent Act provided a protection term of 17 years while under the TRIPS Agreement Members were required to grant a term of protection of 20 years. There was no alternative interpretation of the TRIPS Agreement. The United States regretted that Canada had refused to settle this matter promptly and had decided to prolong this dispute unnecessarily. The United States welcomed the establishment of a panel and would seek to resolve this dispute promptly.

The representative of Canada expressed his country's disappointment that the United States had decided to proceed with its second request for a panel. Canada's patent regime created a healthy environment for innovation, investment and research and development. Canada believed that its patent regime was consistent with its international obligations, and would therefore defend it before the Panel. Nevertheless, Canada was carefully looking into the allegation made by the United States.

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.

4. European Communities – Anti-Dumping duties on imports of cotton-type bed-linen from India

(a) Request for the establishment of a panel by India (WT/DS141/3)

The Chairman drew attention to the communication from India contained in document WT/DS141/3.

The representative of India said that his country was requesting the establishment of a panel to examine anti-dumping duties imposed by the EC on imports of cotton-type bed-linen from India. As indicated in India's request, in September 1996, the EC had initiated anti-dumping proceedings against imports of cotton-type bed-linen from India. On 12 June 1997 the EC had imposed provisional anti-dumping duties, and subsequently on 28 November 1997, definitive anti-dumping

duties had been imposed. In accordance with relevant documents which had been made available by the investigating authorities, the EC had not made a proper determination of the standing of the complainant as required by the Agreement on the Implementation of Article VI of the GATT 1994 (ADA). In determining whether material injury had been caused to its domestic industry, the EC had failed to consider all the relevant factors required under Article 3.4 of the ADA. It had wrongly assumed that all imports of bed-linen from India, during the period of investigation, had been dumped. As a result, the causality finding between imports from India and the alleged injury caused to the EC's domestic industry was tainted and was inconsistent with Article 3.5 of the ADA. Although the EC authorities had chosen a sample from the domestic industry, they had not based their determination of injury on that sample. The EC had explicitly determined that the domestic industry consisted of 35 companies, but had relied on its injury determination on companies outside this group.

In the course of its investigation, the EC had not only used an incorrect method of calculation of the dumping margin, but had also applied it in a wrong manner by, *inter alia*, applying administrative, selling and general costs and profits to the whole Indian bed-linen industry on the basis of the data of only one company. This misapplication had led to unreasonably higher dumping margins, which in turn had resulted in the imposition of unreasonably high anti-dumping duties on the bed-linen from India. In addition, the EC had not taken into consideration India's special situation as a developing country as required under Article 15 of the ADA, and had failed to provide the requisite information or evidence on which it had based its various decisions and the reasons thereof, as required under Article 12 of the ADA.

India considered that the EC authorities had violated several provisions of the ADA and the GATT 1994 by wrongly initiating the investigations and by imposing first provisional and then definitive anti-dumping duties. These measures had had a significant impact on India's exports of cotton-type bed-linen and had nullified and/or impaired the benefits accruing to India under both the GATT 1994 and the ADA. On 18 September 1998 and 15 April 1999, consultations had been held with the EC on the measures in question. However, these consultations had failed to settle the dispute. Therefore, at the present meeting India was requesting the establishment of a panel with standard terms of reference.

The representative of the European Communities said that two rounds of extensive consultations had been held with India on this matter. In addition written replies had been submitted to no less than 117 questions, either individually or in logical groupings. Since many questions had been raised, the EC recognized that some of its replies might not have provided sufficient clarification. Should India still have some problems or questions with regard to the proceedings, the EC was prepared to hold further consultations. This was be the most constructive and fruitful way forward. He noted that India had made its preliminary request for consultations almost one year after the investigation had been terminated. Since then the EC had made every effort to explain all its actions which, it believed, were in line with the WTO anti-dumping rules and procedures. He also noted that no Indian party had requested the judicial or administrative review of the measures, as provided by the EC legislation and the WTO rules. Therefore, the EC could not accept the establishment of a panel at the present meeting.

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

5. Colombia – Safeguard measure on imports of plain polyester filaments from Thailand

(a) Request for the establishment of a panel by Thailand (WT/DS181/1)

The Chairman drew attention to the communication from Thailand contained in document WT/DS181/1. He recalled that in cases of disputes initiated pursuant to the Agreement on Textiles

and Clothing (ATC) which had been examined by the Textiles Monitoring Body (TMB) and which remained unresolved: "Either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the DSU".

The representative of Thailand said that her country was requesting the establishment of a panel to examine Colombia's safeguard measure on imports of plain polyester filaments from Thailand. Her country considered that this measure was inconsistent with, at least, the following: (i) the requirements of Article 6 of the ATC concerning a transitional safeguard mechanism; and (ii) the provisions of Article 2 of the ATC with regard to the introduction and application of restrictions. On 28 and 29 September 1998, consultations had been held with Colombia pursuant to Article 6.7 of the ATC. However, these consultations had not resulted in a mutual understanding as to whether the situation called for restraint on the imports in question. In October 1998, Colombia had unilaterally decided to apply, through the Resolution of the Higher Council of Foreign Trade, No. 0009/98, a safeguard measure on imports of plain polyester filaments from Thailand, effective from 26 October 1998. This measure had subsequently been examined by the TMB, pursuant to Article 6.10 of the ATC. In November 1998, the TMB had recommended that the measure be rescinded. Following Colombia's notification of its inability to conform with the recommendations, the TMB had further recommended, pursuant to Article 8.10 of the ATC, that Colombia reconsider its position and that the measure should be rescinded. In June 1999, Colombia had formally informed the TMB that it would maintain its safeguard measure. Since the matter remained unresolved, Thailand considered that all the requirements of Article 8.10 of the ATC had been met, and was therefore requesting the establishment of a panel with standard terms of reference.

The representative of Colombia expressed her country's surprise at Thailand's request for a panel. She noted that her delegation had been informed of it only 24 hours before the closure of the agenda of the present meeting. She first wished to comment on the opening statement made by the Chairman. Colombia believed that it was not appropriate for the Chairman to make a statement with regard to the application of the WTO Agreements, and in particular with regard to the application of the DSU provisions. Since there were different interpretations of Article 8.10 of the ATC, such a statement should not have been made by the Chairman.

Colombia was surprised at the panel request because it appeared to be inappropriate from the procedural point of view and was inconsistent with the proper use of the dispute settlement system. She pointed out that Colombia had informed the TMB of its reasons as to why it did not agree with the TMB's recommendations (G/TMB/17). However, since these reasons had no bearing on Colombia's position with regard to the panel request, she would not revert to them in the course of the meeting.

She noted that Thailand had submitted its request for a panel without fulfilling the requirements of Article 4 of the DSU. She recalled that two situations had arisen in the past in connection with the measure covered by the ATC. In one case[3], after the TMB process had been completed, Costa Rica had requested consultations under Article 4 of the DSU. Since these consultations had not led to a satisfactory outcome, Costa Rica had requested the establishment of a panel. In two other cases[4], India had submitted two requests for a panel without prior consultations pursuant to Article 4 of the DSU. In those cases, the defendant had accepted or, at least, had not objected to the fact that consultations had not been held. She recalled that since then, the Appellate Body in the case on "Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico"[5], had pointed out that the provisions under the DSU constituted a coherent body of rules and

[3] United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear (WT/DS24).
[4] United States – Measures Affecting Imports of Women's and Girls' Wool Coats (WT/DS32); and United States – Measures Affecting Imports of Woven Wool Shirts and Blouses (WT/DS33).
[5] WT/DS60/AB/R .

procedures to be applied together with the special or additional provisions contained in Appendix 2 of the DSU, except when there was a conflict in the application of these provisions. The Appellate Body had clearly indicated that the general provisions of the DSU only ceased to be applicable when they could not be read together so as to complement the provisions of another Agreement. The Appellate Body had expressly stated that the DSU provisions were only inapplicable in the event of conflict. In the case at hand, it appeared that no conflict between the provisions had arisen. Article 8.10 of the ATC provided that if a dispute persisted after completion of the TMB procedures, either of the parties might invoke Article XXIII:2. This provision made it clear that seeking a TMB ruling did not preclude Members from seeking a DSB ruling. Colombia believed that this was not a source of conflict.

From an economic point of view, it was difficult to justify Thailand's request for a panel since as of June 1999, i.e. after three quarters of the time allowed for the measure to be in place had already elapsed, Thailand had only used 25 per cent of the quota allocated to it. Moreover, Thailand's request appeared to be inappropriate since it had been made one year after the adoption of the measure, more than six months after the conclusion of the TMB's proceedings and four weeks before the expiration of the safeguard measure. Although, Members had the sovereign right to bring any matter to the DSB, Article 3.7 of the DSU provided that "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful". When, on 6 September 1999, Colombia had been informed of Thailand's intentions to request a panel, it had reminded Thailand that the safeguard measure had only been adopted for one year. Furthermore, if Thailand had held consultations with Colombia, or had verified through its embassy in Bogota, it would have been informed that the private sector which had requested the application of the measure had not requested INCOMEX, the authority for safeguard investigation, that the measure be extended. Therefore, the measure in question would expire as foreseen.

In the light of this development, Colombia questioned Thailand's intention with regard to its request for a panel. Colombia could not accept the establishment of a panel since Thailand had requested a panel without prior consultations under Article 4 of the DSU, and the measure in question would expire before such a panel could be established. Furthermore, given the scarce human resources of developing countries, in particular at the time when they had to face intense preparatory work for the Ministerial Conference, Colombia questioned Thailand's intentions in invoking a dispute settlement procedure one year after the adoption of the measure and one month before its expiry.

The Chairman clarified that he had only quoted the relevant provisions of Article 8.10 of the ATC. It was his understanding that this procedure had been followed by India in 1996 with regard to its complaint on the US measures affecting imports of woven wool shirts and blouses (WT/DS33).

The representative of Korea said that his country was one of the major exporters of polyester fibers to Colombia and, together with Thailand, a target of Colombia's contested safeguard measure. Korea had substantial interests in this case, and if a panel was established at the present meeting it would reserve its third-party rights. Korea was concerned about Colombia's measure not only because its commercial interests had been affected, but, more importantly, because the credibility of the dispute settlement system was at stake. Colombia had been given every opportunity to defend its safeguard measure. The TMB's rulings and recommendations had been made after a thorough and careful examination of the case, including its second review in January 1999 conducted at Colombia's request. As a result of its decision of 22 June 1999 to maintain the safeguard measure solely on the ground that it was unable to conform with the TMB's recommendations, Colombia had not acted in good faith. If left unchecked, this decision might invite similar actions by other Members thereby undermining the TMB's authority and its effective functioning. He recalled that Article 8.9 of the ATC provided that: "The Members shall endeavour to accept in full the recommendations of the TMB". Korea once again urged Colombia to comply with the TMB's recommendations and to

immediately rescind its safeguard measure. Otherwise, it would set a bad precedent for the rule-based trading system.

The representative of India wished to present his country's position with regard to one point raised by Colombia. He said that Colombia had asked whether under Article 8.10 of the ATC, a Member could directly request a panel without prior consultations under Article 4 of the DSU. It was India's understanding that the TMB process was an elaborated consultation mechanism. For that reason, Article 8.10 of the ATC stipulated that if the matter remained unresolved, after the TMB process had been completed, a Member could bring that matter before the DSB. For this reason Article 8.1 through 8.12 of the ATC was included in Appendix 2 to the DSU, which referred to special or additional rules and procedures contained in the covered Agreements. Therefore, once the matter remained unresolved, the complaining party was entitled to request the establishment of a panel and there was no need to hold consultation under Article 4 of the DSU.

The representative of Thailand said that, as India had pointed out, in accordance with Article 8.10 of the ATC there was no need to consult under the DSU since Thailand had met all the requirements under that Article. In addition, there was a solid WTO practice supporting Thailand's position.

The representative of Colombia wished to raise objection with regard to Korea's statement to the effect that Colombia had not acted in good faith. She believed that Korea's statement was inappropriate. In the course of the TMB proceeding, Colombia had made detailed written submissions concerning its views on how the TMB had reached its conclusions. At the present meeting she only wished to refer to two elements. First, since the ATC did not provide a definition of national industry, Colombia had therefore used the definition contained in the Anti-Dumping Agreement and the Agreement on Safeguards. While the TMB had not agreed to Colombia's definition, it had not indicated what would be the appropriate definition. Second, with regard to the product definition, Colombia's investigating authorities had referred to one product in the Annex to the ATC which contained the list of products covered by the ATC. The TMB had concluded that such product definition was not appropriate without specifying what products had to be considered. On several occasions, Colombia had sought clarification on this matter, but without success. Despite these inconsistencies, the TMB had made its analysis and had reached its conclusions. Her country had once more asked the TMB to indicate how it should proceed in this case, but had not received any reply. This demonstrated that Colombia had cooperated with the TMB and explained why it had not been able to accept the TMB's interpretations, which were not mandatory. This did not mean that Colombia had not acted in good faith. It was important to ensure the balance of rights and obligations under the WTO Agreement. Colombia had complied with its obligations and was now requesting that its rights be respected. With regard to the statement made by India, she recognized that India had its own views on this matter. However, contrary to what Thailand had stated, there was no solid WTO practice in this area. In one case consultations under Article 4 had been held while no such consultation had taken place in two other cases.

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

6. India – Quantitative restrictions on imports of agricultural, textile and industrial products

(a) Report of the Appellate Body (WT/DS90/AB/R) and Report of the Panel (WT/DS90/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS90/13 transmitting the Appellate Body Report in "India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products", which had been circulated in document

WT/DS90/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He said that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

The representative of the United States said that the Reports before the DSB were of very high quality and showed that the Panel and the Appellate Body had considered the issues seriously and thoughtfully. The United States thanked the members of the Panel and the Appellate Body as well as the Secretariat for their work. The United States supported adoption of these Reports, which for the first time had addressed the balance-of-payments provisions of the WTO Agreement. While the Reports build upon the work of GATT 1947 in this area, including the Panel on Korea's beef regime[6] they were a milestone in the WTO with regard to this very important topic. At the present meeting, she wished to underline a few significant aspects of the Reports. First, the Appellate Body and the Panel had confirmed that the DSU provisions could be invoked with respect to any matter relating to balance-of-payments measures, and in particular that panels could decide whether a Member's invocation of the balance-of-payments provisions of the WTO Agreement was justified. Although this conclusion followed naturally from the text of the WTO Agreement, and was confirmed by past GATT practice, the United States considered that the reaffirmation of this point was an extremely important result of the proceedings. As this case demonstrated, the balance-of-payments restrictions could bring trade in products affected to a complete halt. In accordance with the statistics cited by the Panel, in one recent year there had been zero imports into India under 29 HS chapters -- including such items as meat; fish; cereals; malt and starches; cocoa; chocolate and cocoa preparations; nuts; canned and pickled vegetables and fruits and fruit juices; leather articles; matting and baskets; carpets; headgear; and furniture. Those statistics also showed that for other items, in particular clothing, there had been zero imports into India over a period of more than 15 years. Moreover, these figures confirmed that balance-of-payments restrictions involved products of export interest to all Members, developed and developing. The ability of panels to review, when necessary, whether such measures were justified by a Member's balance-of-payments situation was therefore a crucial safeguard in the trading system. At the same time, the Appellate Body and the Panel had recognized, and the United States agreed, that this dispute did not by any means call into question the work of the Committee on Balance-of-Payments Restrictions (the BOP Committee). The BOP Committee was extremely effective under the WTO and had been able to take into account individual Members' circumstances and achieve solutions satisfactory to all concerned in virtually every case, except the one at hand. The United States agreed with the Appellate Body and the Panel that there was no conflict between the DSU review of balance-of-payments measures and the work of the BOP Committee and the General Council, and that dispute settlement and the BOP Committee surveillance each fulfilled important functions. The United States was therefore pleased that the Appellate Body and the Panel had finally laid to rest for good the suggestion that BOP measures were beyond the scope of the DSU.

With regard to the substantive aspects of the dispute, the United States was pleased that the Panel had found that India's extensive import licensing system and its "canalization" system operated as import restrictions in violation of Article Xl:1 of GATT 1994. The same finding had been made by the Panel with regard to India's prohibition on imports by anyone other than the "actual user" of a good, which was a prohibition that systematically banned imports by wholesalers or other import intermediaries for resale. The Panel had also found that India's reserves were not inadequate and that

[6] Panel Reports on "Republic of Korea - Restrictions on Imports of Beef", complaints by Australia , New Zealand and the United States, adopted on 7 November 1989, BISD 36S.

India was not facing a serious decline or a threat of serious decline, and that its balance-of-payments restrictions therefore exceeded what was "necessary" within the meaning of Article XVIII:B. The United States noted that these findings which constituted the core factual and legal issues before the Panel, had not been appealed by India.

The United States considered that the Appellate Body and the Panel had correctly decided on the subsidiary points made by India. In this context, the United States agreed with the Appellate Body that the Panel's decision had not implicitly required India to change its development policy. The United States had also agreed with the Appellate Body that the Panel had conducted an objective assessment of the facts, and that its application of the rules on burden of proof did not constitute an error. The United States had also supported the Appellate Body's analysis of the Note Ad Article XVIII:11. That Ad Note made clear that a Member might maintain balance-of-payments measures even after its balance-of-payments difficulties had ended, but only in those very limited circumstances that had been defined by the Appellate Body.

Overall these reports amounted to a recognition that Article XVIII:B provided a balance between rights and obligations. That meant that any Member that actually met the criteria specified in the balance-of-payments provisions of the WTO Agreement might invoke those provisions, subject to the requirement to use price-based measures where possible, and these Reports had not changed that right. However, a Member invoking those provisions had to adhere to the obligations that accompanied those provisions, including the obligation to eliminate those measures when conditions no longer justified them, and other obligations set out in the relevant provisions. Only in this way could the rights of that Member's trading partners be preserved. The Panel and Appellate Body Reports had reached the right result on these issues in general and on India's restrictions in particular. In so doing the Reports had made a valuable contribution to the multilateral trading system. However, the United States had one concern with regard to the Panel Report. The Panel had made correct analysis of the legal issues presented by the parties. However, it had addressed an issue that had neither been raised nor briefed by either party: it had made non-binding "suggestions for implementation" under Article 19 with regard to the reasonable period of time referred to in Article 21.3(c) of the DSU. During the interim review of the Panel Report, the United States had objected to the Panel's making suggestions concerning the "reasonable period of time" as inappropriate under Articles 19 and 21. The United States had also commented on the inappropriateness of the considerations cited by the Panel in paragraphs 7.5 and 7.6 of its Report, noting in particular the Panel's finding that, as of November 1997, India had lacked a justification under Article XVIII:B for its measures. As stipulated in Article 19 of the DSU, a panel might make non-binding suggestions about the ways in which to implement, not about how long a party should take to do so. In contrast, Article 21 set out a clear process for establishing a reasonable period of time, beginning with a statement by the defending Member of its intentions in regard of implementation, to be followed by negotiations among the Members concerned. That process did not include a recommendation on the Panel's point before those discussions had begun. The United States regretted that the Panel had chosen to include these unwarranted suggestions. The United States expected to be informed by India of its intentions in respect of the recommendations of the Panel and Appellate Body Reports, and looked forward to engaging in constructive discussions with India on prompt implementation.

The representative of India said that the Reports of the Panel and the Appellate Body submitted for adoption at the present concerned India's quantitative restrictions which had been maintained for balance-of-payments reasons pursuant to Article XVIII:B of GATT 1994. Article XVIII:B permitted a Member in the process of development to restrict imports in order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development. India had been regularly consulting with the BOP Committee as required under Article XVIII:B, paragraph 12(b). During the consultations held in January 1997, the BOP Committee, on the basis of consensus, had invited India to present a phase-out plan in respect of the BOP related

quantitative restrictions still in force. In terms of the phase-out plan submitted to the BOP Committee by India in May 1997 and subsequent consultations in the BOP Committee in June and July 1997, India had agreed to phase out the remaining restrictions during a period of six years starting from 1 April 1997. All members of the BOP Committee, except one, had accepted the six-year phase out period commencing from 1 April 1997. Thus, the main element of disagreement in the BOP Committee was with regard to the length of the phase-out plan: i.e, while all Members could agree to a six-year phase out plan commencing from 1 April 1997, one Member had not agreed. In view of the importance of the two Reports and their significant implications for the interpretation of the WTO provisions, including those not covered by this dispute, and for the benefit of those Members who were not parties to the dispute, he believed that it was his duty to express India's concerns on the Panel and the Appellate Body Reports. He requested that these views be fully recorded in accordance with Articles 16.3 and 17.14 of the DSU. The Appellate Body had made important rulings on the relationship between the judicial and political organs of the WTO in the area of balance-of-payments measures and, by implication, also in the area of regional trade agreements. The Appellate Body had also made some other important rulings which, India believed, had curtailed the scope of the developing country Members' substantive rights under Article XVIII:B. In particular, the Appellate Body had ruled that the DSU could be invoked with respect to any matter relating to balance-of-payments restrictions; i.e. not only with regard to matters arising from the application of individual BOP measures, but also with regard to overall justification of the BOP measures. The provisions of Article XVIII:12 and 13 of the BOP Understanding that permitted the General Council to decide that balance-of-payments restrictions found to be inconsistent be removed within a "specified period", and to formally approve a time-schedule for the removal of restrictions, did not need to be taken into account in the dispute settlement proceedings. The right to gradually phase out balance-of-payments restrictions in accordance with the Note Ad Article XVIII:11 was limited to cases in which renewed balance-of-payments difficulties would arise "immediately" from the removal of the restrictions. Consequently, this provision could not be invoked in cases in which the adverse balance-of-payments impact of the removal of the restrictions, though direct and foreseeable, had taken place after some time. The proviso to Article XVIII:11, according to which no Member "shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which was applying" did not relate to macroeconomic policy instruments. Consequently, developing country Members could be required to change their macroeconomic policies to render their balance-of-payments restrictions unnecessary. India had argued both before the Panel and the Appellate Body that, with regard to the balance-of-payments justification under Article XVIII:B and consistency of regional trade agreements with Article XXIV, there were strong grounds to rule, on the basis of the relevant texts and GATT practice, that the judicial organ would consider the matters arising from the application of restrictive import measures taken for balance-of-payments purposes or matters arising from the application of provisions of Article XXIV, and that they would not go into the overall justification of BOP measures or consistency of a regional trade agreement with Article XXIV.[7]

[7] India presented the following overview of the provisions in the WTO Agreements giving access to the DSU:

Understanding on BOP Provisions	**Understanding on Article XXIV**
The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.	The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.
Other WTO agreements and understandings: example of the TBT Agreement	
Consultations and settlement with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of the GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.	

India had also placed before the Panel and the Appellate Body details regarding the legal background on the question of the competence of the panel to examine balance-of-payments measures and regional trade agreements. The panel on "European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region"[8] had opined that examination or re-examination of Article XXIV Agreements was the responsibility of the Contracting Parties and had clearly expressed the view that it would not be appropriate to determine the conformity of an Agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a). The approach adopted by the Panel on "EEC – Member States' Import Regimes for Bananas"[9] had demonstrated that the question of the institutional balance between the panel and the Committee on Regional Trade Agreements (CRTA) was not necessarily whether or not panels might review agreements under Article XXIV:7, but rather to what extent they should review them. The three panels on Korea's beef regime had ruled as follows: "The latest full consultation concerning Korea's balance-of-payments situation in the Balance-of-Payments Committee had taken place in November 1987, the report of which had been adopted by the CONTRACTING PARTIES in February 1988 . . . The Panel considered that it should take into account the conclusions reached by the Balance-of-Payments Committee." (BISD, 36S p. 303-4) The panels which had then examined the conclusions in the BOP Committee, had noted that the prevailing view was "that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B." The panels had noted that this conclusion was still valid because the balance-of-payments situation had improved since the consultations and had found on that basis that the restrictions were not justified by Article XVIII:B. In this connection the panels had made the following observation: "in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts whereas the latter provided for a general review of the country's balance-of-payments situation by a committee of government representatives." (BISD, 36S, p. 303-4)

However, the appreciation of the Panel and the Appellate Body of the reports of Korea's beef panels was different. India believed that the Panel and the Appellate Body had erred by taking into consideration only some elements of the Korea's beef regime reports and had ignored the context in which these remarks had been made and the overall thrust of these reports. In the only case in which GATT panels were asked to review the balance-of-payments justification of a measure, the panels had not assessed the external financial position of the country concerned but had based their analysis on the decision that the CONTRACTING PARTIES had already taken on this matter on the basis of a determination by the IMF. The panels had limited their examination to the GATT-consistency of the individual measures imposed for balance-of-payments reasons. Furthermore, the two panels that had been asked to review the consistency of agreements notified under Article XXIV had both refused to do so. Throughout the history of the GATT 1947, not a single panel had thus decided to determine the balance-of-payments justification of measures notified under Article XII and XVIII:B or the consistency of a regional trade agreement with Article XXIV. The consistent practice of the CONTRACTING PARTIES was thus to assign these matters to bodies composed of the representatives of the Contracting Parties.

During the Uruguay Round negotiations, the United States had presented a broad proposal for a reform of the provisions relating to surveillance of balance-of-payments measures which included, *inter alia*, provisions explicitly providing for resolution by panels of the question of consistency of the BOP measures under review in the BOP Committee (MTN.GNG/NG7/W72; 15 June 1990, paragraph 19). This particular portion was strongly opposed by the developing countries and it was India's firm belief that a compromise had been found after lengthy negotiations in the form of a footnote to the BOP Understanding with the following text: "Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of

[8] GATT document, L/5776 circulated on 7 February 1985, not adopted.
[9] Bananas I, GATT document DS32/R, circulated on 3 June 1993, not adopted.

Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes." The footnote made three matters clear: (i) the dispute settlement procedures might be invoked in respect of restrictions notified under Article XVIII:B (which had been in dispute until the panels on Korea's restriction confirmed that such restrictions might be examined by panels); (ii) the invocation had to relate to "matters arising from the application of restrictive import measures taken for balance-of-payments purposes" (which was the only matter that the panels on Korea's restrictions had examined); and (iii) the invocation could not entail a modification of the rights and obligations under Article XVIII:B.

The reference to the application of measures in the footnote to the BOP Understanding was identical to that in the text of paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994. None of the other clauses in the WTO Agreements and Understandings that defined the causes of action under the DSU contained a similar reference to the application of measures. While the proceedings on India balance-of-payments restrictions were underway, another panel had examined, at the request of India, Turkey's restrictions on imports of textile and clothing products.[10] These restrictions had been introduced by Turkey under a trade arrangement with the European Communities that Turkey had described as an agreement towards the completion of a customs union. Turkey had claimed that only the CRTA was competent to examine the matter: "…it was not the Panel's task to substitute itself for the CRTA and that the Panel could not rule on the legality of the measures forming the object of the complaint in the absence of agreed conclusions on the consistency of the Turkey-EC Agreements with Article XXIV." (WT/DS34/R para. 6.133). The response of the panel to this argument was as follows: "We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV that panels have jurisdiction to examine 'any matters *arising from* the application of those provisions of those provisions of Article XXIV.' For us this confirms that a panel can examine the WTO compatibility of one or several measures 'arising from' Article XXIV types of agreement, as also argued by the United States in its third-party submission. … Thus we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members ... on the occasion of the formation of a customs union. As to the ... question of how far-reaching a panel's examination should be of the regional trade agreement underlying the challenged measure, we note that the ... CTRA has been established, *inter alia*, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CTRA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole." (paragraphs 9.50-52). That panel had thus interpreted the terms "any matters arising from" to refer to specific measures taken in connection with the formation of an Article XXIV agreement and had ruled that the overall justification of that agreement was a matter to be generally left by panels to the CTRA. However, the Panel that had examined India's BOP related quantitative restrictions, had specifically rejected the contention that the terms "any matters arising from" in the Understanding on Article XXIV had this implication. It had ruled: "The phrase 'the application of those provisions of Article XXIV' plainly means 'the implementation of the provisions of Article XXIV ...' and does not allow for a distinction such as the one proposed by India." (paragraph 5.70) Two concurrent panels had thus arrived on the same fundamental issue at opposite conclusions. He recalled that the panel on "Brazil – Export Financing Programme for Aircraft" (WT/DS46/R) had observed in paragraph 7.89 of its report: "In considering this issue, we note that this element of Article 27.4 is troubling from the perspective of a panel. Article 27.4 provides in relevant part that a developing country Member 'shall eliminate [its export subsidies] within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs.' We recognise that as written this clause is mandatory, and a conclusion that this clause was not susceptible of application by a panel would be

[10] WT/DS34/R

inconsistent with the principle of effective treaty interpretation. On the other hand, an examination as to whether export subsidies are inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal. Further, the SCM Agreement provides panels with no guidance with respect to the criteria to be applied in performing this examination. We consider that it is the developing country Member itself which is best positioned to identify its development needs and to assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country member in question." In the footnote attached to this paragraph the panel had stated that in its view, a body such as the Subsidies Committee was far better equipped to perform this type of examination than a panel.

The Panel Report in this case provided the following meaning to the terms: "The 'application' of a measure would thus refer to the fact that a measure is in use. The terms ... therefore simply refer to the fact that a measure is applied for balance-of-payments purposes." India had argued before the Appellate Body that, if the Panel's interpretation were correct, the terms to which the Panel claimed to give meaning would have no meaning at all. If the footnote read: "The DSU may invoke with respect to any [matters arising from the application of] restrictive import measures taken for balance-of-payments purposes" the text would indicate that the measure at issue must have been taken for balance-of-payments purposes. In other words they had to be "in use", as stated by the Panel. The text would also clearly indicate that the measures at issue must be taken for balance-of-payments purposes, in other words that they have been "applied for balance-of-payments purposes", as stated by the Panel. This demonstrated that the Panel had interpreted the terms "matters arising from the application of" out of existence: they could be struck from the text of the footnote without any legal consequence. Such an interpretation was inconsistent with the principle of interpretation which the Appellate Body recalled in its report on "Japan-Taxes on Alcoholic Beverages".[11] The Appellate Body had rejected India's argument on the following grounds: "We do not agree with India that, under the Panel's interpretation, the words "matters arising from the application of" would have no meaning at all and would be read out of existence. These words reflected the traditional GATT doctrine that, with the exception of mandatory rules, only measures that are effectively applied could be the subject of dispute settlement proceedings." (paragraph 93 of the AB Report). The Appellate Body had not indicated any reasons why the drafters of the Understandings on BOP measures and on Article XXIV would have wanted to establish the requirement that balance-of-payments measures must be "effectively applied" to be subject to dispute settlement proceedings. In none of the other Understandings and WTO agreements, the provision establishing the right to invoke the DSU was qualified by the requirement that the measure at issue was effectively applied. There was simply no reason to distinguish between balance-of-payments measures and measures taken under regional trade agreement from other measures in this respect. In any case, under Article XVI:4 of the WTO Agreement, a Member had to ensure the conformity of its domestic laws with the provisions on balance-of-payments measures and regional trade agreements. This provision made clear that laws on balance-of-payments measures as such - before being effectively applied - could be subject to dispute settlement proceedings. Article XVI:3 of the WTO Agreement made clear that the general requirement of Article XVI:4 overrided any conflicting requirement in the provisions of the Understandings on BOP measures and Article XXIV. Thus, the explanation provided by the Appellate Body had failed to give any function to the requirement that the matters in respect of which the DSU was invoked had to "arise from the application of" balance-of-payments measures. The Appellate Body, contrary to its own jurisprudence, had thus interpreted the terms "matters arising from the application of" in a manner that deprived them of any practical or legal relevance.

India had raised before the Appellate Body the issue of institutional balance or judicial restraint by which it was meant that each organ of the WTO had to, in determining the scope of its own powers, proceed with due regard for the powers of other WTO organs and for the rights and obligations of

[11] Appellate Body Reports contained in documents WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R.

Members. The basic ruling of the Panel on the distribution of decision-making power between the judicial and the political organs of the WTO was the following: "The role of panels is defined in Article 3.2 of the DSU which provides that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.' Panels were in all instances required to make an objective assessment of the facts of the case and apply the relevant WTO provisions to those facts".

This ruling, in India's view, had failed to address the following question: What was the relationship between the general provisions of the DSU that defined the competence of panels and the specific provisions of other WTO Agreements allocating the competence to make legal determinations to political organs of the WTO, in particular the BOP Committee and the CRTA? There were three possible answers to this question: First, the provisions allocating competence to the judicial organs of the WTO (and, consequently the rights of the complainant under the DSU) prevailed completely over the provisions assigning competence to the political organs (and hence the rights of the defendant under other WTO Agreements). Second, the competence of the political organs was exclusive. Third, a balance between the competence of the judicial organs of the WTO and that of its political organs must be found (and, with it, a balance between the rights of the complainant under the DSU and the rights of the defendant under other WTO Agreements).

India had argued before the Appellate Body that the recognized principles of interpretation and the provisions of the DSU called for the adoption of the third approach. When an organ of the WTO determined its own jurisdictions, it interpreted the provision of the WTO Agreement conferring the jurisdiction upon it. As the Appellate Body had emphasised on numerous occasions, the provisions of the WTO Agreement, including the provisions conferring powers on WTO organs, must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". When an WTO organ determined its jurisdiction, it must take into account not only the terms of the provision attributing powers to it but also the context in which this provision appears. That context comprised those provisions of the WTO Agreement that attributed related powers to other bodies. An analysis of the terms of those jurisdictional provisions might lead a particular WTO organ to the conclusion that not only that particular organ but also another organ could claim jurisdiction over the matter at issue. Such a conflict must be resolved in good faith in the light of the institutional structure that the framers of the WTO Agreement had set up to realise the purpose of the WTO. In practice this would mean that panels would normally refrain from performing the central tasks assigned to the political bodies of the WTO, or at least exercise judicial restraint in this respect. In the case of balance-of-payments measures, the overall objective of a panel's examination should not be to make, *de novo* or in anticipation, an assessment equivalent to the assessments the BOP Committee and the IMF were to make, but to determine whether the measure at issue, given the margin of appreciation of the BOP Committee and the IMF, was capable of approval.

This approach would protect Members against invocations of the balance-of-payments provisions that were made in bad faith. At the same time, it would avoid modifying the balance of rights and obligations under those provisions. India had pointed out many examples wherein judicial organs take into consideration competence assigned to other bodies forming part of that structure. India had also pointed out that, if panels were to use their interpretative powers to confer upon themselves the authority to make precisely the same legal determinations that the BOP Committee and the CRTA were to make, a legal situation would arise in the WTO that was without parallel in any other legal system. The Appellate Body, in India's view, had not examined any of these arguments. It had declared at the beginning of its brief discussion of the issue: "We are of the opinion that the competence of the Panel to review all aspects of balance-of-payments restrictions should be determined in the light of Article XXIII of the GATT, as elaborated and applied by the DSU, and of footnote 1 to the BOP Understanding." (paragraph 83) It further ruled that: "If panels refrained from reviewing the justification of the balance-of-payments restrictions, they would diminish the explicit procedural rights of Members under

Article XXIII and footnote 1 to the BOP Understanding, as well as their substantive rights under Article XVIII:11." (paragraph 102). These brief rulings did not address the fundamental issue that India had submitted to the Appellate Body. There were provisions creating and defining the competence of panels that the Appellate Body had invoked to justify its ruling. However, there were equally valid provisions that created and defined the competence of the BOP Committee and the General Council. The interpretative task of the Appellate Body was to determine the relationship between those provisions that conferred powers with overlapping scope. This task was not accomplished by a simple reference to the provisions defining the competence of panels alone. India regretted that the Appellate Body had ignored the fundamental impact of the creation of panel track on the decision-making process in the BOP Committee. India had pointed out that, according to Article 3.2 of the DSU, the dispute settlement process "cannot add to or diminish the rights and obligations" of Members. This implied that a panel could not determine its jurisdiction in a manner that entailed a change in the procedural or substantive rights and obligations of Members. This provision left no doubt that the procedural rights of Members under the DSU were subsidiary to those conferred by the WTO Agreements because the rights under the DSU might only be used to enforce the balance of rights and obligations under other WTO Agreements, not to change that balance.

As India's experience demonstrated, the panel track, once open to Members affected by balance-of-payments measures, would replace in effect the BOP Committee process and the implementation provisions applied by the BOP Committee by the compliance provisions of the DSU. Giving unlimited access to this track would therefore no doubt change the balance-of-rights and obligations under the balance-of-payments provisions. The decision-making in a WTO body inevitably took place in the shadow of the alternative available in other bodies. The legal alternatives formally available in one forum could therefore be reduced to inutility by the creation of new procedural opportunities in another forum. The circumstances surrounding this appeal provided a perfect example. There was another important aspect of the Panel ruling which deserved to be highlighted. The Panel and the Appellate Body had concluded that the Panel was competent to look into the overall justification of India's BOP restrictions which was normally a responsibility of the BOP Committee. The Panel had assessed just as the BOP Committee would on the basis of an IMF opinion, the monetary reserves of India. However, having found them adequate, it did not, as the BOP Committee would have in that situation, apply Article XVIII:12 of the GATT or paragraph 13 of the Understanding on the ground that these provisions did not apply in a panel proceeding. By performing some but not all of the functions of the BOP Committee, the Panel had modified the balance of rights and obligations of India under the WTO rules governing balance-of-payments consultations.

He also wished to refer to a few other aspects. According to Note Ad Article XVIII:11 developing country Members shall not be: "... required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII." The Note Ad Article XVIII:11 was intended as acknowledged by the Panel, to "make it possible for a developing country having validly instituted measures for balance-of-payments purposes and whose situation had sufficiently improved so that the conditions of Article XVIII:9 were no longer fulfilled, not to eliminate the remaining measures if this would result in the reoccurrence of the conditions which had justified their institution in the first place." (paragraph 5.189) The Panel had interpreted the term "thereupon" in this provision to mean "immediately" and had ruled on this basis that restrictions might be phased out gradually only in those situations in which the balance-of-payments impact occurs "immediately on lifting of the current balance-of-payments measures". The Appellate Body had endorsed this interpretation, essentially on the ground that "immediately" was one of the dictionary meanings of "thereupon". In India's view, it was reasonable to interpret the term "thereupon" to require a direct (and therefore clear and foreseeable) causal link between the removal of the restrictions and the recurrence of balance-of-payments difficulties because the indirect consequences of a removal of restrictions on the external financial position were difficult to trace and quantify. This interpretation would also conform to one of the dictionary meanings of "thereupon". In India's view, it was not appropriate to distinguish in the context of the Note Ad Article XVIII:11

between an impact that occurs "immediately" and an impact that occurs after a lapse of time. The consequence of the interpretation given to the word "thereupon" by the Panel and the Appellate Body was that the Note Ad Article XVIII:11 lost its practicability in situations where there was a time lag between removal of restrictions and its impact on the level of reserves.

With regard to the proviso to Article XVIII:11 of GATT 1994, the requirement set out in Article XVIII:11 of the GATT 1994 that restrictions no longer necessary for balance-of-payments purposes shall be eliminated was subject to the proviso that: "no Member shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this section." There was a corresponding provision in Article XII:3(d) which provided in relevant part that a Member: "shall not be required to withdraw or modify restrictions on the ground that a change in policies [directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources] would render unnecessary restrictions which it is applying under this Article." These provisions made it clear that a developing country Member would not be asked to change its development policies on the ground that if such a change was made, the BOP related quantitative restrictions would be rendered unnecessary. Similarly, in the case of developed country Members there was no requirement to change the policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources.

At the meeting of the BOP Committee in June 1997, the representative of the IMF had made the following comment on India's balance-of-payments situation: "It remains the Fund's view that the external situation can be well managed using macroeconomic policy instruments alone; QRs are not needed for balance-of-payments adjustment." (Paragraph 126) India had argued that macroeconomic policies have an interface with development policies and that it was not possible to view them as watertight compartments. However, the Appellate Body had rejected this argument. It had ruled that: "We are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue. The IMF statement that India could manage its balance-of-payments situation using macroeconomic policy instruments alone did not, therefore, imply a change in India's development policy. ...We believe structural measures are different from macroeconomic instruments with respect to their relationship to development policy." (Paragraph 128) The IMF while replying to a question prepared by the Panel had stated, *inter alia*, that "the macroeconomic policy instruments would need to be complemented by structural measures such as scaling back reservations on certain products for small scale units and pushing ahead with agricultural reforms" (paragraph 3.367 of the Panel) India had argued before the Appellate Body that the IMF was referring to the need for complementing macroeconomic measures with changes in its development policy. To assume that changes in macroeconomic policies of a developing country would have no implications for its development policies does not appear to be realistic. The Appellate Body's interpretation had the consequence that stricter requirements were imposed on developing countries than on developed countries. As he had pointed out, Article XII:3(d) provided that a Member shall not be required to change its "policies directed towards the achievement and maintenance of full employment". Macroeconomic policies were commonly pursued for this purpose and were covered by this language. By excluding macroeconomic policies from the scope of the proviso in Article XVIII:11, the Appellate Body had imposed constraints perhaps inadvertently on developing country Members invoking this provision that were not imposed on developed countries resorting to Article XII.

He regretted that he was not in a position in his statement to capture all the arguments presented by India before the Panel or the Appellate Body. It was also not possible to adequately cover the response of the Panel and the Appellate Body to its arguments. He therefore urged Members to consider these Reports carefully, since their rulings constituted a fundamental change from the practices under the GATT 1947 and modified significantly the balance of rights and obligations under Article XVIII:B. The Appellate Body's rulings raised fundamental questions: should a judicial process

determine the adequacy of the monetary reserves of a sovereign State and of the length of the phase-out period for restrictions that cease to have a balance-of-payments justification? Should panels have the authority to establish legal standards for evaluating the adequacy of the reserves of WTO Members, assess the macroeconomic and other developmental policy alternatives available to Members and developmental situation and prospects of the Member concerned? What was the proper relationship between the judicial and the political organs of the WTO? Was not Article XVIII:B progressively getting diluted in such a way that it could no longer serve the developmental interests of developing countries? He wished to make three observations. First, in making his statement regarding the concerns arising out of the two Reports, it was his intention to promote a debate with a view to find meaningful solutions to these concerns so that the political bodies of the WTO, in particular the BOP Committee and the General Council could continue to play the role that had been assigned to them and that Article XVIII:B continued to be a relevant provision for the developing countries. Second, he expressed his delegation's gratitude to the Chairman and the two members of the Panel as well as the three Appellate Body members who had dealt with this case. He also thanked the WTO Secretariat and the Appellate Body Secretariat. Third, notwithstanding its serious reservations about the rulings given by the Panel and the Appellate Body, India would join in a consensus in deference to the institutions of the Panel, the Appellate Body and the DSB.

The representative of the European Communities said that his delegation noted with satisfaction that the Appellate Body's conclusions had confirmed the strengthening of the rules of GATT 1994 and the BOP Understanding. In particular, the EC welcomed that the Appellate Body had recalled that the dispute settlement mechanism could be used in the case of disputes relating to all issues involving restrictions applied for balance-of-payments purposes. Furthermore, the EC supported the interpretation whereby the second sentence of Article XVIII:11 placed upon the party that had adopted restrictions for balance-of-payments purposes, an obligation to remove these restrictions in a situation where it was no longer in a position to establish a direct causal link between the removal of the restrictions and reoccurrence of the conditions defined in Article XVIII:9.

The representative of the Dominican Republic said that her delegation supported the statement made by India. Regardless of India's measures and their compatibility with the WTO Agreements, her country was concerned about the respective roles of the BOP Committee, the General Council and the DSB. In this regard, her country wished to draw attention to the case on "Brazil - Export Financing Programme for Aircraft" (WT/DS46), in which the Panel had concluded that it was for a developing country Member to identify its development needs and that panels should give particular attention to the views of developing countries. The BOP Committee and the General Council should continue to play their respective roles, and Article XVIII:B should remain an important and effective provision in favour of developing countries.

The representative of Malaysia said that his country shared the concern expressed by India. The Appellate Body's decision had serious systemic implications for the WTO and in particular for the rights of developing countries. Malaysia supported all the systemic issues raised by India with regard to the Appellate Body's decision, but at the present meeting, he only wished to refer to one aspect. In Malaysia's view, the Appellate Body had gone beyond its jurisdiction in interpreting the word "application" in footnote 1 to the BOP Understanding. It had gone into the justification of the measures implemented by India, which was within the realm of Members not the Panel. In doing so, the Appellate Body had modified significantly the rights and obligations of Members contrary to Article 3.2 of the DSU. It had taken away the rights of developing country Members with regard to the provisions of the BOP Understanding. The Appellate Body's decision had thus seriously affected the delicate balance of rights and obligations provided not only in the BOP Understanding but also within the entire package of the WTO Agreements, which had been agreed as a single undertaking. This was not acceptable to Malaysia.

The representative of Cuba said that his delegation shared the concerns raised by India and supported the statements made by the Dominican Republic and Malaysia. Cuba believed that the rulings of the Panel and the Appellate Body were not in line with the trade policy issues as stipulated in Article XVIII:B. Developing countries should have the possibility of imposing restrictions for balance-of-payments reasons. In this regard, the General Council and the BOP Committee had permitted India to take certain measures in order to defend its economy. It was not appropriate for the Panel or the Appellate Body to rule against it. Developing countries should have every opportunity to identify their development needs. He therefore appealed that the DSB should take into consideration the development needs of developing countries and ensure that their interests were not further affected in the future.

The representative of Egypt said that, like previous speakers, her country as a developing country shared India's concerns. In particular Egypt was concerned that the Appellate Body had based its interpretations on certain terms without full examination of all the arguments made by India, and had excluded the macroeconomic policies and instruments from the scope of Article XVIII:11. Furthermore the Appellate Body had ruled that such policies were not related to any particular development policy, thereby imposing constraints on developing country Members invoking the provisions of that Article.

The representative of the Philippines wished to draw attention to paragraph 128 of the Appellate Body Report concerning macroeconomic instruments and their relationship to development policy. The IMF used specific terminology to distinguish between macroeconomic policy, development policy and structural measures. However, countries were not bound by such a distinction. Contracting parties had agreed to development policies under the relevant provisions of Article XVIII not in a limited technical sense. Development was an objective with macroeconomic policies as means towards that objective. In the Philippines' view, the Appellate Body did not need to state that development policies should be construed in a very narrow context.

The representative of Sri Lanka said that his delegation noted the statement made by India with regard to the decision of the Appellate Body and the Panel. His delegation also noted that India had stated that it would abide by the Appellate Body's decisions and would take actions to implement these decisions. India had also raised some systemic issues related to the balance of rights and obligations of Members, in particular developing country Members. India had pointed out two sets of broad issues arising from the conclusions and findings of the Panel and the Appellate Body. First, the relationship between the judicial and political organs of the WTO. Second, the prospect that substantive rights of developing countries under Article XVIII:B would be undermined. India had provided substantial evidence supporting its position. Sri Lanka welcomed India's statement which raised some important questions with regard to the findings and conclusions of the Panel and the Appellate Body. His delegation thanked India for its contribution and shared the concerns expressed by other delegations that some findings and conclusions of the Panel and the Appellate Body seemed to erode confidence and the credibility of the system.

The representative of Indonesia said that his delegation noted the statement made by India. Indonesia shared the concerns expressed by India on the decisions of the Panel and the Appellate Body, and was concerned about the systemic issues resulting from these decisions, in particular with regard to the relationship between the judicial and political organs of the WTO in the area of balance-of-payments measures. Indonesia regretted that the Panel and the Appellate Body, in exercising their powers, had not paid due regard to the powers attributed to other organs of the WTO.

The representative of Jamaica wished to register his delegation's concerns with regard to the rulings that had upset the balance of rights and obligations negotiated within the WTO. His delegation was also concerned that the rulings had not fully appreciated development concerns and imperatives of developing countries.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS90/AB/R and the Panel Report in WT/DS90/R as upheld by the Appellate Body Report.

7. Adoption of the 1999 Draft Annual Report of the DSB (WT/DSB/W/111 and Add.1)

The Chairman said that in pursuance of the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO contained in document WT/L/105, he was submitting for adoption a draft text of the 1999 Annual Report of the DSB contained in document WT/DSB/W/111 and Add.1. This Report covered the work of the DSB since January 1999. It had been prepared in accordance with the structure of the 1998 Report. For practical purposes, the overview of the state of play of WTO disputes, covering the period from 1 January 1995 to 31 August 1999, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He proposed that, following the adoption of the Annual Report at the present meeting, the Secretariat be authorized to update this Report under its own responsibility in order to include the actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would be circulated on 22 October and would be submitted for consideration by the General Council at its meeting on 4 November 1999.

The DSB adopted the Draft Annual Report contained in WT/DSB/W/111 and Add.1 on the understanding that it would be further updated by the Secretariat, as proposed by the Chairman.

8. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/110)

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

The DSB so agreed.

The Chairman recalled that in accordance with the proposals for the administration of the indicative list of panelists approved by the DSB on 31 May 1995, the list should be completely updated every two years. To this effect, within the first month of each two-year period, Members would be required to forward updated curricula vitae of persons appearing on the indicative list. He also informed delegations that a new consolidated indicative list, containing the names included in document WT/DSB/13 as well as the names approved by the DSB in the period between 1 October 1998 and 27 October 1999, would be circulated by the Secretariat at the end of October. He therefore asked Members to forward to the Secretariat any modifications they would wish to make in order to update curricula vitae of the persons contained in the indicative list as circulated in October 1999. He proposed that this be done by the end of December 1999 in order to enable the Secretariat to circulate an updated indicative list in January 2000.

The DSB took note of this information.

9. Review of the DSU

The Chairman said that some delegations had expressed their preference to adjourn the formal meeting in order to continue with informal consultations on the subject of the DSU Review. He therefore proposed to adjourn the proceedings of the meeting and resume the consideration of the item on "Review of the DSU" at a later stage.

The DSB so agreed.

Upon resumption of the meeting on 24 September, the Chairman said that intensive consultations had been held on the DSU Review, including on the possibility to extend the 31 July deadline for completion of the Review. However no agreement had been reached thereon. Whether consultations should be resumed needed to be further discussed. He proposed to adjourn the meeting.

The DSB took note of the statement and agreed to adjourn the meeting until further notice.

10. Appointment of Appellate Body members

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", said that Article 17.2 of the DSU provided for the DSB to appoint persons to serve on the Appellate Body for a four-year term. Each Appellate Body member might be reappointed once for a final four-year term. After a lengthy and difficult process, the first seven Appellate Body members had been appointed in late 1995. Pursuant to Article 17.2 of the DSU, the terms of office of three of the original Appellate Body members had expired after two years, and on 25 June 1997, as a result of the intensive consultations carried out by the Chairman, the DSB had reappointed these three Appellate Body members – Messrs. Claus-Dieter Ehlermann, Florentino Feliciano, and Julio Lacarte-Muró – to a final four-year term of office, which would expire in December 2001. The terms of four of the original Appellate Body members would expire on 11 December 1999. They were: Messrs. James Bacchus, Christopher Beeby, Said El-Naggar and Mitsuo Matsushita.

On 15 September 1999, he had met with the Chairman of the Appellate Body, Mr. Said El-Naggar, and two other members of the Appellate Body, Messrs. Julio Lacarte-Muró and Mitsuo Matsushita. They had informed him that two Appellate Body members did not intend to seek renewal of their terms. These two Appellate Body members, Messrs. Said El-Naggar and Mitsuo Matsushita, had cited personal reasons for their decisions to leave at the end of their terms of office, i.e. by 11 December 1999. The two other Appellate Body members whose terms would expire on 11 December 1999, Messrs. James Bacchus and Christopher Beeby had expressed their willingness and interest in being reappointed for a second four-year term.

These developments presented the DSB with two very important matters that required immediate consideration. He believed that it was important to treat these matters as two separate decisions to be taken by the DSB. The first was to extend, as soon as possible, the terms of office of the two Appellate Body members who were available for re-appointment for a second four-year term. The second was to decide on a selection process to replace the two departing Appellate Body members. He recalled the last time the DSB had to face this issue was in 1995, when the original seven Appellate Body members had been first selected.

He emphasized the tremendous importance of the work of the Appellate Body for the dispute settlement system as a whole. Currently, the Appellate Body was hearing five appeals and there were 21 additional cases before panels. The Appellate Body was facing a very heavy caseload, which had to be managed within very strict timeframes. For example, a "worst-case scenario" would be one in which only three members of the Appellate Body were left to rule on the ever-increasing number of appeals and other cases, such as arbitrations pursuant to Article 21 of the DSU. Therefore, it was imperative that there be no vacancies in the membership of the Appellate Body at the end of the year. For these reasons, he considered it to be of the utmost importance that Members develop a process that would allow the DSB to deal with this situation as quickly and effectively as possible. As there

was no time to lose, he had already begun consultations with some Members and these consultations would continue over the next few days.

He underlined that it was important to agree on the reappointment of two Appellate Body members as soon as possible and then to decide on a selection process to replace the two departing members. This was important because if all four members whose terms of office would expire on 11 December had to be selected, the Appellate Body would be left with only three members by the end of the year to deal with the ever-increasing number of appeals. If one of them had a conflict of interest, he would not be able to serve on an appeal proceeding. During his consultations with some delegations different views had been expressed on this matter. Some delegations were willing to reappoint the two members. Other delegations had stated that the selection process should be open to any applicants, including the two members whose terms of office would expire on 11 December 1999. Some Members had informally suggested the possibility of increasing the number of Appellate Body members. This issue had also been discussed in the DSU review but no consensus had been reached thereon. He proposed that delegations further reflect on this issue and that informal consultations be held in the next few days.

The DSB took note of the statement.