WORLD TRADE ORGANIZATION

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Dispute Settlement Body
7 June 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 7 June 2000

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

1. United States – Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom

(a) Report of the Appellate Body (WT/DS138/AB/R) and Report of the Panel (WT/DS138/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS138/8 transmitting the Appellate Body Report on "United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom", which had been circulated in document WT/DS138/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

2. The representative of the European Communities said that the EC welcomed the Appellate Body Report, which had upheld the Panel's findings that the imposition of countervailing duties by the United States was inconsistent with the provisions of the Agreement on the Subsidies and Countervailing Measures (SCM). The Appellate Body had confirmed that in conducting a countervailing duty investigation concerning a firm that was privatized or otherwise changed ownership, one had to examine whether, during the investigation period, a benefit had accrued to that firm. Therefore, the United States could not continue its present practice of irrefutably presuming that subsidies granted before the change of ownership "passed through" to the current producer of the product concerned. The Appellate Body had also confirmed that where a firm was privatized or otherwise changed ownership for fair market value, prior subsidies conferred no benefit to the successor company. It was now up to the United States to change its countervailing duty practice to prevent this situation from arising in future investigations and reviews, and to promptly review the large number of outstanding countervailing duty orders which involved pre-privatization subsidies, in order to bring them into conformity with the Appellate Body's findings.

3. A number of steps were required to this end and the first step could be taken immediately. Although the United States had terminated its measures on the lead and bismuth steel from the United Kingdom, there was an outstanding countervailing duty order on cut-to-length carbon steel plate from the United Kingdom. The United States had imposed that measure in July 1993 and, on

29 March 2000, the US Department of Commerce (the US Department) had concluded, in the framework of a sunset review, that the alleged subsidization would continue. The company involved was British Steel plc. the same that had been subject to measures in the Lead and Bismuth case. The alleged subsidies as well as the circumstances of the privatization were the same. The Appellate Body had found that British Steel plc. (now Corus) had received no subsidy. Therefore, the United States should terminate the proceeding immediately.

4. The next step concerned the outstanding countervailing orders on other EC privatized companies. The EC would soon enter into consultations with the United States on a number of these cases, which all involved subsidies granted prior to privatizations at a fair market value. In none of these cases, had the United States examined whether a benefit had accrued to the firms concerned nor had it taken into account the nature of privatization. In the light of the Appellate Body report, the United States had to do this now. The EC looked forward to a prompt review of the measures in question to be carried out on this basis. Finally, the United States would have to change its countervailing practices to ensure that its methodology used with regard to lead and bismuth could not be repeated in the future. The EC looked forward to a good faith implementation of this important ruling to avoid unnecessary litigation in the future.

5. The EC considered that the way the Appellate Body had dealt with the issue of *amicus curiae* briefs was not entirely satisfactory. The Appellate Body had made it clear that individuals and organisations that were not WTO Members had no legal right to make submissions to, or to be heard by, the Appellate Body and that the Appellate Body did not have the legal authority to accept or consider unsolicited *amicus curiae* briefs submitted by non-WTO parties. Nevertheless, the Appellate Body had concluded that it had the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it found it pertinent to do so. However, the Appellate Body did not provide any guidance under what circumstances it might find it pertinent to consider *amicus curiae* briefs nor how this would be reflected in its Working Procedures.

6. The representative of the United States said that her country had always implemented the DSB's recommendations promptly and in good faith. It should not come as a surprise that the United States was disappointed with the Panel and Appellate Body Reports and that it fundamentally disagreed with their contents. It remained the US view that subsidies did not disappear simply because the ownership of a subsidized firm changed and the new owner paid a fair market value for the subsidized assets that it had acquired. The United States did not wish to engage in a re-argument of the substantive issues in this case. However, it was compelled to comment on one aspect of the analysis of Reports which involved systemic concerns.

7. In the proceedings, the United States had demonstrated that if the Panel's findings were allowed to stand, Members could easily circumvent the remedies authorized by the SCM Agreement against subsidies that caused injury. The United States had referred to a situation in which a government that invested £1 billion to build a steel facility which, due to market conditions, was worth only £400 million based on the income stream that the facility was to be able to generate. Immediately after the facility was built, the government decided to sell it to a private entity that agreed to pay what the facility was worth: i.e. £400 million. Since the private purchaser paid only £400 million for a facility that would have cost it £1 billion to build on its own, the company was able to compete with lower prices for its steel because its cost was artificially lower. However, according to the Panel and the Appellate Body, this effective gift of at least £600 million could not be countervailed because the private purchaser had paid what the facility was worth. In the US view, this was an absurd outcome which undermined one of the objectives and purposes of the SCM Agreement, namely, to provide a remedy against government subsidies that distorted trade. Because the outcome was so absurd, it raised very serious questions about the validity of the Panel's interpretative analysis. However, the United States was in particular concerned that the Appellate Body had not addressed that argument at all. The credibility of the dispute settlement system would be affected, if

fundamental arguments were not addressed or interpretations that undermined the basic objectives of an agreement were adopted.

8. However, there was one positive aspect of the Appellate Body Report, namely, its finding that the Appellate Body had the authority to take into account submissions by interested private parties, so-called *amicus curiae* briefs. By allowing affected private parties to present their views in WTO appeals, the Appellate Body had taken a positive step towards making the WTO more open and enhancing public confidence in the dispute settlement process. The possibility to make *amicus curiae* submissions in an appeal built on the possibility to do so at the panel level. This seemed to have worked well and the same should be true at the appeal level. As her delegation had noted in the Appellate Body proceeding, the United States was confident that the Appellate Body was fully able to adopt procedures for *amicus curiae* submissions so as to benefit from them without unduly burdening the system or the parties. The United States, therefore, welcomed the Appellate Body's findings on *amicus curiae* submissions.

9. The representative of Mexico said that his country had participated in the dispute at hand as a third party due to its interest in ensuring that the provisions of the SCM Agreement were being applied properly. In Mexico's view, the Panel had correctly concluded that the three administrative reviews carried out by the United States and the resulting countervailing duties were inconsistent with Article 10 of the SCM Agreement. The manner in which the Panel and the Appellate Body had interpreted the concept of "benefit" was particularly sound. Nevertheless, Mexico believed that a conclusion on Article 19.4 of SCM Agreement would have considerably added to the security and predictability of the multilateral trading system. Mexico particularly welcomed the Panel's suggestion in paragraph 8.2 of its Report that the United States take "… all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned violation of Article 10 of the SCM Agreement from arising in the future". This would allow other companies to benefit from the outcome of this case.

10. With regard to the submission of *amicus curiae* briefs by entities not related to the WTO, the Appellate Body had rightly observed that the participation in panels or the Appellate Body proceedings was reserved exclusively to WTO Members, and specifically to the parties and third parties to a dispute. On this basis, the Appellate Body had correctly stated in paragraph 41 of its Report that "… individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body". However, the authority granted to the Appellate Body under Article 17.9 of the DSU should not be seen as a way to legitimize such submissions. Had the Appellate Body accepted the so-called *amicus curiae* submissions that would have affected the rights of Members, in particular the rights of parties and third parties, arising from the covered agreements and the DSU, which prevailed over the working procedures of the Appellate Body. The outcome of this case was beneficial to the WTO and would encourage efforts being made by Members, in particular developing-country Members, towards privatization.

11. The representative of Canada said that his delegation wished to comment on the preliminary procedural matter decided upon by the Appellate Body with respect to *amicus curiae* briefs. The Appellate Body had stated that it had the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it found it "pertinent and useful to do so"(paragraph 42 of the AB Report). The Appellate Body had pointed that Article 17.9 of the DSU provided that working procedures should be drawn up by the Appellate Body in consultation with the DSB Chairman and the Director-General. The Appellate Body had stated that Article 17.9 made it clear that it had broad authority to adopt procedural rules which did not conflict with any rules and procedures of the DSU and the covered agreements. The Appellate Body had concluded that as long as it acted consistently with the provisions of the DSU and the covered agreements, it had the legal authority to decide whether or not to accept and consider any information it believed to be pertinent and useful in an appeal. Canada had a number of concerns about the Appellate Body's ruling on this issue.

12. First, Canada questioned whether the general authority under Article 17.9 of the DSU to draw up working procedures provided a sufficient legal basis for the Appellate Body to accept and consider *amicus curiae* briefs. Second, the Appellate Body had provided no guidance as to when, in future cases, it would be prepared to accept and consider *amicus curiae* briefs. Third, by explicitly recognizing that it had to act consistently with the DSU provisions, the Appellate Body seemed to have precluded its consideration of *amicus curiae* briefs that contained new facts, or that sought to re-argue issues of facts already decided by the Panel. To do otherwise would contravene Article 17.6 of the DSU, which limited the jurisdiction of the Appellate Body to issues of law. However, the Appellate Body's reasons did not specifically address whether it could consider factual information contained in an *amicus curiae* submission. The Appellate Body's decision on this critical issue was more than a matter of procedure. It highlighted the need for Members to decide and clarify, in the DSU rules, whether *amicus curiae* briefs should be permitted and, if so, under what conditions. Canada was aware that the issue of *amicus curiae* briefs raised many complex and controversial issues which could not be resolved at the present meeting. Those issues were of systemic concern and, as such, should only be addressed by Members.

13. The representative of Japan said that his country had serious concerns with regard to the Appellate Body's interpretation of the treatment of *amicus curiae* briefs. Japan had expressed its position on this issue at the DSB meeting on 6 November 1998 upon adoption of the Panel and the Appellate Body reports in the Shrimp case.[1] That position had not changed since then. In the Report before the DSB, the Appellate Body had argued that "as long as we act consistently with the provisions of the DSU and of the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal" (paragraph 39 of the AB Report). As a legal basis for its argument, the Appellate Body had only referred to Article 17.9 of the DSU and in Japan's view that was not convincing. The issue of the treatment of *amicus curiae* briefs should be decided by Members, possibly through the clarification of the current DSU provisions. He regretted that the Appellate Body repeatedly made findings on this controversial issue without taking into consideration the opposite view expressed by many Members.

14. The representative of Argentina said that his country also wished to express its view on the systemic issue of the Appellate Body's decision concerning its authority to accept and consider *amicus curiae* briefs submitted in an appeal. The Appellate Body had recognized that the authority to accept and consider *amicus curiae* briefs was not specifically provided for in the DSU nor in the Working Procedures for Appellate Review. However, the Appellate Body had concluded that its authority was covered by the authority to adopt rules granted to it under Article 17.9 of the DSU. Argentina did not share the Appellate Body's interpretation thereon. First, it was not clear that the procedural rule established in this case was authorized by the DSU. The dispute settlement system established intergovernmental procedures and the authority to accept and consider unsolicited briefs submitted by individuals or organizations, not Members of the WTO, could distort the character of dispute settlement procedures. Access to the WTO dispute settlement procedure was restricted to WTO Members and panels, and the Appellate Body only had a duty to consider submissions from parties or third parties in a given dispute. The authority to accept and consider *amicus curiae* briefs appeared less justified if one took into account the fact that an appeal had to be limited to issues of law covered in panel reports and to legal interpretations developed by panels. Furthermore, recognition of the authority to accept *amicus curiae* briefs raised a number of doubts over the rights of Members that were neither parties nor third parties in a dispute. The question was whether those Members had the right to make voluntary submissions that might be accepted and considered by panels or the Appellate Body. If not, this would entail that they would have less rights than individuals or organizations that were not Members of the WTO. Argentina believed that recognition of the authority to accept and consider *amicus curiae* briefs raised many complex problems. Furthermore, the interpretation made by the Appellate Body exceeded its authority to establish working procedures for Appellate Review.

[1] WT/DS58

15. The representative of Hong Kong, China said that the dispute under consideration raised a number of systemic issues that deserved Members' attention and examination. Hong Kong, China was concerned about the Appellate Body's view on the question of *amicus curiae* briefs (paragraphs 36-42 of the AB Report). In paragraph 42, the Appellate Body had stated: "We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal proceedings in which we find it pertinent and useful to do so." The Appellate Body's view was legally unsound and practically problematic. To justify its claim, the Appellate Body had relied upon its interpretation of Article 17.9 of the DSU. However, that Article concerned only procedures for Appellate Review and allowed the Appellate Body to draw up its working procedures under certain constraints. Therefore, the issues to be considered in this context had to be procedural. However, the acceptance by the Appellate Body of *amicus curiae* briefs was not a procedural but a substantive matter. It affected the inter-governmental character of the WTO as well as Members' rights and the obligations. It might also affect the Appellate Body rulings in other cases. Therefore, Article 17.9 of the DSU and, by extension, the Working Procedures for Appellate Review were not applicable to substantive issues. Moreover, the acceptance of *amicus curiae* briefs by the Appellate Body was not explicitly provided for in the DSU nor had it been envisaged during the negotiations of the DSU. The unilateral expansion by the Appellate Body of its legal authority, which went beyond the DSU, was not only an act of judicial activism but also a violation of the amendment provisions under Article X:8 of the WTO Agreement. Furthermore, the acceptance of a brief which contained factual information was contrary to the letter and spirit of Article 17.6 of the DSU. The Appellate Body's view was practically problematic and was not a model of clarity. The only criterion put forward by the Appellate Body to distinguish which briefs to accept or not was to state "in which we find it pertinent and useful to do so". However, the question was what could be considered to be useful. The Appellate Body had refused to bind its discretion, which it should not have, *ex ante*, in this respect. Member were thus left with some uncertainty. Moreover, if the Appellate Body accepted what the Panel had previously rejected, it would take its decision on an evidentiary basis which did not correspond to that of the Panel. Hong Kong, China reiterated that the Appellate Body's view on the question of *amicus curiae* briefs was legally unsound and practically problematic.

16. The representative of Hungary said that his delegation wished to make comments on the issue of acceptance of *amicus curiae* briefs by the Appellate Body. This was without prejudice to Hungary's consistently open-minded position on whether or not *amicus curiae* submissions should be accepted in dispute settlement proceedings. Hungary was concerned about the approach taken by the Appellate Body on this issue. In Hungary's view, that issue went beyond a question of procedure. It affected the intergovernmental character of the dispute settlement mechanism and, as such, it constituted an issue of substance with far-reaching implications. It was up to Members to decide on this matter. Hungary was also concerned that the Appellate Body in taking its decision that it had the legal authority to decide as to whether or not to accept and consider *amicus curiae* briefs, had not elaborated on the criteria for its decision. Members were, therefore, left without any guidance with regard to future cases and this was a systemic problem.

17. The representative of India said that although his country had not participated as a third party in the dispute at hand, it wished to comment on two systemic issues. First, India noted with satisfaction that the Appellate Body had reiterated its earlier decision that the standard of review in Article 17.6 of the Anti-Dumping Agreement (ADA) was only relevant to the ADA. In this case, the Appellate Body had ruled more specifically that the standard of review provided for in Article 17.6 of the ADA was not applicable to the SCM Agreement. India believed this was a good and timely contribution of the Appellate Body to the multilateral trading system.

18. With regard to the issue of acceptance of *amicus curiae* briefs, India continued to have serious reservations on the approach taken by the Appellate Body. India was not convinced that the DSU permitted, by not prohibiting, panels and the Appellate Body to consider *amicus curiae* briefs. Such an interpretation was resulting in a situation in which not only non-governmental voluntary

organisations, but also powerful business associations, like in this dispute, would be able to intervene in the dispute settlement process. This was not a good development for the long-term functioning of the dispute settlement system, which was meant to be a mechanism for the resolution of disputes between Members. India believed that this was not merely a procedural but rather substantive matter. India was also surprised about the analysis contained in paragraph 39 of the Appellate Body Report. There was no provision in the working procedures, which had been drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General of the WTO and communicated by the Appellate Body to the Members, that enabled the Appellate Body to accept *amicus curiae* briefs. The Appellate Body had argued that neither the DSU nor the working procedures explicitly prohibited acceptance or consideration of such briefs. In India's view, this approach was completely against the basis on which the DSU had been negotiated. India questioned whether in any system it was possible to list all the prohibitions in order to prevent a situation faced in this case. India considered that an approach which was not explicitly prohibited and was permitted on a discretionary basis, might not be consistent with the predictability and security of a rule-based system.

19. The representative of the Philippines said that his country shared and supported the concerns expressed by previous speakers with regard to paragraph 42 of the Appellate Body Report. In accordance with the Appellate Body, the DSU and the Working Procedures for Appellate Review did not contain any provisions in regard to acceptance of *amicus curiae* briefs. The Appellate Body had also stated that it had the authority to draw up procedures for Appellate Review. In paragraph 40 of its Report the Appellate Body had stated: "We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel and Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute." The Philippines supported this statement. In the context of the WTO, the right to participate in dispute settlement proceedings implied the opportunity to be heard. However, that right did not mean that a panel or the Appellate Body would have to accept arguments made by parties. In paragraph 40 of its Report, the Appellate Body had also stated that only Members had a legal right to participate and to be heard in a dispute. However in paragraph 42 the Appellate Body had made a different argument and had conferred itself the authority to accept and consider submissions if it found it pertinent and useful to do so. The Philippines believed the Appellate Body had acted inconsistently with the DSU because Members had clearly specified or limited as to who had the opportunity to be heard. In that sense, the Appellate Body had exercised the prerogatives of Members and should not be encouraged to continue to do so.

20. Although the Appellate Body could draw up procedures for Appellate Review, it could not do so as it went along. He asked whether in drawing up its working procedures in the case at hand, the Appellate Body had consulted the DSB Chairman and the Director-General and if those procedures had been communicated to Members, as provided for in Article 17.9 of the DSU. The Appellate Body should have also kept in mind that the issue of *amicus curiae* briefs had been taken up in the context of the DSU Review and was among those issues which were considered to be controversial. At that time no Member had claimed that the issue of *amicus curiae* briefs was part of the WTO law. Members still had to decide thereon. The Appellate Body should have taken into account the fact that Members still had to discuss whether and under what circumstances *amicus curiae* briefs could be accepted. Therefore, the Appellate Body's decision to accept *amicus curiae* briefs had again pre-empted the powers of Members. The Philippines took exception with regard to paragraph 42 of the Appellate Body Report.

21. The representative of Brazil said that his country wished to comment on the issue of *amicus curiae* briefs and the implications of the Reports for US countervailing duty proceedings involving other Members. He recalled that Brazil, which had participated as a third party in the dispute at hand, had objected to the possibility of the Panel or the Appellate Body accepting *amicus curiae* briefs. Brazil joined previous speakers who had expressed their concerns about the way the Appellate Body

had dealt with this issue. The Appellate Body should be informed by the Chairman of the DSB of Members' views regarding its decision on *amicus curiae* briefs.

22. He noted that like the British steel producer subject to the proceedings in question, Brazil's largest steel producers had also been privatized in the early and mid-1990s. Like steel exports from the United Kingdom, steel exports from Brazil had also been subject to US countervailing duties over the past decade, based on the US presumption that subsidies conferred to a company prior to its privatization somehow "passed through" to the purchaser of a company. This presumption had now been found by the Panel and the Appellate Body to be inconsistent with the SCM Agreement. The Panel had recommended that the United States bring its countervailing duty practice on privatized companies into conformity with the SCM Agreement. By recognizing that the inconsistencies in the United States practice were not specific to the dispute at hand, but actually tainted all countervailing duties investigations involving privatized companies, the Panel had recommended that the United States take "all appropriate steps, including a revision of its administrative practices" to prevent future violations of the SCM Agreement. The Panel's recommendation was intended to obviate the need for Members subject to the US practice to bring their cases under the dispute settlement system. The Panel and Appellate Body decisions, pursuant to Article 3.2 of the DSU, had clarified the existing provisions of the SCM Agreement. As a result, in order for the United States to be in conformity with its obligations under the SCM Agreement all its countervailing duties decisions had to conform to the Panel's recommendations. The United States had to examine the analysis that supported its current application of countervailing duties to imports from Brazil, and from other Members, so as to ensure that it conformed with the Panel and the Appellate Body decision. There were no legal or procedural barriers to delay a US decision to swiftly and comprehensively incorporate the Panel's recommendations into its countervailing duties practice. No changes to the US law or to its pertinent regulations were necessary because the United States had never integrated its privatization practice into its countervailing duties regulations. As a result, there was no justification for the United States to delay putting its practice into conformity with the Panel's decision. Ultimately, a revision of US practice would remove import restrictions on several steel products originating from Brazil as they were based exclusively on the countervailing duties analysis that had been found to be invalid. In adopting the Panel's recommendations, Brazil hoped that the United States would reiterate its commitment to the integrity of the dispute settlement system. He noted that in light of the Panel and the Appellate Body findings, Brazil was considering all options available to it under the multilateral framework of the WTO.

23. The representative of Malaysia said that he only wished to comment on the issue of *amicus curiae* briefs. He did not wish to repeat the arguments as to why the Appellate Body had gone beyond its legal authority. Malaysia took great exception to paragraph 42 of the Appellate Body Report and shared the concerns expressed by previous speakers with respect to the Appellate Body's view that it had the legal authority under the DSU to accept and consider *amicus curiae* briefs. At the DSB meeting on 6 November 1998, upon adoption of the Panel and the Appellate Body reports in the Shrimp case, Malaysia, along with other delegations, had raised its concern about the Appellate Body's interpretation of Article 13.1 of the DSU regarding the word "seek" and the acceptance of *amicus curiae* briefs by panels and the Appellate Body. In the case at hand, the Appellate Body had not only repeated but had further compounded that mistake. It was clear that the Appellate Body had chosen to ignore the views of Members in this regard. There was a need to resolve this issue and Malaysia would act accordingly at the appropriate time and place. Malaysia wished to register its strong exception with regard to paragraph 42 of the Appellate Body Report.

24. The representative of Pakistan expressed his delegation's concern with regard to the Appellate Body's opinion on *amicus curiae* briefs as contained in paragraph 42 of its report. Like other delegations, in Pakistan's view the arguments made by the Appellate Body in order to accept *amicus curiae* briefs were not well-founded and, as such, they were inconsistent with the DSU. The Appellate Body's reference to Article 17.9 of the DSU, did not convince Pakistan as well as other

Members. Pakistan did not share the Appellate Body's argument. Pakistan considered that *amicus curiae* briefs should not be accepted or considered by panels and much less by the Appellate Body whose authority was limited to issues of law in accordance with Article 17.6 of the DSU. The Appellate Body should not be encouraged to go beyond the authority granted to it by the DSU. Pakistan wished to register its serious concerns about paragraph 42 of the Appellate Body Report.

25. The representative of Ecuador expressed his delegation's concern regarding the Appellate Body's decision to accept and consider *amicus curiae* briefs. The Appellate Body's decision went against the letter and spirit of the DSU and was counter to the balance that should be preserved. The Appellate Body's decision was not only inconsistent with the DSU but also ran a risk of causing damage to developing countries, in particular to those that had limited resources to participate actively in the DSB's proceedings. In Ecuador's view, the difficult situation of developing countries would further deteriorate if their scarce resources were to be spent to examine and react to *amicus curiae* briefs that the Appellate Body considered to be relevant to an appeal, even when such briefs were unsolicited.

26. The representative of Australia said that it was clear from the statements made by previous speakers that the ways in which panels and the Appellate Body had approached *amicus curiae* briefs was a very important issue with systemic implications for the rights of Members in the dispute settlement process. Australia, therefore, considered that it would be useful for Members to discuss the issues involved, including what rules might be agreed for appropriate handling of submissions by non-WTO Members.

27. The representative of Thailand said that like previous speakers, in particular Malaysia and the Philippines, his country wished to express its concern with regard to the way in which the Appellate Body report had dealt with the issue of *amicus curiae* briefs. In Thailand's view, this was a substantive and not merely a procedural issue is which affected Members' rights and obligations. The Appellate Body's position created a situation of uncertainty with regard to the basis of a review, factual or otherwise, by the Appellate Body in a given case. A number of Members wished to avoid such a situation and had repeatedly expressed their views in the DSB in relation to the Shrimp case as well as in the DSU review. The Appellate Body had taken its position on this issue in spite of Members' views and on the basis of a legal reasoning that was not convincing. Thailand hoped that its concerns would be heard and taken into account.

28. The representative of India recalled that the Philippines had sought information as to whether the Chairman of the DSB and the Director-General had been consulted by the Appellate Body on the issue of acceptance of *amicus curiae* briefs, in accordance with Article 17.9 of the DSU. In this context and based on the discussion in the DSB in 1995, it had been agreed that whenever the Appellate Body consulted the DSB Chairman on procedures, the Chairman would, in turn, consult Members because under Article 17.9 of the DSU, the Chairman should be consulted in his official capacity; i.e. on behalf of Members. He asked the Chairman to confirm India's understanding.

29. The Chairman said that it would not be appropriate for him to respond at the present meeting to the questions raised by the Philippines and India. Some careful study of the Appellate Body wording would be required to see the extent to which it relied totally and directly on Article 17.9 of the DSU. He asked the Secretariat to consult its records to see whether there had been consultation with the Director-General or with the previous Chairman of the DSB. He believed that the questions raised were legitimate and it was his intention to revert to them.

30. The representative of India said that he did not have any problem with the fact that the matter had to be examined. He only wished the Chairman to be aware that the matter had been discussed in the DSB in 1995. He asked whether the Chairman, at an appropriate time, could confirm India's understanding thereon.

31. The Chairman said that it was his recollection, as confirmed by the Secretariat, that India's understanding was correct. Therefore, there was no need for further research on the point in relation to the reference to the Chairman of the DSB acting on behalf of Members and not in his personal capacity.

32. The representative of the Philippines said that he had raised three questions in relation with the matter under consideration: (i) whether the Chairman of the DSB had been consulted on behalf of Members?; (ii) whether the Director-General had been consulted?; and (iii) whether information had been communicated to Members?

33. The representative of the United States said that her delegation noted the questions raised by the Philippines and India. The United States believed that it was not accurate to state that no delegation in the DSU review had thought that *amicus curiae* briefs were allowed under the current DSU. On the contrary, the United States was one of those delegations who had recognized that *amicus curiae* submissions were allowed under the DSU. The United States had made known its position on this matter which had been discussed at length. Therefore, the point made by the Philippines that the Appellate Body had pre-empted this issue was not correct. In the DSU review Members had focused on the question of how to make *amicus curiae* submissions more operational under the current DSU rather than whether or not *amicus curiae* could be submitted. With regard to Article 17.9 of the DSU, the United States referred Members to Rule 16(1) of the Working Procedures for Appellate Review. However, the concerns expressed by delegations at the present meeting pointed out to the need that this issue required further consultations.

34. The representative of the Philippines said that the issues relating to *amicus curiae* briefs, as discussed in the DSU review, were only proposals on how to modify rather than interpret the WTO Agreement. These included the proposal by the United States.

35. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS138/AB/R and the Panel Report in WT/DS138/R, as upheld by the Appellate Body Report.