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DISPUTE SETTLEMENT BODY
21 February 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 February 1996

Chairman: Mr. C. Lafer (Brazil)

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1. Brazil - Measures affecting desiccated coconut
- Request by the Philippines for the establishment of a panel (WT/DS22/5)

The Chairman recalled that this matter had been proposed for inscription on the Agenda of the DSB meeting on 31 January. Its consideration was, however, postponed to the next meeting of the DSB. He then drew attention to the communication from the Philippines in document WT/DS22/5.

The representative of the Philippines said that since her country's request for the establishment of a panel was explained in WT/DS22/5 she wished only to point out that the 121.5 per cent countervailing duty imposed by Brazil on Philippine's exports of desiccated coconut was inconsistent with Brazil's obligations under Article VI of GATT 1994 and other related covered agreements. The measure nullified Philippine's benefits under the GATT 1994. In was her country's view that an investigation should not have been initiated by Brazil nor a countervailing duty have been imposed. Although several meetings had been held with Brazil over the last few months on this matter, it had not been possible to arrive at a mutually agreed solution. Therefore, the Philippines requested that

a panel be established at the present meeting and hoped that Brazil would be able to agree to this request.

The representative of Brazil recalled that his country's arguments concerning this dispute were contained in WT/DS22/3. During the last few months, Brazil and the Philippines had been discussing the question of applicable law, i.e., the legal framework to examine a countervailing measure imposed by Brazil on coconut imports from the Philippines. Brazil firmly believed that a measure should be reviewed against the same standards which had been used for its adoption. This principle was contained in Article 32.3 of the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM). Members had also agreed on that principle in the transitional arrangements negotiated in 1994[1]. Overturning this principle would not be very constructive and might cause serious problems for the WTO system. Members were formally and morally requested to abide by the rules which they had established. This issue involved important standards such as fairness, reasonableness and legality. Fairness, because all procedures, decisions and practices under a certain legal system ought to be examined. Reasonableness, since the Philippines had an effective remedy for their complaint in the Tokyo Round Subsidies Code which was in place for dispute settlement purposes until the end of 1996. Brazil was not against the reasonable right of the Philippines to seek redress to what it perceived as nullification and impairment of its benefits. Legality, because decisions had been taken to avoid "contamination" of the WTO with GATT cases. In December 1994, Members had decided that the Tokyo Round Code would be extended until December 1996 in order to deal with cases initiated under that Code, prior to the establishment of the WTO, and that the SCM Agreement would not apply to investigations initiated before 1 January 1995. Brazil and the Philippines were still discussing this matter. Brazil therefore considered that it was premature to establish a panel at the present meeting and wished the DSB to revert to this matter at its next meeting.

The representative of Indonesia, speaking on behalf of ASEAN countries, said that ASEAN countries supported the request for the establishment of a panel. The Philippines had only invoked its rights under Article VI of GATT 1994 to which Brazil was also bound. It had chosen neither to invoke the Tokyo Round Subsidies Code nor its rights under the SCM Agreement. Therefore, ASEAN countries did not support Brazil's view that the question of the applicable law should first be resolved. The Philippines had complied with the DSU requirements and the DSB would have to establish a panel. Indonesia and Malaysia had also been affected by the same measure taken by Brazil on 21 August 1995. The investigation initiated by Brazil on desiccated coconut was inconsistent with its obligations under Article VI of GATT 1994 and the WTO. This had resulted in definitive countervailing duties of 155.57 and 196.5 per cent for Indonesia and Malaysia respectively. He reiterated that Brazil had neither conducted the investigation transparently nor had it provided a reasonable opportunity for Indonesia and Malaysia to clarify the factual situation. Although a set of questionnaires had been answered, and some statistical data and various legal dispositions submitted, Brazil had neglected to take this information into account since it was not supplied in Portuguese. Brazil's Government which should have determined and calculated the subsidy margin on the basis of information available, had violated Article VI of the GATT 1994. Malaysia and Indonesia reserved their right to actively participate in the panel as third parties.

The representative of Sri Lanka said that his delegation supported the Philippines' request for the establishment of a panel. His country agreed with the Philippines on the rationale for a panel to examine the countervailing duties imposed by Brazil on exports of desiccated coconut from the Philippines. Sri Lanka was one of the countries which had also been severely affected by Brazil's action on desiccated coconut and coconut milk powder. The countervailing duty imposed by Brazil on 21 August 1995 on imports of desiccated coconut and coconut milk powder amounted to 81.4 per cent and 175.8 per cent respectively. Sri Lanka considered Brazil's action as unjustifiable and

[1] PC/15-L/7586 and PC/16-L7587

unreasonable because it violated Sri Lanka's rights under the GATT 1994. Consultations had been held with Brazil with a view to arriving at a mutually acceptable solution, but the outcome of these consultations had not been positive. Sri Lanka would hold further consultations with Brazil until all prospects of arriving at a mutual settlement were exhausted. Sri Lanka's exports of desiccated coconut and coconut milk powder had come to a halt as a result of Brazil's action. As his country had a direct trade interest in the matter, it reserved its third-party rights.

The representative of the Philippines thanked Brazil for elaborating on its position with respect to the application of Article VI of GATT 1994 contained in WT/DS22/3 and wished to make the following points. First, in past GATT practice it had been recognized that it was up to the complainant to decide whether it wanted to invoke the general GATT provisions -- in this case Article VI -- or the specific Tokyo Round Code provisions. There had been disputes in the past where parties had invoked their rights with respect to Article VI and not the Tokyo Round Codes. Second, the fact that Brazil's investigation had started in 1994 under the Tokyo Round Subsidies Code did not deprive the Philippines of their rights under GATT 1994 and the DSU. The Philippines' view was that the transitional provision in Article 32.3 of the SCM Agreement applied to the said Agreement itself and did not govern the application of Article VI of GATT 1994 which, since its entry into force in 1995, required Brazil to implement countervailing measures only in conformity with Article VI. Third, although the Tokyo Round Committee continued to be in place until the end of 1996, this did not preclude the Philippines from invoking its rights under GATT 1994. Moreover, the Decision of 8 December 1994 on Transitional Co-existence of the Tokyo Round Subsidies Code and the WTO Agreement confirmed the priority of WTO dispute settlement procedures over the Tokyo Round Subsidies Code. The Decision of 8 December 1994 on the consequences of termination of, or withdrawal of, the Tokyo Round Subsidies Code governed only the transition from the Tokyo Round Subsidies Code to the 1994 SCM Agreement. This Decision did not prevent the right of Members to invoke Article VI of GATT 1994 and the DSU. Fourth, Brazil had stated that Article VI of GATT 1947, as interpreted by the Tokyo Round Subsidies Code, was legally distinct from Article VI of GATT 1994, which in turn was interpreted by the 1994 SCM Agreement. To invoke Article VI of GATT 1994 "implied the adoption of the specific views of the WTO agreements as opposed to those of the Tokyo Round Agreements."[2] It was the Philippines' position that Article VI of GATT 1994 and the SCM Agreement were two distinct legal instruments and the Philippines was simply invoking its rights under Article VI of GATT 1994. Brazil also alleged that in spite of its repeated offers to consult no formal consultations ever took place. Consultations had not been held because Brazil refused to consult. She reiterated that on 27 November 1995 the Philippines had requested consultations under Article XXIII:1 on the consistency of Brazil's measure with respect to Article VI of GATT 1994. On 29 November the Philippines had notified the DSB, the Council for Trade in Goods, the Committee on Subsidies and Countervailing Measures and the Committee on Agriculture of its request. On 8 December, Brazil had offered to consult only under the Tokyo Round Subsidies Code. In a letter dated 13 December, the Philippines had stated that Brazil's response of 8 December constituted a refusal to consult under Article XXIII:1. Therefore the Philippines hoped that Brazil would be able to engage in Article XXIII:1 consultations within the 30-day period provided for in Article 4.3 of the DSU. On 10 January 1996 Brazil had responded to the Philippines' letter of 13 December 1995 and had reiterated its offer to consult only under the Tokyo Round Subsidies Code. On 15 January the Philippines had informed Brazil that, since Brazil maintained its position, the Philippines had no other recourse but to invoke Article XXIII:2 of GATT 1994 and Articles 4.3, 6 and 7.1 of the DSU. Thus, on 17 January the Philippines had requested the establishment of a panel. The Philippines sought redress from the actions of Brazil under Article VI of GATT 1994. It had faithfully adhered to the requirements in the DSU, and now requested the establishment of a panel. Since Brazil's did not agree with the establishment of a panel at the present meeting the Philippines requested a DSB meeting within 15 days in order to consider its request for the establishment of a panel.

[2]SCM/193, p.3.

The representative of Brazil said that his delegation noted all the statements made at the present meeting. He reiterated that this issue involved such important standards as fairness, reasonableness and legality as he had stated in the statement made earlier. He stressed that Brazil had never refused to consult. It had only insisted that consultations should be held under the Tokyo Round Code provisions. The question of applicable law was central to this case and if a panel was established Brazil would request a preliminary ruling on the question of the applicable law.

The DSB took note of the statements and agreed to convene its next meeting on 5 March in order to revert to this matter.

2. United States - Standards for reformulated and conventional gasoline
- Panel report (WT/DS2/R)

The Chairman recalled that at its meeting on 10 April 1995, the DSB had established a Panel to examine the complaint by Venezuela. On 31 May 1995 the DSB had established a Panel to examine the complaint concerning the same matter by Brazil. At that meeting, pursuant to Article 9 of the DSU in respect of multiple complaints the DSB had decided, with the agreement of all parties, that for practical reasons this matter be examined by the panel already established at the request of Venezuela on 10 April 1995. The Panel report, contained in document WT/DS2/R and circulated on 29 January 1996, was now before the DSB for adoption at the request of Venezuela.

Mr. Harbinson (Hong Kong), speaking in his personal capacity on behalf of Mr. Wong, Chairman of the Panel, said that the Panel had been established by the DSB on 10 April 1995 at the request of Venezuela. The Panel had been given standard terms of reference, with Mr. Joseph Wong as Chairman and Mr. Crawford Falconer and Mr. Kim Luotonen as panelists. Australia, Canada, the European Communities and Norway had reserved their rights to participate in the Panel proceedings as third parties. On 31 May 1995, the DSB had established a Panel on the same matter at the request of Brazil. Pursuant to Article 9 of the DSU in respect of multiple complainants the DSB had decided, with the agreement of all the parties, that for practical reasons this matter be examined by the Panel already established at the request of Venezuela. The Panel had met with the parties to the dispute from 10 to 12 July 1995 and from 13 to 15 September 1995. It had also met with the interested third parties on 11 July 1995. The Panel had issued its interim report to the parties on 11 December 1995. Following a request made by the United States pursuant to Article 15.2 of the DSU, the Panel had held a further meeting with the parties on 3 January 1996. The Panel had issued its final report to the parties to the dispute on 17 January 1996. The Panel had examined the final decision adopted on 15 December 1993 by the United States Environmental Protection Agency, "Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline" (the Gasoline Rule). After a thorough analysis of the underlying facts and arguments of the parties, and in the light of the findings contained in the final report, the Panel had concluded that the baseline establishment methods contained in the Gasoline Rule were not consistent with Article III:4 of the General Agreement, and could not be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement. The Panel had therefore recommended that the DSB request the United States to bring the measures in question in conformity with its obligations under the General Agreement. In concluding, the Panel had underlined that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, Members were free to set their own environmental objectives but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.

The representative of Venezuela expressed his delegation's gratitude to the panelists and the Secretariat for their meticulous and well-structured work. His country appreciated the time and efforts devoted to reviewing and analysing the facts and the legal arguments submitted by the parties during the proceedings, and the efforts in the search for a satisfactory settlement of the dispute. Parties to the dispute had been given equitable opportunity to participate in the proceedings both orally and in writing. The Panel's conclusions followed the same line of reasoning as that of other panels in GATT history. Several aspects of the Panel report deserved special mention. First, the report recognized explicitly that no rule or provision of the WTO Agreement prevented the United States from setting its own clean air standards. Members had sovereign authority in setting their own environmental objectives but they were bound to ensure that national standards and regulations accorded treatment to imported products which was no less favourable than that granted to like domestic products. Second, the report acknowledged what Venezuela had repeatedly stated to the United States namely, that the objectives of the Clean Air Act aimed at improving air quality were not questioned. Venezuela had brought the matter to the Panel to demonstrate that those objectives could be achieved without discriminating against imported gasoline and were in full conformity with the principle of national treatment laid down in Article III of the General Agreement. In this connection, the Panel upheld Venezuela's argument that there was no justification for the discriminatory aspects of the Gasoline Regulation, since several alternative methods were available to the United States to meet environmental objectives without distorting the competitive conditions between imported and domestically-produced gasoline. Far from seeking privileges or special treatment, all that Venezuela had asked of the United States was treatment for Venezuelan gasoline which was not less favourable than the treatment established in the Regulation for the like product of US origin. Therefore, the settlement of this dispute by means of the WTO procedures, had occurred despite Venezuela's wish.

From the beginning of the process of elaboration of the Gasoline Regulation in 1992 until 1994 his country had been proposing alternatives to the United States enabling to avoid all discrimination against imported gasoline. One of these alternatives was an agreement between the two countries to be applied in conformity with the most-favoured-nation principle. Unfortunately the US Congress, when enacting the Gasoline Regulation, had refused funds for putting that proposal into effect. Therefore Venezuela had decided to bring its complaint to the DSB. Thereafter, in the framework of the WTO dispute settlement proceedings, alternatives had been presented to the Panel which, after subjecting them to a thorough and balanced examination, had agreed with Venezuela that they were feasible both practically and legally. Some of the measures were fully consistent with the General Agreement, while others, which were less clearly consistent, at least had the virtue of generating a less trade restrictive effect. In the light of these considerations and in accordance with Article 16.4 of the DSU Venezuela had requested that the adoption of the report be included in the Agenda of the present meeting. However, the United States had notified its intention to apply for a review by the Appellate Body of certain legal aspects of the report. While recognizing that the United States had the right to appeal, its decision to do so could set a pattern which might be followed by Members where panel reports were unfavourable to them. Clearly, this would adversely affect the credibility of panel reports.

The representative of the United States said that the Panel report had been inscribed on the Agenda of the DSB for consideration at the present meeting. However since the United States had notified its decision to appeal certain legal issues, Article 16 of the DSU prevented consideration of the report for adoption at the present meeting. The DSB was not the appropriate forum to discuss the legal issues of the report that the United States had asked the Appellate Body to review which concerned the panel's consideration of Article XX of the General Agreement. However, the United States had serious concerns about the panel's treatment of issues not covered by this appeal. He was referring to what the United States considered a significant and inappropriate deviation from the customary practice that panels had followed in the past under the GATT 1947. Under past practice, panels had carefully avoided discussing legal issues that were uncontested during the panel proceedings, or unnecessary to the panel's findings in a particular dispute. Since Article XVI:1 of the WTO

Agreement affirmed that the WTO shall be guided by the customary practices of the bodies established in the framework of the GATT 1947, it was the United States' expectation that this panel would follow that practice. Regrettably, it did not. In responding to the claim that the US measure in question was inconsistent with Article III:4 of the GATT 1994, the United States did not contest that the measure openly treated imports differently than like domestic products, and the panel acknowledged this position. Nonetheless, the panel proceeded to discuss at length the issue of like products with reference to hypothetical situations not presented, and it did so in a manner that appeared to offer opinions on arguments and issues that had arisen or might arise in the context of disputes other than this one. Such discussion was inappropriate and should serve as a model for what future panels should not do. Article 11 of the DSU clearly set out the limited role of panels, which was "to make an objective assessment of the matter before it, including the facts of the case." By opining on matters that were neither contested nor necessary to reach its conclusions, the panel exceeded these limits. The GATT 1947 panel process gained the confidence of delegations negotiating the DSU in part because of the conservative approach panels generally took in confining themselves strictly to the issues presented for resolution. The departure of this panel from that principle, and its foray into unnecessary *obiter dicta*, did not set a good example for the new WTO system. The United States expected that future panels would refrain from such wandering into policy issues. It simply was not appropriate in the context of dispute settlement.

The representative of Brazil wished to express its gratitude to the panelists, who had put tremendous efforts in understanding and deciding this case, and to the Secretariat who had been efficient and reliable as usual. The decision by the United States to appeal did not, in Brazil's opinion, diminish the merits of this report. One of these merits was the finding that discrimination could not be justified if the disciplines were not respected. One of the other merits of the report was that, "under the General Agreement WTO Members are free to set their own environmental objectives, but they are bound to implement these objectives through measures consistent with its provisions, notably with those on the relative treatment of domestic and imported products".[3] Since the beginning of this dispute settlement procedure, his delegation had expressed its view that this was not an environmental case. Brazil continued to hold this view, and agreed with the conclusions of the panel in this respect.

The DSB took note of the statements and of the US decision to appeal to the Appellate Body the panel report in DS2/R.

3. Turkey - Action on imports of textiles and clothing
   - Statement by Hong Kong

The Chairman drew attention to the request for consultations by Hong Kong contained in WT/DS29/1.

The representative of Hong Kong said that his authorities fully respected the rights of Members to form customs unions or free-trade areas in accordance with the relevant provisions of the multilateral instruments which governed such matters. Nonetheless, Hong Kong was very much concerned that the implementation of customs unions or free-trade areas should not adversely affect other Members. He wished to raise Hong Kong's serious concern over a specific issue associated with the implementation of the Customs Union between Turkey and the European Community. On 1 January 1996, quantitative restrictions had been imposed by Turkey on the import of a broad range of textile and clothing products from Hong Kong and other sources i.e. a total of twenty-five suppliers. The imposition of these restrictions was unilateral and without prior notification. Hong Kong had written to the Turkish

[3]DS2/R para. 7.1.

authorities requesting details of the measures taken and their justification under the WTO Agreement. The response had not provided satisfactory or complete answers to the questions raised. Although the volume of trade affected was relatively small, at stake were important points of principle. The quantitative restrictions violated Article XI of the GATT 1994, which provided for their general elimination, and Article XIII, which required that any such restrictions be administered in a non-discriminatory manner. These restrictions were also inconsistent with Turkey's obligation under Article 2 of the Agreement on Textiles and Clothing (ATC), which stipulated that new restrictions shall not be introduced except under the relevant provisions thereof or GATT 1994. The objective of the ATC was to bring trade in textiles under the GATT disciplines over a period of ten years. During the transitional period, safeguards could only be invoked if serious damage, or actual threat thereof, could be demonstrated. Turkey's action had not met the above-mentioned criteria and the transitional safeguard provisions of the ATC had not been invoked. In the view of Hong Kong Article XXIV could not be interpreted to justify the introduction of the quantitative restrictions by Turkey. In an effort to resolve this issue, Hong Kong had requested consultations with Turkey on 12 February 1996, under Article XXII:1 of the GATT 1994 pursuant to Article 4 of the DSU. It hoped that Turkey would fully discharge its obligations under the GATT and the WTO and urged that the action taken by Turkey be rescinded. In light of the outcome of these consultations, it reserved its rights to take the matter further, should this prove to be necessary.

The representative of the Philippines, speaking on behalf of certain ASEAN countries, namely Malaysia, the Philippines and Thailand which had been affected by the unilateral imposition of quantitative restrictions by Turkey on certain textile and clothing products. At the meeting of the Council for Trade in Goods on 29 January, ASEAN countries had registered their serious concern with the measure taken by Turkey and had stated that they reserved their rights to pursue the matter under the relevant WTO provisions, including GATT 1994 and the ATC. Like Hong Kong, ASEAN countries respected the rights of a Member to form customs unions or free-trade areas in accordance with the relevant multilateral trade agreements. While they welcomed the implementation of the Customs Union between Turkey and the European Community, they believed that Turkey should have ensured that the implementation of the agreement was not at the expense of other Members' rights under relevant WTO provisions. The WTO was a rule-based institution and one expected reasonable compliance with all that was agreed to and that Members would not take actions which would undermine the credibility of the WTO. At the conclusion of the Uruguay Round, Members had committed themselves to bring trade in textiles under the disciplines of GATT 1994 and the ATC. Malaysia, the Philippines and Thailand wished to reserve their rights to participate in consultations requested by Hong Kong. They would also prefer Turkey to withdraw the quantitative restrictions that it had imposed.

The representative of India said that his delegation wished to be associated with the statement made by Hong Kong. India requested Turkey to take into account the serious concerns of Hong Kong and to withdraw the quantitative restrictions it had imposed. Should this not happen, India wished to reserve its rights under the WTO Agreement and, in parallel, wished to express its interest to be joined in consultations requested by Hong Kong.

The representative of Korea shared the concerns expressed by Hong Kong. As a matter of principle, a number of questions remained to be answered concerning the compatibility of this measure with Turkey's commitments under the WTO Agreement. His authorities were currently reviewing the substantive effect the Turkish measure had on Korea's trade, as well as the legal implications thereof. Pending the results of this review, Korea reserved its rights, including that under Article 4.11 of the DSU concerning the request, to be joined in consultations.

The representative of Peru said that his delegation echoed the views expressed by Hong Kong and wished to reserve its rights, including those under Article 4.11 of the DSU.

The representative of Argentina said that his country shared Hong Kong's concerns regarding the conformity of the unilateral measures adopted by Turkey which also affected imports from Argentina. Consultations were ongoing and Argentina wished to reserve its rights on this matter.

The representative of Colombia said that the concerns raised by Hong Kong deserved careful consideration. Colombia would be following these consultations very closely. It hoped that this matter could be resolved in the best possible manner.

The representative of Brazil said that its exports of textiles and clothing had also been affected by the unilateral measure taken by Turkey. Brazil, therefore, wished to reserve its rights on this issue, including those under Article 4.11 of the DSU.

The representative of Pakistan said that the issue raised by Hong Kong had been discussed by the Committee on Trade and Development (CTD) at its meeting on 29 January. On that occasion, Pakistan had understood Turkey's natural disposition to forge closer relations with the European Communities located in close proximity of that market. His country however noted with disappointment that the formation of the Customs Union had resulted in raising discriminatory barriers against the trade of third countries including Pakistan. Pakistan felt that this raised valid questions about the compatibility of such restrictions with the requirements of the relevant provisions of the GATT. Pakistan noted Hong Kong's statement and would follow with deep interest the consultations requested by it.

The representative of Turkey said that his country had accepted to enter into bilateral consultations with Hong Kong in order to discuss this matter which was covered by Article XXIV:8(a) of the GATT 1994. Turkey was ready to fix a mutually agreed date for consultations with Hong Kong. His delegation noted the statements made at the present meeting and would consider the possible further requests, taking into account the relevant provisions of the WTO Agreement.

The representative of the European Communities informed the DSB that the Communities wished to be joined in the consultations requested by Hong Kong. The measures, as indicated by Turkey, resulted from the implementation of treaty establishing the Customs Union between Turkey and the European Community and were, in the view of the Communities, consistent with the provisions of the General Agreement and in particular were covered by Article XXIV:8.

The representative of Hong Kong said that his delegation noted the request of the Communities to be joined in consultations in accordance with Article 4.11 of the DSU. The language of Article 4.11 was clear in that any claim of substantial interest would be for the responding party, in this case Turkey, to agree. Also, if the request to join consultations was denied then the Member requesting to join consultations might proceed to initiate their own consultations. In the present case, any such request to join consultations were requests to join Hong Kong in consultations with Turkey. The purpose of such requests could not be to join Turkey in consultations with Hong Kong. Otherwise, the decision as to whether the requesting party should be joined in the consultations would be in the hands of Hong Kong rather than Turkey. Hong Kong had no wish to be difficult in this, but hoped that due consideration would be given to the above view on the systemic aspects of this case. Hong Kong was glad that Turkey agreed to bilateral consultations. He referred to a letter from the Turkish authorities indicating that it would not be convenient for them to consult in Geneva in the week beginning of the 11 March, which was the date suggested by Hong Kong. He hoped that in light of the interest which had been expressed by a number of delegations, Turkey might reconsider this matter because given the number of delegations interested, and given the fact that this dispute was taking place under multilateral instruments, it would be far more convenient for consultations to take place on neutral ground.

The DSB took note of the statements.

4. United States - Restrictions on imports of cotton and man-made fibre underwear
- Statement by Costa Rica

The representative of Costa Rica, speaking under "Other Business", recalled that at the DSB meeting on 31 January his delegation had informed the DSB that on 22 December 1995 Costa Rica had requested consultations with the United States with regard to the restrictions on Costa Rica's exports of cotton and man-made fibre underwear (category 352/652). However, these consultations did not arrive at a mutually satisfactory solution. Since the 60-day period for consultations had already expired, Costa Rica would soon request the establishment of a panel to examine this matter. In order for the panel to be established as quickly as possible, Costa Rica wished to request that a meeting of the DSB be convened for this purpose as provided for in footnote 5 of Article 6 of the DSU.

The DSB took note of the statement.

5. Appellate Body - Working Procedures for Appellate Review
- Statement by the Chairman

The Chairman, speaking under "Other Business", recalled that the Appellate Body's Working Procedures for Appellate Review which came into force on 15 February, had been circulated in WT/AB/WP/1. On 19 February informal consultations had been held for the purpose of providing a technical briefing on the Working Procedures during the course of which questions and comments had been made by Members. The package circulated on 15 February contained both the Working Procedures adopted by the Appellate Body and a covering letter from the Chairman of the Appellate Body to the DSB Chairman. The letter addressed the issues raised by Members which had been conveyed to the Appellate Body during the consultations held by the outgoing and incoming Chairmen of the DSB in accordance with the Decision on the Establishment of the Appellate Body contained in WT/DSB/1. It also explained the Appellate Body's reasons for its conclusions on certain key elements of the Working Procedures. For example, on issues of establishment of divisions, rotation and collegiality.

The consultations that he had held on behalf of Members with the Appellate Body, pursuant to Article 17.9 of the DSU and the DSB Decision on the Establishment of the Appellate Body, had the objective of making the Appellate Body aware of the concerns of Members. It was important to familiarize the Appellate Body with the sensitivities of the WTO and its "climate of opinion". Article 17.9 of the DSU contemplated neither a negotiations process nor a formal approval by the DSB of the Appellate Body's working procedures. The consultations contemplated in the DSU and the DSB Decision on the Establishment of the Appellate Body were in the nature of an advice - *consilium* - counsel to, and for the benefit of, the Appellate Body, but not a command - *praeceptum* - that obliged the Appellate Body. Aquinas - distinguished between *praeceptum* - command and *consilium* - advice, by saying that *praeceptum* implied necessity to obey, while *consilium* provided options for those to whom they were given. The Working Procedures for Appellate Review were legally in effect, as of 15 February. They could be modified through the amendment procedure set out in Rule 32 of the Working Procedures. Finally, he drew the attention of Members to the fact that the Appellate Body had decided that the Working Procedures for Appellate Review would be issued as an unrestricted document.

The representative of Mexico recalled that in accordance with Article 17.9 of the DSU "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information". Mexico had hoped that its concerns, as well as other Members' concerns expressed during the informal consultations, would be reflected in the Appellate Body's Working Procedures. However, he noticed that this was not the case. His country's concerns pertained to the issues of collegiality and nationality of Appellate

Body members which might affect the integrity and credibility of the dispute settlement mechanism. In accordance with Rule 4.3 of the Working Procedures "the division responsible for deciding each appeal shall exchange views with the other members before the division finalizes the appellate report for circulation to WTO Members". In other words, the seven members of the Appellate Body would influence the final decision through an exchange of views before the appellate report is finalized. However, Article 17.1 of the DSU provided that "the Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation". He recalled that collegiality was a new concept alien to the issues negotiated in the Uruguay Round. When Article 17 of the DSU was negotiated the idea was that each appellate review would be carried out only by three members of the Appellate Body. On the one hand, Article V:4(b)(i) of the Rules of Conduct stated that persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case (i.e. the three persons) shall review the factual portion of the panel report and complete the form at Annex 3. On the other hand, Rule 9.1, of the Working Procedures of the Appellate Body stated that each member (i.e. each of the seven members) shall take the steps set out in Article V:4(b)(i) of the Rules of Conduct.

Mexico was also concerned that Rule 6.2 of the Working Procedures provided for the "opportunity for all members to serve regardless of their national origin". He recalled that GATT practice, as well as Article 8.3 of the DSU were clear that "citizens of Members whose governments are parties to the dispute or third parties…shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise". This was the best way to avoid possible direct or indirect conflict of interest. His authorities did not doubt the impartiality, honesty and moral integrity of the Appellate Body members. However, it would be very difficult for Mexico, and perhaps for other Members, to explain to some sectors of its national public opinion, in particular those who disagree with free trade, that in a lost dispute a citizen of the other party was a member of the Appellate Body, while no Mexican citizen had the same possibility.

His delegation hoped that the members of the Appellate Body would urgently reconsider the need to maintain the concepts of collegiality and nationality. Mexico reserved its rights under Article 17.1 of the DSU with regard to collegiality. It would also seek, if it considered appropriate, to define more precisely the notion "direct or indirect conflict of interest" in Article 17.3 of the DSU through the Rules of Conduct which were still subject to negotiations.

The representative of Egypt welcomed the fact that the Appellate Body finalized its Working Procedures. His delegation would have wished to have been consulted further in the process of the preparation of the Working Procedures. However, the covering letter from the Chairman of the Appellate Body explained the various issues which would have raised some concerns. Egypt was not concerned over collegiality or over nationality. Appellate Body members would be receiving documents related to all appeals. In accordance with Rule 4.3 of the Working Procedures, the division deciding each appeal shall exchange views -- not consult -- with other members. Working Procedures required only an exchange of views not that due consideration be given to the views expressed. However, the seven members would be overburdened with work since they would have to work as if they were involved in each and every case. They would have to study and reflect on documents circulated to them and in due course exchange their views. As to the question of nationality of members, all precautions had already been taken prior to their selection. Although the Rules of Conduct had not yet been adopted, the Appellate Body should be bound by these same rules since there were not other such rules available. In connection with Rule 8.1 of the Working Procedures which indicated that the Rules of Conduct for the DSU had only been adopted on a provisional basis, Egypt's position was that the same rules would govern not only the Appellate Body but also the Textiles Monitoring Body. In case these rules were amended in future, ag greater transparency should be observed. While Members would not be

involved in negotiating amendments, at least their views would be made known to the Appellate Body members.

The representative of India said his country had already raised some concerns with regard to the Working Procedures and the letter from the Chairman of the Appellate Body during the informal consultations on 19 February. At the present meeting he wished to share some systemic concerns and to draw attention to the substance of the Working Procedures. He recognized that not all concerns could be dealt with by the Appellate Body and that some of them would have to be dealt with by the DSB. At the present meeting he wished only to enumerate those concerns so that in the future Members would be able to deal with them in a manner consistent with the roles that the DSU assigned to the DSB and the Appellate Body.

On the issue of collegiality Members had had different views regarding the extent to which the four members not serving on a division should influence the decision of the division. In his view any process which would enable the four members not serving on the division to be involved in the dispute was contrary to the letter and spirit of Article 17.1 of the DSU. He also mentioned that the circumstances under which the concept of collegiality was brought to the forefront could not be ignored. Rule 4.3 of the Working Procedures was not in accordance with Article 17.1 of the DSU and this problem could not be resolved through Rule 4.4 which is clearly inconsistent with Rule 4.3.

With regard to the question of nationality, there were some practical reasons which made it difficult to have a requirement that a member of the Appellate Body should stand aside in an appeal involving that member's country of origin. Article 17.3 of the DSU stipulated that the Appellate Body members should not participate in the consideration of any dispute that would create a direct or indirect conflict of interest. It was a moot point whether the nationality of a member created a conflict of interest. While one should not attach nationality tags to the Appellate Body members it would have been better for the credibility of the system if a mechanism had been devised to enable an appellant or appellee to convey informally his concerns about an Appellate Body member who was a citizen of a country involved in the dispute. Disputes brought to the Appellate Body were bound to acquire high political visibility and media attention. Therefore, it would not be wise to ignore perceptions. Although Rule 6.2 of the Working Procedures specified the principle of rotation, its mechanics were not spelled out. The DSB needed to be assured that the mechanism for ensuring rotation was reliable.

Rules 8, 9, 10 and 11 had been adopted on a provisional basis and Rule 8.1 implied that Rules of Conduct were not yet approved by the DSB. India was concerned that certain rules acquired legitimacy even before they were brought before the DSB and Members had to find ways of ensuring that this did not recur in the future. He noted that there was some dichotomy. The Appellate Body believed that dealing with the issue of nationality in any other way would be unnecessary in view of the qualifications required for membership of the Appellate Body and undesirable because it would cast doubts on the capacity of the Appellate Body members to be independent and impartial. However, the Appellate Body was willing to accept a situation where there would be a challenge on the basis of financial or professional interests. If the qualifications of the Appellate Body members and their selection process had ensured independence and impartiality in decision-making then there would be not need for the Appellate Body members to have Rules of Conduct.

Rule 32.2 of the Working Procedures stipulated that the Appellate Body might amend its rules in compliance with Article 17.9 of the DSU. In accordance with WT/DSB/1 the DSB Chairman should consult with the Members in order to obtain their views prior to advising the Appellate Body on the working procedures. It would be an anomalous situation if the Members were consulted by the Chairman at the initial stage of preparation of the Working Procedures but not when they would be subsequently amended.

He also had a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU. As to Rule 29 regarding failure to appear, it was not clear as to how the views of a participant who failed to make a written submission and to appear could be heard.

He also noted that the letter of the Chairman of the Appellate Body indicated that the Appellate Body had held consultations with the Chairman of the DSB in December 1995 and January and February 1996. However, the first informal consultations with the Members on this subject had been held on 1 February. It would have been appropriate and useful if informal consultations on this subject had been initiated in December. The Appellate Body members would have been sensitized to various concerns and issues prior to drawing up of their working procedures. If consultations had been held in time Members would probably not face the difficulties at the present meeting. He recalled that the Chairman of the DSB, whenever provided an input to the Appellate Body regarding working procedures was performing an official duty assigned to him in the DSU. It would not be unfair for the collectivity of the DSB to expect that the Chairman would consult Members before providing an input to the Appellate Body, even if there had been no decision by the DSB that the Chairman should consult Members before advising the Appellate Body. He was glad that the Appellate Body had expressed formally its strong commitment to the dispute settlement system as a whole. Countries involved in the Uruguay Round negotiations had the vision and courage to opt for a strengthened dispute settlement system with the Appellate Body at the apex of that system. Members were unlikely to be less committed to the integrity of the dispute settlement system as a whole than anybody else.

The representative of the United States thanked the Chairman for holding the informal meeting on 19 February concerning the Working Procedures for Appellate Review. The technical briefing provided at that meeting had been very useful. On that occasion the United States had expressed some concerns, and in view of the Chairman's commitment to relay those concerns to the Appellate Body, he did not see the need to reiterate them at the present meeting. However, he wished to register some of the clarifications that delegations had received concerning two issues. First, the Appellate Body Secretariat had confirmed that the decisions of the Appellate Body might only "uphold, modify or reverse" the legal findings or conclusions of the panel as provided for in Article 17.13 of the DSU. The United States fully understood that the Appellate Body Secretariat did not presume to speak for the Appellate Body itself, but this helped to clarify the references in Rules 21 and 22 to "the nature of the decision or ruling sought". Second, the proof of service requirement in the Working Procedures could lead to a needless waste of paper. His country noted that the Appellate Body Secretariat had confirmed that proof of service might be provided in a manner consistent with the current practice of indicating on the document itself the parties to whom copies had been sent. He further noted that the Working Procedures were far from perfect. In particular Rule 29 was disturbing in its implications for possible sanctions against Members. However, it would be better to live for a while with the problems that these rules presented rather than have the Appellate Body entering into a series of too frequent modifications of these new rules.

The representative of Chile supported the statements made by Mexico and India with regard to the question of collegiality. Rule 4.3 of the Working Procedures went beyond what was authorized under the DSU. A division consisting of three members was to decide an appeal and under no circumstances was an exchange of views with other members to take place. An attempt had been made

to ensure flexibility in time periods provided for in Rules 18.1 and 29. However, this should not be turned to the disadvantage of the parties. He recalled that the DSU had not authorized the Appellate Body to establish time-periods or to consider the failure to submit a written submission. While Chile was aware that the Working Procedures had been established in accordance with Article 17.9 of the DSU. It wished the Appellate Body to take into consideration the concerns expressed by Members in order to ensure fairness in the implementation of procedural aspects of the Appellate Body.

The representative of Canada said that her country was very interested in the Appellate Body's Working Procedures and had made several suggestions with regard to some important elements of these procedures. The Working Procedures as presently drafted incorporated worthy principles. However, Canada identified some questions and concerns with regard to a few aspects of these procedures. Her country intended to follow closely the application of these procedures. It expected that they would be applied in a practical and flexible manner and that with time Canada's questions would be answered and its concerns would turn out to be unjustified. Her delegation was certain that the Appellate Body would also be closely watching how these procedures worked in practice and would be receptive to the comments and concerns which Members might express at a later date prior to any review of these procedures by the Appellate Body.

The representative of the European Communities said that, like other delegations, the Communities clearly accepted the premise on which the debate in this forum was taking place. The Working Procedures were indeed now operational as indicated in the informal meeting on 19 February and Members were not involved at this stage in any negotiating process. However, the Communities had a number of concerns. The practical concern had already been addressed by the United States and the Communities shared the United States' views. His delegation was concerned in particular with the question of the service of documents as required by Rule 18 and was grateful for the confirmation that, as far as possible, the existing practice would continue. However, Rule 18 should be applied with a degree of flexibility which would indeed allow for the use of technology, the fax machine and copying which would facilitate what could otherwise be a burdensome extra obligation. The legal and judicial concern related to Rule 29; the Communities had a very genuine concern that, in fact, a new law had been created in the sense that failure to make a submission within a prescribed time-limit or to appear in an oral hearing could have the result of the dismissal of the appeal. This was a serious issue which should be drawn to the attention of the Appellate Body. The Community hoped that judgement by default would be the rare exception to the rule and that those concerns be communicated to the Appellate Body. The linguistic concern related to the French and Spanish language versions of the text. The Communities would be submitting some comments in writing as soon as they were available. He stressed that these comments did not relate to substance. The objective was only to ensure conformity as between one language version and another. Rule 8.1 of the working procedures stipulated that on a provisional basis the Appellate Body would adopt only those rules which are applicable to it. But the text of the Rules of Conduct was clear in all cases as to which rules were applicable to it. In other words a rule of *mutatis mutandis* could well apply but one had to be certain what the *mutandis* element contained. For example, on page 17 of the document WT/AB/WP/1 would the footnote on that page fall into the category of the *mutandis*? The Communities would be watching the application of the rules of procedure in the light of experience and hopefully some of the concerns would dissipate. They would be grateful if those concerns could be conveyed to the Appellate Body.

The DSB took note of the statements.