WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/73
4 February 2000

(00-0430)

Dispute Settlement Body
12 January 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 12 January 2000

Chairman: Mr. Kåre Bryn (Norway)

Subjects discussed: Page

1. Chile - Taxes on alcoholic beverages

(a) Report of the Appellate Body (WT/DS87/AB/R - WT/DS110/AB/R) and Report of the Panel (WT/DS87/R - WT/DS110/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS87/10 - WT/DS110/9 transmitting the Appellate Body Report on "Chile - Taxes on Alcoholic Beverages", which had been circulated in document WT/DS87/AB/R - WT/DS110/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, 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".

The representative of the European Communities expressed the EC's satisfaction with the findings of the Reports and thanked the Panel and the Appellate Body for their work. He noted that, from an economic point of view, this case was extremely important for the European operators. The EC was satisfied that the jurisprudence on taxation issues pursuant to Article III:2 of GATT 1994 had now been confirmed unequivocally. On the basis of its contacts with the Chilean authorities, the EC expected that Chile would rapidly implement the Panel's and the Appellate Body's recommendations.

The representative of Chile said that her country agreed with the adoption of the Panel and the Appellate Body Reports. However, Chile did not share the findings and conclusions contained therein. The Panel's and the Appellate Body's interpretations had gone beyond the meaning, scope

and spirit of Article III:2 of GATT 1994. In particular since this case concerned an *ad valorem* tax system used by many countries, which was based on two objective characteristics of the product: alcohol content and price. Although Chile did not agree with the Panel's and the Appellate Body's findings, it recognized that the Reports provided clear guidelines on the interpretation of the meaning and scope of Article III:2 as well as the reasons why the Chilean system was not in conformity with the WTO rules. Those guidelines, and in particular those provided by the Appellate Body, would be taken into account by Chile in the process of modifying its legislation.

In paragraph 60 of its Report, the Appellate Body had reiterated the important principle, namely, that "Members of the WTO have sovereign authority to determine the basis or bases on which they will tax goods, such as, for example, distilled alcoholic beverages, and to classify such goods accordingly, provided of course that the Members respect their WTO commitments". In the same paragraph, the Appellate Body had even been more explicit by stating that: "Members of the WTO are free to tax distilled alcoholic beverages on the basis of their alcohol content and price, as long as the tax classification is not applied so as to protect the domestic production over imports". On the basis of the above, one could conclude that either an *ad valorem* or a mixed system based on alcoholic content was permitted under the WTO Agreement. Chile was satisfied that the Appellate Body had confirmed that its regulation establishing a minimum alcohol content for various alcoholic beverages fully reflected similar standards in other markets. The Appellate Body had reversed the Panel's reasoning which had assumed that there was a linkage between that regulation and the tax classification under the Chilean tax system. Chile appreciated that the Appellate Body had understood Chile's objective in modifying its legislation on its own initiative and without being compelled by any dispute settlement procedure. Consequently, the Appellate Body had not upheld the Panel's view that the new legislation could result in similar protection of domestic beverages like that under the old legislation, which was no longer in place. Therefore, Chile was satisfied that the Appellate Body had affirmed that "Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith" (paragraph 74). Her authorities were now carefully examining the implications of the Reports in order to be able to comply with the Panel's and the Appellate Body's recommendations, within a reasonable period of time.

The representative of the United States said that his country, as a major exporter of distilled spirits, had participated in this dispute as a third party. The United States welcomed the findings of the Appellate Body and Panel that Chile's tax regime was inconsistent with Article III:2 of GATT 1994. In particular, the United States was pleased that the Appellate Body Report had clearly laid out the relevant factors in its analysis of Article III:2. The Appellate Body had confirmed that the purpose of a measure, to the extent reflected in its structure, was "intensely pertinent" to the task of evaluating whether a measure was applied so as to afford protection to domestic production. At the same time, the Panel was correct in finding that the aim of Chile's measure was to protect its domestic pisco industry. It was now up to Chile to comply promptly with its obligations. For a long time, the Chilean Government had been on notice that its measures raised serious GATT questions. The legal changes required in this case were relatively simple. Given the harm that the new system would cause to US exports as of the beginning of the year, the United States hoped that the new Chilean Government would give careful consideration to the elimination of its discrimination before it was allowed to create new adverse effects.

The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS87/AB/R - WT/DS110/AB/R and the Panel Report in WT/DS87/R - WT/DS110/R, as modified by the Appellate Body Report.

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

(a) Report of the Appellate Body (WT/DS98/AB/R) and Report of the Panel (WT/DS98/R and Corr.1)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS98/9 transmitting the Appellate Body Report on "Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products", which had been circulated in document WT/DS98/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1 both Reports had been circulated as unrestricted documents. He recalled that in accordance with Article 17.14 of the DSU: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

The representative of the European Communities expressed his delegation's satisfaction with the Reports. The EC wished to know, as soon as possible, how Korea would implement the recommendations, and looked forward to the immediate lifting of the safeguard measure in question.

The representative of Korea thanked the Panel and the Appellate Body for their Reports. He said that the EC's action concerning Korea's safeguard measure on skimmed milk powder preparations was significant since it constituted the first WTO case with regard to the application of the Agreement on Safeguards and raised a number of important procedural issues. At the present meeting, he wished to make a few comments with regard to the Panel and the Appellate Body Reports. First, the Panel had held that a Member wishing to impose a safeguard measure had to evaluate and report on each and every "relevant factor" of injury set out in Article 4.2 of the Agreement on Safeguards. While Korea recognized that all the relevant injury factors should be considered, it did not believe that the completeness of the investigation report (the "OAI report") should be a prerequisite to finding a Member's safeguard measure adequate. The Panel had pointed out defects in Korea's reasoning with regard to its determination of serious injury based on the OAI report on which the EC had not based its claims. Korea provided the OAI report not as evidence supporting its arguments but rather as background information. It was for this reason that an English translation of the OAI report was only submitted after the Panel had requested it. Korea did not expect the Panel to assess its actions solely on the basis of the OAI report. During the appellate review, Korea had argued that the submission of the OAI report did not justify the Panel's reliance on that report in order to establish arguments not made by the EC. Korea noted that it would be difficult for a panel to seek information and then use it against the Member providing such information, in particular where the other party had not made claims on specific points regarding that information. The Panel had also pointed out the inadequacy of Korea's data to prove its case and had considered that a reasonable estimate should be made in the absence of data available. It would be ideal to use a set of data the scope of which matched exactly the question presented. However, it was often difficult to obtain such data and, therefore, minor discrepancies should be tolerated given such practical difficulty. The Panel should have provided a standard on the acceptability of the discrepancies and should have examined Korea's data in accordance with such standard before dismissing its reasoning. As to the estimation of data, the Panel's demand to make such estimation, notwithstanding its reliability, would be tantamount to directing Members as to how they should conduct their own investigations and thereby taking on the role which it had repeatedly declared not to assume.

Second, the Panel had held that Korea violated Article 5 of the Agreement on Safeguards by failing to justify its safeguard measure. It had also held that Article 5 required a complete analysis of why a specific measure was necessary, even where the level of quota was equivalent to or not less

than the average of the import levels for the three most recent representative years for which statistics were available. The Appellate Body had reversed this view and had stated that it did not see anything in Article 5.1 that established an obligation to provide such reasoning for a safeguard measure other than a quantitative restriction, which reduced the quantity of imports below the average of imports in the last three representative years. As a result of the Appellate Body's ruling, a Member was not obliged to justify, in its recommendations or determinations, a measure in the form of a quantitative restriction, which was consistent with the average of imports in the last three representative years for which statistics were available.

Third, with respect to the specificity requirement under Article 6.2 of the DSU with regard to the request for the establishment of a panel, Korea welcomed that the Appellate Body had upheld its argument. Korea had appealed that the Panel had ignored the additional requirement laid down by the Appellate Body in the Bananas case to the effect that the Panel had to undertake a careful review of a request for the establishment of a panel. The Appellate Body had reversed the Panel's position that the simple listing of Articles of an agreement, asserted to be violated, met the standard of specificity requirement under Article 6.2 of the DSU. However, the Appellate Body had added an additional layer of analysis, and had held that Korea had to establish why the mere listing of the Articles asserted to be violated had prejudiced its ability to defend itself in the course of the Panel proceedings. In Korea's view, the Appellate Body's approach was incorrect for the following reasons. Korea had argued that the EC's case was fundamentally flawed. If the Appellate Body had concluded that the Panel had failed to properly address the most basic issue concerning the EC's case: i.e. the specificity of the EC's claims, then it should have concluded that the basis for the EC's case and the Panel's analysis thereof were irremediably flawed. Furthermore, this argument was also supported by the principle of burden of proof, namely it was for the EC to make its case not for Korea to establish why arguments made by the EC could not be accepted. Since the Appellate Body was, in effect, introducing a new element of jurisprudence, it should have asked Korea to provide specific evidence of detriment. During the hearing, it was clear that the Appellate Body was prepared to consider arguments and analysis not raised by the parties in their written submissions. However, the Appellate Body had appeared to use this "technicality" to avoid the fundamental issue of whether or not the EC's case was properly before the Panel. Korea noted that even if the Appellate Body was correct in requesting specific evidence of detriment, then it should have considered all the arguments made in respect of Article 6.2 of the DSU in the written submission and oral hearing as such evidence.

Fourth, with regard to the so-called "unforeseen developments" issue, the Appellate Body had considered that Members wishing to apply a safeguard measure were required to demonstrate the "unforeseen developments" under Article XIX:1 of GATT 1994, and had reversed the Panel's conclusion that the "unforeseen developments" clause did not add a condition to rules on safeguards. Therefore, the Appellate Body's interpretation of Article XIX of GATT 1994 seemed to place an obligation on a Member, wishing to apply a safeguard measure, to comply with both the provisions of Article XIX of GATT 1994 and the Agreement on Safeguards, at least in the absence of conflict between the two. In Korea's view, whether certain developments were foreseen by a Member was a question of perception and as such it was difficult to ascertain and could lead to a wide spectrum of possible interpretations. Hence, due to the Appellate Body's reasoning, Members were now left with an ambiguous requirement to demonstrate the existence of "unforeseen developments". This was not in line with the drafters' intention. During the Uruguay Round, the negotiators had carefully examined the terms of Article XIX of GATT 1994 and had developed a new set of rules on safeguards, namely the Agreement on Safeguards. That Agreement, which modified and revised Article XIX of GATT 1994, contained all the substantive and procedural requirements for the invocation of safeguards. Therefore, it would be unreasonable to conclude that the negotiators had left an essential requirement in Article XIX of GATT 1994 and had not included it in the new Agreement, which was meant to be the final embodiment of the rules on safeguards.

Finally, Korea maintained that the EC had failed to discharge its burden of proof. Korea believed that the Panel and the Appellate Body had failed to adequately allocate the burden of proof on the parties by examining arguments and evidence provided by both parties without first establishing whether the EC had proved its case. However, in spite of the above-mentioned as well as other significant systemic concerns with regard to the Panel's findings and the Appellate Body's rulings, Korea accepted the adoption of the Reports in order to uphold the integrity of the dispute settlement process. In accordance with Article 21.3 of the DSU, Korea would inform the DSB of its intention with respect to implementation of the recommendations and rulings of the Panel and the Appellate Body.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS98/AB/R and the Panel Report in WT/DS98/R and Corr.1, as modified by the Appellate Body Report.

3. Argentina - Safeguard measures on imports of footwear

(a) Report of the Appellate Body (WT/DS121/AB/R) and Report of the Panel (WT/DS121/R)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS121/8 transmitting the Appellate Body Report on "Argentina – Safeguard Measures on Imports of Footwear", which had been circulated in document WT/DS121/AB/R in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, 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".

The representative of the European Communities expressed the EC's satisfaction with the Reports and thanked the Panel and the Appellate Body for their work. The EC hoped to be informed shortly of Argentina's intentions in regard to implementation of the recommendations in this case. The EC also looked forward to the immediate removal of the safeguard measures by Argentina.

The representative of Argentina said that in accordance with Articles 16.4 and 17.14 of the DSU, his country wished to make comments with regard to certain legal interpretations developed by the Panel and the Appellate Body. Although Argentina accepted the Reports, it wished to highlight certain points which, it believed, would affect the ability of Members to apply safeguard measures. In Argentina's view, by imposing additional obligations, the interpretations of the Panel and the Appellate Body would have an impact on the attitude of Members, in particular developing-country Members. During the Uruguay Round, a package of rights and obligations had been agreed by Members and the new dispute settlement mechanism had been put in place. However, it had not been envisaged that the aim of solving disputes could result in additional obligations nor that the outcome of a dispute settlement procedure could make it impossible for Members to comply with the WTO requirements, in this case the Agreement on Safeguards.

At the present meeting, he wished to refer to some interpretations which, in Argentina's view, were in contradiction of or had modified the Appellate Body's previous findings, and which would not be without serious implications for Members in future. He recalled that in the Appellate Body's proceedings, Argentina had raised a procedural issue with regard to the mandate of the Panel. His country considered that by invoking Article 3.1 of the Agreement on Safeguards to justify its reasoning, the Panel had exceeded its terms of reference set out in Article 7.2 of the DSU. In other

words, the Panel had made findings on the matter that had not been raised by the EC in its request for a panel. Subsequently, the Appellate Body had confirmed that extension of authority and the errors committed by the Panel. As a result, the Appellate Body did not assume its role of reviewing the Panel Report in order to determine whether or not that Report was legally correct.

In paragraph 73 of its Report, the Appellate Body had simply referred to paragraphs which dealt with the findings of non-compliance by Argentina with its obligations on the basis of Article 3 of the Agreement on Safeguards. As pointed out by the Appellate Body in footnote 59, Argentina had referred to the Panel's reasoning in paragraphs 8.126 and 8.127 of its Report and to the arguments referred to in its submission to the Appellate Body. The Panel had not made specific findings that Argentina had acted inconsistently with Article 3 of the Agreement on Subsidies. The Panel had only provided its reasoning thereon which had subsequently been endorsed by the Appellate Body. Argentina considered that the Panel had departed from its terms of reference as set out in Article 7 of the DSU. It believed that the Appellate Body should have upheld its jurisprudence in the Bananas case (paragraph 143), which had also been upheld in the case on "India - Patent Protection for Pharmaceutical and Agricultural Chemical Products". In paragraph 88 of the above Report, the Appellate Body had stated that: "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third party to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceedings." Although Argentina, hypothetically, had accepted that, by reference, Article 3.1 was expressly incorporated into the proceeding, as indicated in paragraph 74, the Appellate Body had confirmed that it did fail to see how a panel could ignore the publication requirements set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the Agreement on Safeguards. It was surprising that in the last sentence of paragraph 74, the Appellate Body had stated that it could not make an "objective assessment" of the matter, as required by Article 11 of the DSU, if a panel only referred in its reasoning to the specific provisions cited by the parties in their claims. This was not only in contradiction with the Appellate Body's jurisprudence in the Bananas case, but would seem to grant panels a kind of inquisitorial power or a prosecuting role whereby they could rely on other provisions of the WTO Agreements to justify their reasoning. He questioned whether any Member when negotiating the DSU had envisaged a situation in which panels would be invested with such power or whether it was in the interest of any Member, currently involved in a dispute proceeding, to allow panels to introduce claims of non-compliance which had not been raised. Such expansive jurisdiction of panels, which had been endorsed by the Appellate Body, looked more like a "police power" and had never been provided for in the negotiations. If the system continued to evolve in that direction, panels could start making recommendations to Members to initiate dispute settlement procedures in cases of non-compliance that would go beyond those duly alleged in specific disputes.

In referring to the "unforeseen developments" clause, he first wished to provide some background. For more than 40 years, Article XIX was inapplicable as a result of that clause. Thus, among other reasons, the GATT contracting parties had frequently used the so-called "grey-area measures" in the 1970s and the 1980s. The objective of renegotiating safeguards in the Uruguay Round was two-fold: (i) to eliminate grey-area measures in order to make Article XIX more operational; and (ii) to provide an "escape valve" beyond Article XXVIII and waiver requests. It was precisely in order to attain those objectives that the clause "unforeseen developments" had been omitted by the Uruguay Round negotiators. That was also the understanding of the United States and Korea in relation to item 2 of the Agenda where the panel on "Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products" had considered that the requirement of "unforeseen developments" did not add any specific elements to the conditions in which measures under Article XIX could be applied. If that clause had been part of the Uruguay Round Agreement, the United States would have had to modify its Section 201 which did not refer to "unforeseen

developments". The same applied to the EC legislation (EC Regulation 3285/94), the text of which did not contain such a requirement.

The Appellate Body's interpretation, in imposing the requirement to demonstrate that an increase in imports was due to "unforeseen developments" prior to the determination of the three elements contained in Article 2.1 of the Agreement on Safeguards (increase in imports, causal relation and injury) had altered the balance of rights and obligations resulting from the Uruguay Round Agreement. It had gone beyond the political agreement reached in this area during the Uruguay Round negotiations. In that regard, the Appellate Body had exceeded the scope of Article 3.5 of the DSU by "impeding the attainment of the objectives" of the Agreement on Safeguards, which was meant as an escape clause to allow a structural readjustment. In other words, the Appellate Body would seem to be legislating rather than verifying the application of law in the case at hand. To define the content of this obligation, the Appellate Body, which had considered that the clause was not covered by Article 2.1 of the Agreement on Safeguards, had characterized that measure as an extraordinary one. This interpretation of the Appellate Body would influence other interpretations of all the requirements under the Agreement.

He noted that it was not appropriate to refer to the cumulative application of the provisions of Article XIX and the Agreement on Safeguards in the same sense as in the case of GATT 1994 provisions *vis-à-vis* Annex 1A (*dura lex sed lex*). From now on, Members would have to verify as a necessary precondition before confirming the existence of the three conditions required under Article XIX and the Agreement on Safeguards that these conditions were the results of "unforeseen developments" and stem from obligations, including tariff concessions. The Appellate Body had clearly stated that such "unforeseen developments" were a precondition and were distinct from the conditions contained in Article 2.1 of the Agreement on Safeguards. However, it was more difficult to accept the description of the use of the measure as extraordinary and as an exception to the normal exercise of one's rights. As interpreted by the Appellate Body, a safeguard was an exception to the general GATT rules. That interpretation of the Appellate Body in the context of the purpose and object of the treaty had contradicted the outcome of the Uruguay Round negotiations, which was to render Article XIX more flexible and operational and to eliminate grey-area measures.

He noted that the treaty should be interpreted in accordance with the Vienna Convention on the Law of Treaties and the preparatory work involved was only of secondary value for the purposes of defining the scope of obligations. Argentina was surprised that the Appellate Body had applied the most restrictive interpretation in this case. That interpretation was not in line with the WTO's objective to promote free trade and had eliminated the only escape clause provided for by the Agreement. Furthermore, it had contradicted the definition of an extraordinary use of safeguard measures under Article XIX. He noted that the words: "extraordinary" and "exceptional" did not have the same meaning. He wondered whether this extraordinary character made it possible to interpret the provisions of the Agreement on Safeguards on the basis of more restrictive standards as compared to other Agreements. If so that should not be the case. The Appellate Body had imposed a strict standard which could ensure the trade flow but would not encourage Argentina or other developing countries which had made generous market access concessions to continue to do so with regard to, at least, industrial goods. In accordance with this excessively restrictive definition of safeguards as contained in paragraph 131 of the Appellate Body Report: "Article 2.1 of the *Agreement on Safeguards* and Article XIX:1 of the GATT 1994 … requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury". He wondered how many cases in the history of GATT and the WTO could have met all such requirements. That interpretation would not strengthen the WTO Agreement.

In the context of customs unions, he wished to draw attention to two issues which had systemic implications. First, Argentina considered that all the provisions of the Agreement on

Safeguards were applicable to all Members, independently of their legal nature or their differences in the international legal personality. This issue was also related to the question of whether Members that could avail themselves of their rights and obligations under the WTO Agreement included, in addition to sovereign states, other international legal persons: i.e. customs unions. This was not a minor issue nor was it a matter that only affected Argentina and MERCOSUR in this specific case. He noted that footnote 95 of the Appellate Body Report implied that in referring to a Member, footnote 1 to Article 2.1 of the Agreement on Safeguards indicated only a WTO Member, which would be tantamount to stating that it applied only to a customs union which was a Member of the WTO, namely the EC. Such interpretation would have implications for all 119 regional agreements notified to the WTO under the provisions of GATT 1994. If this restrictive interpretation were to imply that only the EC could use the exceptions under Article XXIV to depart from other GATT 1994 provisions, then one would accept an interpretation that was not envisaged in the Uruguay Round negotiations.

Second, even if the Appellate Body had considered that Article XXIV was not applicable in this case due to the characteristics of the notification of the safeguard measure, it was factually incorrect for the Appellate Body to ignore Argentina's defence of the MERCOSUR exception based on Article XXIV on the pretext that the issue had never been raised. Argentina had invoked Article XXIV in the Panel's proceedings as contained in paragraphs 5.101, 5102 and 5.103 of the Panel Report. Furthermore, Argentina noted that the Panel had avoided making a statement on the usual practice of customs unions and free-trade areas of excluding their members from safeguard measures. Argentina's arguments, which were contained in paragraphs 5.296 to 5.298 of the Panel Report, had never been contested by the Panel. Consequently, Argentina had decided to appeal this issue following the same line of defence and arguing the existence of a discrepancy with regard to the interpretation of the relationship between Articles XIX and XXIV.

In particular, Argentina was surprised that the Appellate Body had avoided taking any position in this case, reserving its *dictum* probably for other cases presently under consideration. He therefore wondered how in future the Appellate Body would reconcile the potential exception that it had recognized could exist under Article XXIV, as indicated in paragraph 109 of the Appellate Body Report, with the above-mentioned statement in footnote 95 according to which only WTO Members could benefit from such an exception. Furthermore, if one were to follow the Appellate Body's position in the case on "Turkey - Import Restrictions on Textiles and Clothing Products", the exception to Article XXIV would not be applicable in a transitional period for the establishment of a customs union or free-trade areas, which could extend for a period of 10 years. He wondered whether it would be reasonable to impose on Members an obligation resulting from such interpretation of the Agreement. He questioned whether footnote 1 to the Agreement on Safeguards had only been designed to benefit the EC but not other free-trade areas and customs unions.

This difficult and complex dispute settlement procedure concerned a dispute with a commercial value of 0.4 per cent of the EC exports to Argentina. The procedure had a much higher cost for the WTO system and for other regional groups which had been notified to the WTO. Finally, if trade liberalization was not encouraged in the form of a reasonable escape clause under the Safeguards Agreement, countries would adopt a more restrictive position in negotiating their concessions. That in turn would encourage more protectionist attitudes since the only remedy under the WTO, recourse to Article XXVIII or a waiver were even more restrictive. He noted that Argentina would inform the DSB of its intentions in regard of implementation of the recommendations in accordance with Article 21.3 of the DSU.

The representative of Indonesia said that his delegation supported the findings and conclusions of the Appellate Body Report, which had clearly determined that Argentina's restrictions on imports of footwear from Indonesia as well as from other sources were in violation of Argentina's WTO obligations. Indonesia, as a third party with substantial interest in this matter, supported the

adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body. Bearing that in mind and the significant commercial consequences of Argentina's restrictions for Indonesia's exporters, his authorities expected Argentina to comply fully with the rulings and recommendations by immediately eliminating its import restrictions. Indonesia noted that in accordance with the terms of Resolution 987/97, Argentina's safeguard measures would expire on 25 February 2000. The subsequent decisions by the Argentinian authorities (Resolutions 512/98 and 1506/98) to modify its safeguard measures had not altered that date. Notwithstanding this, the Appellate Body had found that the measures at issue: i.e. special tariffs and quotas on footwear, were inconsistent with Argentina's obligations under the GATT 1994 and the Agreement on Safeguards. Indonesia therefore urged Argentina to inform the DSB that it would fully and promptly implement the recommendations to be made by the DSB.

The representative of Brazil said that, at the present meeting, his delegation did not wish to comment on the substance of Argentina's safeguard investigation. Brazil would address the question of the Appellate Body's comments on the standards contained in the Agreement on Safeguards at a later date. At the present meeting, he wished to refer to two issues which might have some implications for his country's rights. These issues related to the Southern Common Market (MERCOSUR): i.e. a customs union which consisted of four countries, including Brazil. The first issue related to the Appellate Body's analysis concerning the imposition of safeguard measures by a member of a customs union (Section VI of the Appellate Body Report). Brazil recognized that the Appellate Body had carefully dealt with the issue of the relationship between Articles XIX and XXIV of GATT 1994, and had reversed the Panel's findings which had gone beyond its mandate. The Appellate Body had indicated that it did not make any generalisations on this subject. To this end, in several paragraphs of its Report, the Appellate Body had used the wording such as "on the facts of this case". In paragraph 114, of its Report, the Appellate Body had also stated: "… we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure". However, the Appellate Body had made some findings with regard to what constituted a measure applied by MERCOSUR on behalf of a member of a customs union. The Appellate Body had also indicated that as a result of its investigation, Argentina had to apply safeguards on imports from all sources. Brazil did not intend to reiterate its position stated before the Panel which was contained in Section VI of the Report. It only wished to stress that it did not agree with the Appellate Body's view that Argentina was obliged to apply safeguards on other members of MERCOSUR. Argentina had the right under Article XXIV of GATT 1994 - which had not been questioned by the Appellate Body - and its international contractual obligations under the Treaty of Asuncion not to impose safeguards on other members of MERCOSUR. Brazil wished to reserve its position on the interpretations and findings with regard to the question of what constituted a measure taken by MERCOSUR and its status. Brazil supported Argentina's view that all Members had rights and obligations under Article XXIV of GATT 1994 and not only those customs unions that were Members of the WTO, as implied by the Appellate Body.

He also wished to refer to the statement made by the United States before the Panel. That statement, which concerned MERCOSUR and Article XXIV, was related to the issue to which he had just referred. He drew attention to paragraph 65 of the Appellate Body Report which contained the following summary of the US position on MERCOSUR and Article XXIV: "The United States also notes that Argentina and the Panel have wrongly referred to Article XXIV of the GATT 1994. In the view of the United States, MERCOSUR has never been notified under Article XXIV. The parties to MERCOSUR have chosen to notify it instead exclusively under the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause). The United States contends that, having made this legal choice, Argentina is now precluded from basing its arguments on the assumption that MERCOSUR is an Article XXIV Agreement, and that, therefore, the fourth sentence of footnote 1 to Article 2.1 of the *Agreement on Safeguards* is legally irrelevant in this case". If the United States' argument was correct, he questioned why MERCOSUR was being examined by the Committee on Regional Trade Agreements

and why should Brazil enter into Article XXIV:6 negotiations. If the United States changed its position and was willing to accept that MERCOSUR was fully covered by the Enabling Clause, that would simplify matters and would preserve Brazil's rights under MERCOSUR. Brazil hoped that the United States did not imply that MERCOSUR had obligations under Article XXIV but no rights either under Article XXIV or the Enabling Clause. He noted that neither the Appellate Body nor the Panel had commented on the US position.

The representative of the United States said that his country had been an active third-party participant in both the Panel and the Appellate Body proceedings. He recalled that the United States had brought an earlier proceeding[1] on the specific duties that Argentina had replaced with the safeguard measures now found to be inherently illegal. At the request of the United States, the DSB had established a panel to examine Argentina's modification of the original safeguard measure. The United States believed that Argentina could easily comply with the findings of the Panel and the Appellate Body. In fact, the measures were set to expire on 24 February 2000. In view of the findings, Argentina should ensure the expeditious elimination of this problematic measure. It was high time that Argentina implement its Uruguay Round commitments on footwear.

With regard to the substance of the Reports, the United States was pleased that both the Panel and the Appellate Body had reaffirmed the long-standing trend to discount *de novo* reviews of the investigations of competent authorities. The findings of both Reports on this critical issue had confirmed that the WTO was not the forum in which it was possible to re-litigate factual issues that had been fully and effectively examined by domestic competent authorities. The United States was astonished that some Members continued to question this fundamental, well-established principle, and hoped that the current Reports would lay to rest any questions on this issue. The United States was equally pleased that the Appellate Body had corrected the Panel's erroneous conclusions on the question of Article XXIV of GATT 1994 and the Safeguards Agreement. The Safeguards Agreement left open the very important question of the treatment customs unions and free-trade areas might accord to their partners when they exercised their right to impose temporary safeguard measures. It was in the interest of all Members to respect the terms of that Agreement.

The United States also wished to raise one point of concern with regard to the Appellate Body's Report. His country considered it unfortunate that the Appellate Body had decided to resurrect language in Article XIX that had been determined to be no longer relevant. During the Uruguay Round negotiations, there was a clear consensus that the Safeguards Agreement should impose no requirements regarding "unforeseen developments." This understanding was evidenced by the fact that few Members even used that term in their national safeguards legislation. However, the Appellate Body had agreed in substance with the US position that "unforeseen developments" was not a condition a Member had to satisfy before imposing a safeguard measure. In this context, it was important to note the clear distinction drawn by the Appellate Body between "unforeseeable" and "unforeseen" developments. Article XIX of GATT 1994 referred to "unforeseen" developments as to "unexpected" events. Some Members had argued that the language in Article XIX should be interpreted as "unforeseeable", thereby creating an unduly restrictive standard that would force Members to demonstrate that the developments in question could not be "foreseen, foretold or anticipated." The Appellate Body had quite correctly and decisively rejected that position.

The representative of Uruguay said that his country had participated as a third party in this dispute. At the present meeting he did not wish to comment on all issues related to this case. He only wished to highlight one aspect concerning this dispute, namely the imposition and application of safeguard measures by a member of a customs union. In this context, he drew attention to footnote 1 to Article 2.1 of the Agreement on Safeguards. His delegation noted the statements made by some Members at the present meeting as well as the reasonings of the Panel and the Appellate Body with

[1] WT/DS56.

regard to that footnote. Uruguay considered that the conclusions of the Panel and the Appellate Body should only apply to the case at hand. His country did not agree with all the positions expressed by delegations at the present meeting nor with all the conclusions of the Reports. Uruguay believed that no general conclusions should be drawn from this case nor should its results apply as a precedent with regard to other cases.

The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS121/AB/R and the Panel Report in WT/DS121/R, as modified by the Appellate Body Report.