# WORLD TRADE ORGANIZATION

RESTRICTED

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**Dispute Settlement Body**
**23 October 2002**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 23 October 2002

*Acting Chairman: Mr. Kåre Bryn (Norway)*

Prior to the adoption of the agenda, the Deputy-Director General, Mr. R. Yerxa said that in the absence of the Chairman of the DSB, Mr. Pérez del Castillo, he had the pleasure to open the present meeting of the Dispute Settlement Body. He recalled that in accordance with the Rules of Procedure for meetings of WTO bodies, if the Chairperson of the Dispute Settlement Body was absent from any meeting or part thereof, the Chairperson of the General Council or in the latter's absence, the Chairperson of the Trade Policy Review Body shall perform the functions of the DSB Chairperson. If the Chairpersons of the General Council and the Trade Policy Review Body were also not present, the DSB shall elect an interim Chairperson for that meeting or that part of the meeting. He said that it was his understanding that both the Chairman of the General Council and the Chairperson of the Trade Policy Review Body were not available to chair this meeting. He, therefore, proposed that Mr. K. Bryn of Norway be elected as an interim Chairman to preside over the proceedings of the present meeting.

It was so agreed.

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## 1. Egypt – Definitive anti-dumping measures on steel rebar from Turkey

### (a) Implementation of the recommendations of the DSB

1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of

the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 1 October 2002, the DSB adopted the Panel Report in the case on "Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey". He then invited Egypt to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2. The representative of Egypt said that his country wished to inform the DSB that it was its intention to comply with the DSB's recommendations and rulings in this case. Pursuant to Article 21.3(b) of the DSU, Egypt would consult with Turkey in order to arrive at a reasonable period of time for implementation which should be mutually agreed within 45 days from the date of the adoption of the Panel Report.

3. The representative of Turkey said that his country welcomed the statement made by Egypt to the effect that it was its intention to comply with the DSB's recommendations in this case. Given the deadline specified in Article 21.3(b) of the DSU, Turkey hoped that it would be possible to agree on a reasonable period of time within the next few days.

4. The DSB took note of the statements and of the information provided by Egypt regarding its intentions in respect of implementation of the DSB's recommendations.

## 2. Chile – Price band system and safeguard measures relating to certain agricultural products

(a) Report of the Appellate Body (WT/DS207/AB/R) and Report of the Panel (WT/DS207/R)

5. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS207/7 transmitting the Appellate Body Report on "Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products", which had been circulated in document WT/DS207/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report 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".

6. The representative of Argentina said that her country wished to thank the Appellate Body, the Panel and the Secretariat for their work on this case. Argentina was satisfied that its claim that the Chilean price band system violated Article 4.2 of the Agreement on Agriculture had been confirmed. In this regard, she emphasized the importance of the task accomplished by the Panel and the Appellate Body, which had to take a position on the scope of this key provision of the Agreement on Agriculture. As a result, for the first time in the history of the WTO, there was an unequivocal interpretation of the scope of Article 4.2 in relation to the measure that was prohibited to maintain, resort to, or revert to, in terms of variable levies, minimum import prices and similar measures. She noted that the findings of the Panel and the Appellate Body had confirmed Argentina's claims with regard to Chile's price band system, by qualifying it as a border measure similar to a variable import levy and a minimum import price that should have been tariffied upon the conclusion of the Uruguay Round negotiations. As stated in paragraph 190 of the Appellate Body Report, the fact that Chile's price band system was a measure prohibited by Article 4.2 of the Agreement on Agriculture meant that the duties resulting from its application were illegal, irrespective of their categorization according to the terms of Article II of GATT 1994. She pointed out that the recommendations in this case had implications with regard to market access beyond Chile's market.

7. The interpretation of the Appellate Body, which put emphasis on transparency and predictability that ordinary customs duties alone could provide, as the object and purpose of Article 4.2, was a crucial step towards eliminating one of the most distortive barriers to market access, which affected efficient agricultural producers such as Argentina. In this connection, she noted that both the Panel and the Appellate Body had corroborated Argentina's interpretation of the nature of price band systems. This meant that variable import levies or similar schemes such as the Chilean price band system were inconsistent with Article 4.2 of the Agreement on Agriculture, irrespective of the existence of a "cap" or a "ceiling" mechanism for automaticity. Lack of transparency and predictability and the partial insulation resulting from such mechanisms were not characteristics of ordinary customs duties. Ordinary customs duties provided certainty for commercial planning while allowing an efficient transmission of world prices, which was an ideal situation for creating trade potential in trade liberalization contexts. She recalled that one of Argentina's claims in these proceedings was the application of safeguard measures, to the extent that it merely constituted an attempt to provide legal justification for the inconsistency of the price band system, in addition to being in breach of Article XIX of GATT 1994 and the Agreement on Safeguards. Although Chile had not appealed the Panel's findings with regard to this issue, Argentina considered that those findings were important. She emphasized that this ruling confirmed the important role played by the dispute settlement mechanism not only in contributing to the satisfactory settlement of trade disputes, but also as a valid instrument in order to clarify the scope of obligations contained, in this particular case, in the Agreement on Agriculture. Argentina was ready to discuss with Chile the time-frames and modalities for implementing the DSB's recommendations in order to resolve the differences that impeded access for Argentina's exports to the Chilean market. Argentina hoped that it would be possible to do so in the same constructive spirit in which the two countries had conducted these proceedings.

8. The representative of Chile said that his country wished to thank the Panel, the Appellate Body as well as the Secretariat for their work in this case, which was of special and systemic importance to his country. Unlike Argentina, Chile was not fully satisfied with the results in this case due to the following reasons. The price band system had been applied by Chile since 1983 to protect the domestic production sector from excessive fluctuations in world prices of certain agricultural commodities. Under this mechanism, when world prices dropped below a five-year average, an additional specific duty would be applied – always below the bound level. If prices were to raise above that average, the duties would fall and could be as low as zero. Such a mechanism had to be put into place because world prices were affected by substantial subsidies and support maintained by certain WTO Members. In Chile's view this was the issue at stake in this dispute.

9. He said that at the present meeting, he wished to refrain from commenting on the Panel Report and noted that many of the Panel's conclusions had been reversed by the Appellate Body. He wished to focus on three points, which related to the Appellate Body Report and its implications. First, the Appellate Body concluded that the Panel had exceeded its mandate in finding that the duties stemming from the price band system were inconsistent with the second sentence of Article II:1(b) of the GATT 1994, i.e. that they were "other duties and charges" that Chile should have scheduled during the Uruguay Round. Indeed, the Panel had overstepped its mandate by ruling on a point that Argentina had never argued or had no intention to do so. The Appellate Body had reaffirmed that it was up to the parties to a dispute to establish the framework for a case brought before the panel, which was not authorized to go beyond that framework even on the grounds that this might facilitate reaching conclusions.

10. Second, the Appellate Body had rejected the Panel's definition of the term "ordinary customs duties" for the purpose of Articles II:1(b) of GATT 1994 and 4.2 of the Agreement on Agriculture. In the Panel's view, duties assessed or determined on the basis of exogenous factors were not ordinary customs duties. Conversely, and according to the Panel, duties determined exclusively on the basis of product volume or price constituted ordinary customs duties. This conclusion was not substantiated by the text of the WTO Agreements. In reversing that finding, the Appellate Body had pointed out that customs duties were frequently set on the basis of exogenous factors such as world market prices

and domestic price developments (para. 273 of the AB Report). It indicated, moreover, that not all duties calculated on the basis of the value and/or volume of imports were necessarily ordinary customs duties (para. 274 of the AB Report). Had the Panel's decision been confirmed, this would have called into question many bindings involving seasonal tariffs or a minimum price.

11. Third, the Appellate Body had upheld the Panel's conclusion that the Chilean price band system was a measure similar to a variable import levy and a minimum import price of the type prohibited by the Agreement on Agriculture and that it was, therefore, inconsistent with Article 4.2 of that Agreement. The Appellate Body had modified the reasoning developed by the Panel in order to reach that conclusion. However, in this regard, he wished to note the following points. First, the Appellate Body had stated that it would have been sufficient for the Panel to determine similarity on the basis of sufficient resemblance between two measures and that it was not necessary to focus on the extent to which the two measures shared fundamental characteristics. Second, the Appellate Body had concluded that any Member might, at any time, change the rate at which it applied a duty, provided that the changed rate remained below the level bound in the Member's Schedule (para. 232 of the AB Report). Therefore, variations, periodic though it might be, did not make a measure a prohibited variable import levy. The condition that turned a measure into a prohibited variable import levy was the presence of a formula causing automatic and continuous variability in the level of applicable duties. The Appellate Body had nevertheless underscored that a formula which caused automatic and continuous variability of duties was a necessary, but by no means a sufficient condition for a particular measure to be prohibited under Article 4.2 of the Agreement on Agriculture (para. 234 of the AB Report). The Appellate Body had indicated that the additional features that a measure needed to have in order to be considered a variable import levy or a minimum import price of the kind prohibited by the Agreement on Agriculture included lack of transparency and lack of predictability in the level of duties resulting from such measures. Lack of transparency and lack of predictability basically stemmed from the absence of rules or laws to prevent arbitrary management of the effects of the measure by the authority and from the fact that world market price developments were not transmitted to the domestic market. In this connection, the Appellate Body had identified a number of elements of the Chilean price band system which, it considered, resulted from such lack of transparency and predictability. The Appellate Body had concluded that there were dissimilarities between Chile's price band system and the features of "minimum import prices" and "variable import levies" (para. 252 of the AB Report). However, the overall nature of the system and the way in which it was designed and operated presented sufficiently similar characteristics.

12. Finally, he wished to highlight a number of issues of systemic importance that had emerged from the Reports of the Panel and the Appellate Body. As he had emphasized at the outset, the total level of tariff protection afforded by the price band could not exceed the rate bound by Chile in the WTO; i.e. 31.5 per cent for wheat, wheat flour and edible vegetable oils, and 98 per cent in the case of sugar. In practice, the duty resulting from the price band system had almost always remained below these bound levels. As Chile had argued in this dispute, during the Uruguay Round negotiations Members had consulted on this issue and in accordance with the Secretariat's technical opinion, it was not necessary for Chile to tariffy or eliminate the price bands since they operated below the bound level. That was the basis on which Chile had negotiated and established them in its Schedule, which had been endorsed by all interested parties. A number of Members, including Canada, Peru, Costa Rica and the MERCOSUR countries, including Argentina, had subsequently recognized and had accepted Chile's right to maintain the price band system, as established in specific provisions of the respective free-trade agreements. Argentina had a similar system for sugar. Moreover, Chile noted that Argentina had expressed its satisfaction that – in its view – the price band system should be abolished as a result of the conclusions reached by the Appellate Body. Chile hoped that Argentina would set an example by eliminating its price band for sugar. In contrast, a number of measures that should have been tariffied by other Members were not made subject to binding.

13. He further stated that the Panel and the Appellate Body had disregarded the context, purpose and history of the negotiations and the Appellate Body had opted for a literal interpretation of the text of the Agreement. In Chile's view, the Appellate Body was reconstructing the history in its

conclusions, which showed a complete lack of deference to Governments that had taken part in the negotiations. Indeed, the conclusions of the Appellate Body and the Panel had rewritten the results of the negotiations and had altered the balance of rights and obligations. This had an impact on the stability and legal certainty of the Agreements which had been negotiated by Members. Chile's only obligation was the bound tariff. Chile was under the impression that it could use any mechanism for setting duties under the bound level and change them and that there were no requirements in respect of such mechanisms. However, this did not appear to be the case.

14. In conclusion, Chile was concerned that as a result of the Reports such as those at the present meeting, Members would be faced with new obligations which had never been negotiated and which would lead, as in this case, to a transformation of the bases and legal effects of the most fundamental rules of GATT 1994. He, therefore, questioned whether this was the outcome that Members wanted. Finally, it was of equally serious concern that there was no overall policy consideration in the light of the objectives of the WTO; i.e. to promote the liberalization of trade. A Member was being punished for implementing a system that applied duties below the bound level. The Appellate Body had maintained that the price band system impeded the transmission of world prices into the domestic market. Would this mean that applying a very high bound rate rather than an effective lower rate facilitated the transfer of prices and increased market access? Such reasoning had no basis in economic logic and ran counter to everything the WTO stood for. In addition, it provided a direct incentive for Members to apply tariff levels equivalent to – and not below – the bound rates. In short, the agricultural support policies of certain Members, which distorted international markets, compelled countries like Chile to adopt special protection mechanisms such as the price band system. This was why Chile condemned such policies and why it promoted the phasing out of all forms of agricultural export subsidies and domestic support in the ongoing negotiations on agriculture. The Appellate Body had properly corrected various errors of the Panel. It had not challenged the trade and agricultural policy objectives behind those mechanisms. What was questioned was only a combination of very specific features of the Chilean system relating to transparency and predictability, which did not make this mechanism to be inconsistent with the WTO Agreements. For all these reasons, Chile considered that the Reports under consideration should not be adopted.

15. The representative of the European Communities said that the EC wished to thank the Appellate Body for its work and to make some comments on the Reports under consideration due to systemic importance of the legal issues addressed. He noted that the Appellate Body had had to deal with the concept of "tariffication" in Article 4.2 of the Agreement on Agriculture and the meaning of "ordinary customs duties" in Article II:1(b) of GATT 1994. The EC welcomed the Appellate Body's reversal of the Panel's finding that Chile's price band system was inconsistent with Article II:l(b), second sentence of GATT 1994. On the procedural basis for this reversal, the Appellate Body had rightly protected the rights of the respondent in a dispute. It had done so firstly on the basis that the complainant had not made a claim on the provision in question and should, therefore, not have made a finding on the provision, since it was not part of the matter before the panel within the meaning of Article 11 of the DSU. Second, it had done so to protect the respondent's due process rights. On the substantive issue in question, the EC remained strongly convinced of the incorrectness of the Panel's finding that a duty was not an "ordinary customs duty" if it was based on "exogenous" factors. This was an assumption not supported by the text of Article II:l(b) of GATT 1994, and constituted an over-extensive interpretation of the concept of an "exogenous" factor. The EC welcomed the reversal of this finding.

16. The representative of Colombia said that his country had participated as a third participant in the dispute under consideration. In Colombia's view, the Reports were particularly important since they had dealt with the scope and content of Members' market-access commitments on agriculture. In this connection, Colombia emphasized that the Appellate Body had upheld the Panel's conclusion of inconsistency of the Chilean price band system. However, the reasoning of the Appellate Body in reaching that conclusion was different from that of the Panel. The Appellate Body had used Article 5 of the Agreement on Agriculture to lend support to a contextual interpretation of the scope of market-access commitments on agriculture. Colombia submitted that the legal analysis for establishing the

coverage of market-access commitments should begin with a determination of the scope of the term "variable import levies", as set forth in the footnote to Article 4.2 of the Agreement on Agriculture. He re-emphasized that this term could not be examined in isolation and that it was essential to determine its scope in the light of a multilateral discipline and specifically Articles I and II of the GATT. Any other analysis in Colombia's views had gone beyond the commitments negotiated during the Uruguay Round. He also wished to draw attention to paragraph 261 of the Appellate Body Report, which stated that the conclusions regarding the inconsistency of the Chilean price band system had been reached on the basis of a particular configuration and interaction of various particular and specific features of the Chilean price band system. In this respect, Colombia reiterated its systemic and trade concerns regarding Chile's practices in this respect over the past few years. The Panel had concluded that, in applying the safeguard measures, Chile had acted inconsistently with Article XIX of GATT 1994 and Articles 2.1, 3, 4 and 5 of the Agreement on Safeguards.

17. The representative of India said that his country was neither a party nor a third party to this dispute. However, he wished to note that the Appellate Body's finding on the measure at issue was of systemic and legal interest to his country. Argentina had set the terms of reference in its panel request as the Chilean "Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments". He recalled that the Panel had been established on 12 March 2001. During the Panel proceedings, the Chilean Government had amended this measure by Law 19.772 on 19 November 2001 capping the amount of total tariff that could be applied under the price band system at the tariff rate of 31.5 per cent *ad valorem*, which was Chile's bound rate. The question of whether the measure at issue included the amendment effected by Chile subsequent to the establishment of panel had been answered affirmatively by the Appellate Body. The reasons for such affirmative finding were: (i) the complainant's panel request covered such subsequent amendments (para. 135); (ii) this amendment did not change the essence of the Chile's price band system (para. 139); and (iii) it was appropriate to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance" (para 143). Furthermore, the Appellate Body had clarified that "[if] terms of reference in a dispute are broad enough to include amendments to a measure … and if it is necessary to consider an amendment in order to secure a positive solution to the dispute … then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute" (para. 144). India welcomed this useful clarification by the Appellate Body.

18. The representative of Ecuador said that his country, as an interested third party in this case, had expressed, in the course of the proceedings, its views on what had been the central theme of the dispute; i.e. the application by Chile of a price band system. While Ecuador appreciated the considerable work done by the Panel and the Appellate Body, it would not oppose the consensus in spite of the fact that it did not fully agree with the conclusions reached by the Panel and the Appellate Body. Ecuador, together with other third parties in this case, had argued clearly and convincingly that the case referred to the Chilean price band system only, and that the application of systems of this type could be fully consistent with the WTO Agreements. In this connection, he highlighted that paragraph 261 of the Appellate Body Report in which, following Ecuador's arguments, the Appellate Body had found that the conclusions of inconsistency of the Chilean price band system with WTO rules had referred only to the particular configuration of certain elements of the system as applied by Chile. Consequently, Ecuador considered that it was impossible to draw conclusions from this case that would be applicable to other cases. Ecuador noted with concern that both the Panel and the Appellate Body had conducted an analysis which were completely out of touch with the reality in which world agricultural trade was being carried out. The application by a particular country of a price band system did not necessarily reflect protectionist objectives nor was an attempt to isolate the domestic market from the world market. In fact, a price band system could be designed and applied in order to help a country to become integrated and to participate in trade in agricultural products by offsetting the enormous distortions that existed in world trade in agricultural goods. Correctly applied, price band systems essentially served to offset the disproportionate price fluctuations caused mainly by the extremely high subsidies applied by certain countries that had been clearly identified. It was absolutely clear that the solution to the problems which Argentina had identified with respect to

the conditions for access to the Chilean market would not appear to be "out of the blue" with the application by Chile of the recommendations and conclusions that would be adopted at the present meeting. The problems dealt with in this case were only "the tip of the iceberg" – the true problem was the distortions in world agricultural trade. The solution to that problem would not be found in the framework of the WTO dispute settlement system, but in genuine and positive progress in the agricultural negotiations currently under way as part of the Doha Development Agenda.

19. The representative of Argentina said that her delegation had already taken the floor at the beginning of the meeting, but some of the arguments raised by previous speakers had prompted it to take the floor for the second time. All the arguments expressed by Chile were part of the procedures and facts. Argentina was convinced that these elements had been taken into account not only by the Panel but also by the Appellate Body. At the present meeting, she wished to comment on some issues raised by Chile. First, she noted that the MERCOSUR had never recognized the legality of the price band system at any point in time. This was Chile's interpretation. Argentina's understanding of the situation was not the same. Second, Chile had set a ceiling to the operation of the PBS not to go beyond the bound tariff as late as in November 2001. Besides, the fact of the violation of the bound rate was recognized by Chile before the DSB when the Panel had been established. It was true that the Appellate Body had overturned a finding of the Panel regarding the GATT Article II claim, but it was also true that the Appellate Body had declined to rule on that claim on grounds of judicial economy as it had already found that the PBS was inconsistent with Article 4.2 of the Agreement on Agriculture. Finally, Argentina fully agreed with Ecuador's statement on the problem represented by trade distorting measures in the field of agriculture and the whole Membership was fully aware of the constant struggle of Argentina against agricultural subsidies. She reiterated that Argentina was ready to discuss with Chile the modalities for implementation of the DSB's recommendations in this case.

20. The representative of Chile said that Argentina had raised two issues to which he wished to respond at the present meeting. He said that once international treaties – such as the WTO Agreements – were ratified in Chile they entered into force as laws and could not be modified by Congress. In November 2001 with Law 19.772, and as a result of an internal debate, Chile had given a better guarantee of such a fact reiterating the ceiling in order to respect the bound rate. This, in no way, meant that before that there was no ceiling and that had been made clear during the discussions in the context of the proceedings of the Panel and the Appellate Body. Regarding Argentina's statement that the MERCOSUR had never accepted the legality of the Chilean price band system, he affirmed that the text of the treaty between the MERCOSUR and Chile (ACE 35) did say that Chile could maintain and apply its price band system and that it was limited in two ways: Chile could not add new products and could not modify the system in order to make it more restrictive. This was accepted by both parties. He asked if that was not a recognition of the legality of the system, then what was it?

21. The representative of Venezuela said that his country supported the statements made by Chile and Ecuador. He said that it was important that the decision on price band system was taken by developing countries in order to combat distortions in the agricultural trade system as a result of the perverse system of subsidies, which were even more restrictive than any other price band system that could be set up.

22. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS207/AB/R and the Panel Report in WT/DS207/R, as modified by the Appellate Body Report.

### 3. European Communities – Trade description of sardines

(a) Report of the Appellate Body (WT/DS231/AB/R) and Report of the Panel (WT/DS231/R and Corr.1)

23. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS231/14 transmitting the Appellate Body Report on "European Communities – Trade

Description of Sardines", which had been circulated in document WT/DS231/AB/R in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report 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".

24. The representative of the European Communities said that in accordance with the conclusions of the Panel and the Appellate Body Reports, which were before the DSB at the present meeting, Article 2 of the Council Regulation (EEC) Regulation 2136/89 laying down marketing rules for preserved sardines was inconsistent with Article 2.4 of the TBT Agreement. This was because, allegedly, the EC Regulation marketing rules were not based on the relevant international marketing standards which reserved the name "sardines" for one single species of fish "Sardina pilchardus Walbaum", and foresaw that other fish species might be called "sardines" plus a qualifying term. The EC was disappointed with the WTO ruling, which had placed great importance on the promotion of market transparency and product quality through clear labeling rules for foodstuffs. The provision, which the Panel and the Appellate Body had deemed inconsistent with WTO rules, was aimed at protecting consumers against the risk of confusion resulting from the use of the name "sardines" to designate a number of different fish species, like herrings, anchovies or sprats.

25. He said that the EC was not satisfied with the way the Panel had dealt with the arguments and evidence on the interpretation of the Codex Alimentarius standard and on the perceptions of European consumers, and it certainly did not share its conclusions. However, at the present meeting, he did not wish to make further comments on these factual elements or on the particular outcome of this dispute settlement procedure. Rather, he wished to express the views of the EC on some broader systemic issues, which were of great concern to it. First, he wished to refer to a fundamental issue of systemic importance. Article 17.12 of the DSU provided that the Appellate Body shall address each of the issues of law or legal interpretations that had been raised during the appellate proceedings. The EC considered that the Appellate Body had not done so in this dispute. In particular, he drew attention to indent (d) of the EC's Notice of Appeal, in which the EC claimed, among other things, that "the Panel also erred in law by not properly considering the negotiating history and the validity of Codex Stan 94". The EC had carefully reviewed the Appellate Body Report and had not found any reasoning or finding on this issue. He was not suggesting that the Appellate Body had to necessarily agree with the EC's interpretation of the standard, or even with the need to consider its negotiating history for the purposes of interpretation. In the EC's view, the Appellate Body should have explained why the Panel's decision was right, and why the EC's approach was wrong. The Panel had expressed its opinion on this matter, and stated that, on its face, the text of Codex Stan 94 was clear. The Appellate Body could have been of the same view. However, the fact was that it was not possible to know whether this was the case.

26. He then said that the above-mentioned issue related to the second point. The Panel had stated that Codex Stan 94 was clear on its face. The Panel and the Appellate Body had interpreted Codex Stan 94 on the basis of the English and French versions. The EC contended that, in order to interpret the standard properly, all authentic linguistic versions should be taken into account. Therefore, the EC had referred to the Spanish version in its appellate submission and had made a statement at the oral hearing, for the record. However, the Appellate Body had only discussed the English and French versions but had not even mentioned the Spanish one - equally authentic. Again, he wished to stress that at the present meeting, the EC did not wish to make an argument about the specific interpretation of the Codex standard. He noted that this was a general point concerning the interpretation of multilingual texts. All authentic versions of a text had the same value, unless it was specified otherwise. Hence, all of them should be taken into account by an adjudicating body. The EC would

have expected the Panel and the Appellate Body to pay more attention to the differences between the three linguistic versions of Codex Stan 94.

27. Finally, one interesting feature of the Sardines case related to the way in which WTO bodies applied norms produced outside the WTO. In this case, the norm was a Codex Alimentarius standard. The parties had not agreed on the correct interpretation of the standard. In spite of the differences between the linguistic versions and the evidence on the negotiating history, the Panel had considered that the standard was clear on its face and had turned down the EC's request to consult the Codex Alimentarius Commission. The Appellate Body had ruled that the decision whether to consult or not an outside organization or a body was discretionary and could not be challenged. The EC was concerned about the systemic implications of the Appellate Body's decision on this issue. While the EC recognized that the decisions under Article 13 of the DSU were discretionary, it believed that discretion should not be exercised in an arbitrary manner. This was a basic requirement in any system based on the rule of law. This was also how the EC interpreted the ruling of the Appellate Body in the Hormones case where it was stated that: "[B]oth the SPS Agreement and the DSU leave to the sound discretion of a Panel the determination whether the establishment of an expert review group is necessary or appropriate".

28. The Appellate Body had the authority to review whether or not a Panel had exceeded the boundaries of its discretion when it had refused to consult the drafters of a text which the Panel had been requested to interpret. In this regard, he noted that Article 11 of the DSU, which was a general provision, stipulated the functions of panels. It directed panels to make an "objective assessment of the matter" before them. There was no reason why a general provision such as Article 11 of the DSU should be irrelevant in the context of Article 13 of the DSU. As a matter of fact, the right to seek information, as stipulated in Article 13 of the DSU, was just a means for panels to "make an objective assessment of the matter" before them.

29. He said that, thus far, he had referred to three important horizontal issues which could arise in any dispute settlement procedure. However, he also wished to refer to the interpretation and application of Article 2.4 of the TBT Agreement, in particular, the concept of "relevant international standard". The EC did not share the conclusion of the Panel and the Appellate Body that international standards not based on consensus were relevant under Article 2.4 of the TBT Agreement. This was not what was intended when the Agreement had been negotiated. He, therefore, questioned how could a universal obligation such as the one in Article 2.4 derive from a text on which there was no universal consensus? There was a specific sentence in the explanatory note to the definition of standard which read that: "Standards prepared by the international standardization community are based on consensus". The EC believed that this sentence should have a meaning.

30. The systemic implications of the approach of the Appellate Body were all the greater because the Appellate Body had also held, in effect, that all relevant parts of an international standard had to be incorporated into a Member's technical regulation unless they would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued. Although Article 2.4 of the TBT Agreement provided that the relevant parts of an international standard had to be used "as a basis for" a technical regulation, the Appellate Body had held that what was relevant depended on the subject of the complaint. It seemed that the Appellate Body did not consider it relevant whether a technical regulation was based, as a whole, on an international standard. The examination could thus be narrowed down to particular technical specifications. He noted that more could be said about the Reports before the DSB at the present meeting. However, the EC had chosen to raise only some concerns of general nature which had gone beyond the specific outcome of the Sardines case. He said that the EC would have the opportunity to discuss other issues on another occasion perhaps in the context of another dispute. He underlined that, while the EC disagreed with several aspects of the Reports, it would actively work towards implementation of the DSB's rulings and recommendations within the shortest possible time-frame.

31. The representative of Peru said that his country welcomed the adoption of the Reports of the Panel and the Appellate Body pertaining to this case. He noted that at issue in this dispute was the EC Regulation prohibiting the use of the term "sardines" to describe products made of sardines of species other than those found in European waters. He said that it was difficult to sell canned sardines without being able to inform consumers that the cans contained sardines. This was why a German importer of Peruvian sardines had been forced to cancel all contracts with Peruvian exporters after being advised by the EC that he could not sell them as Pacific sardines. Recourse to trade description rules reserving the use of a generic term that was commonly employed for products of domestic origin was a form of protectionism. Hence not only Peru but also all the other Members should recognize that the Panel and the Appellate Body had confirmed that the EC Regulation was inconsistent with the EC's obligations under the TBT Agreement.

32. Peru thanked the members of the Panel and the Appellate Body who had worked on this case as well as the Secretariat. The efficient work and dedication of all concerned made it possible to resolve this dispute within the time-frame established in the DSU. Peru was especially pleased that the Panel had been able to complete the case in seven months from the first organizational meeting to the date of circulation of the Reports. Peru expressed gratitude that the Panel had responded positively to its request to expedite the resolution of this dispute by exercising judicial economy.

33. Throughout the course of the proceedings, the EC maintained that Article 2.4 of the TBT Agreement should not be interpreted as restricting sovereign authority to regulate where international rules or standards existed. Contrary to the EC's view, the interpretations of the Panel and the Appellate Body did not assume that WTO Members had abandoned their sovereign right to pursue legitimate objectives at the level of protection they deemed to be appropriate. The Panel and the Appellate Body had found that the trade description requirement in the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement because the EC was not pursuing a legitimate objective through this Regulation. The rulings of the Panel and the Appellate Body left no doubt as to Members' freedom to depart from international standards where these were incompatible with their legitimate objectives.

34. The drafters of the TBT Agreement had decided that the issue of consensus was not relevant in determining the scope of the Agreement. This was obvious from the explanatory note in Annex I, paragraph 2, of the TBT Agreement, which stated that "[t]his Agreement covers also documents that are not based on consensus". The Appellate Body had no option, but simply to acknowledge such a clear provision. Peru did not see any contradiction between the general objective of international standards being adopted by consensus and the Appellate Body's decision. The question of what the WTO Members should do with regard to procedures for the adoption of decisions by international standardization bodies and the question of which standards should be regarded as covered by the TBT Agreement were two separate issues.

35. Although Peru welcomed the decisions of the Panel and the Appellate Body, it was concerned about the Appellate Body's reversal of the Panel's ruling on the issue of the burden of proof under Article 2.4 of the TBT Agreement. Peru considered that the Panel had properly determined that the second part of Article 2.4 did not contain any obligation, but specified the circumstances under which it was not necessary to meet an obligation. In practice, the Appellate Body's ruling on this matter might make it difficult for a complaining party to establish a *prima facie* case where the responding party had failed to meet its obligations under Article 2.5 of the TBT Agreement, which were to explain the objective of a regulation and why an international standard would be an ineffective or inappropriate means of fulfilling that objective. Peru emphasized that the party to the dispute that had adopted a regulation was a party that could best explain such matters. Therefore, the obligation to provide such explanations, as set forth in Article 2.5, should be interpreted as applying equally in dispute settlement proceedings. The Appellate Body's ruling in effect required the complaining party to prove the negative; i.e. to demonstrate that a technical regulation was not inappropriate or ineffective for fulfilling legitimate objectives.

36. Peru was equally concerned about two procedural issues in relation to the appeal proceedings. The first was the way in which the Appellate Body had ruled on the withdrawal of the EC's Notice of Appeal and the subsequent filing of a new Notice of Appeal. The Appellate Body had found that in this case the EC had acted consistently with the DSU. Although Peru acknowledged that this unprecedented step by the EC did not entail major consequences in the case at issue, it was concerned that this step introduced unnecessary complications into dispute settlement procedures. Indeed, a new procedural right for one party to a dispute implied a new procedural obligation for the other party. As the Appellate Body had emphasized in previous cases, it could not be assumed that WTO Members had accepted an obligation where the relevant treaty contained no reference to that effect. Peru was, therefore, concerned about the implicit reasoning followed by the Appellate Body in interpreting the Working Procedures and the DSU. The Appellate Body had approved this unprecedented step taken by the EC on the grounds that what was not specifically prohibited by the DSU or the Working Procedures was permitted. Peru believed that this new interpretative approach would serve to justify practices that were not foreseen by the drafters of the DSU and would ultimately lead to the creation of new procedural obligations that had neither been negotiated nor accepted.

37. Peru was also concerned about the Appellate Body's stand regarding Morocco's *amicus curiae* submissions. Peru believed that the Appellate Body's decision to accept such a submission by a WTO Member was a consequence of its previous erroneous rulings. The drafters of the DSU did not provide for the participation of third parties that did not satisfy the conditions specified in Article 10 of the DSU. Morocco had not met those requirements. The fact that *amicus curiae* briefs were not specifically prohibited did not mean that they were allowed under the DSU. In other words, the fact that Members had not accepted the obligation to respond to *amicus curiae* briefs meant that the Appellate Body should refrain from exposing Members to the need to respond to such submissions. Peru reiterated that this issue should be resolved by Members and not by the Appellate Body on a case-by-case basis. Accordingly, Peru urged Members to take advantage of the DSU negotiation process and to resolve this matter. As long as Members had not done so, neither the panels nor the Appellate Body should accept unsolicited *amicus curiae* briefs.

38. In spite of its reservations on certain procedural questions in the Appellate Body's Report, Peru welcomed the rulings of the Panel and the Appellate Body on the trade policy issues that had given rise to this dispute. Peru and the EC had discussed this matter for more than two years. Peru had tried to reach agreement prior to requesting consultations as well as during the consultation phase and had made a further attempt during the Panel process. However, it had not succeeded in persuading the EC to abolish such an obvious form of protectionism, which had caused serious prejudice to an industry of such crucial importance to Peru. At the present meeting, Peru urged the EC to apply, in good faith, the rulings and recommendations of the Panel and the Appellate Body.

39. Peru was convinced that the implementation of the rulings and recommendations in this case was a simple matter. The EC should bring its Regulation into conformity with its obligations under the TBT Agreement and allow Peru to export its sardines to the EC's market under the name "sardines", used in conjunction with one, and only one, of the four names specified in the Codex Alimentarius Standard; i.e. the name of the country of origin, the geographical area from which the fish originates, the name of the species or the common name of the species in the market in which it was to be sold. Both the Panel and the Appellate Body had concluded that the legitimate objectives pursued by the EC would not be compromised by the choice of any one of these options. The EC had repeatedly expressed its commitment to the full integration of developing and the least-developed countries into the multilateral trading system. Peru hoped that this was what would guide its action. Specifically, the EC should comply with Article 21.2 of the DSU, which stated that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement". Peru urged the EC to abide by the spirit and the letter of Article 12.2 of the TBT Agreement, which stipulated that Members "shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement".

40. The representative of Chile said that his delegation wished to thank the Panel and the Appellate Body for their time and attention devoted to this dispute. Chile agreed with the majority of the Panel's findings, which had been reaffirmed by the Appellate Body. In particular, the finding that the EC Regulation establishing common standards for the marketing of canned sardines was inconsistent with Article 2.4 of the TBT Agreement because it was not based on the relevant international standard; i.e. Codex Stan 94. However, Chile did not support two findings of the Appellate Body. First, that it was the responsibility of Peru – the complainant – to prove that Codex Stan 94 was not an effective or appropriate means for the fulfilment of the objectives pursued by the EC in its Regulation. In other words, that the burden of proof in relation to the second part of Article 2.4 was on Peru. Chile, like the Panel, considered that it was the responsibility of the party that was the subject of the complaint; i.e. the EC, to show that the international standard was an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. On the one hand, the Appellate Body had based itself on various assumptions, for example, that the Regulation in question had been properly notified or that the parties had opportunities to exchange information on its objectives and procedure during the consultations so that the complainant might be fully aware of the objectives pursued by the Regulation. In addition, although some objectives could be identified in the preamble, there might be others which the Member was not in a position to know. It was also possible that, as occurred in this case, some of the objectives set out in the preamble might not correspond to the legitimate objectives pursued by the EC. Furthermore, the Appellate Body had not taken into account the fact that Article 2.4 was worded in the negative form (using the expressions "ineffective" and "inappropriate"), unlike the wording of Article 3 of the SPS Agreement which was in a positive form, and on which the Appellate Body had based its analysis. The fact that the negative form was used in the second part of Article 2.4 of the TBT Agreement had confirmed that the negotiators wished to make it clear that it was the Member adopting the regulation that had to prove that, as an exception, it had not applied the international standard because the latter was not a measure that allowed it to pursue its objectives, and only the Member could know precisely what those objectives were.

41. Second, Chile was concerned that the finding reached by the Panel and the Appellate Body to the effect that Annex 1.2 to the TBT Agreement allowed standards that were not based on consensus. In this respect, Chile agreed with the EC that only standards adopted by consensus by an international organization could be "relevant" for the purposes of Article 2.4. This was confirmed by the Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations in relation to Articles 2, 5 and Annex 3 of the Agreement; a decision that the Appellate Body had not even mentioned in its Report. It appeared that the analysis by the Appellate Body made it possible to consider as relevant standards which had not been approved in accordance with the decision-making process followed in international standardization organizations. Chile hoped that in future this point would be clarified by the Appellate Body.

42. He also wished to refer to two procedural decisions adopted by the Appellate Body in this dispute that had systemic implications. First, the acceptance of the withdrawal of a notice of appeal and its replacement, and second the acceptance of two a*micus curiae* briefs. With regard to the latter point, Chile like other Members, had strongly rejected this type of communication and had made this clear during the oral hearing before the Appellate Body. This was not envisaged in the WTO Agreements. Moreover, in this case it had been accepted that a Member of the WTO that had not reserved its third-party rights could submit an *amicus curiae* brief. The Appellate Body's decision created a new category of Members, giving them rights and obligations that had not been negotiated and, furthermore, had not been recognized in the WTO Agreements.

43. Both decisions by the Appellate Body were to a large extent based on the premise that, where an act or a procedural right was not specifically prohibited by the DSU or the Working Procedures, it existed and was allowed (paragraphs 138 and 165). In other words, anything that was not prohibited was permitted. Since these Agreements had been negotiated among several parties, this premise could not be applied. The Agreements were the result of compromises and represented a balance of rights and obligations which the parties had specifically laid down in the text. This was why it was

not possible to read between the lines and necessarily impose new rights and obligations. They provided the system with certainty and predictability. In the final analysis, what should prevail was the principle that only what was allowed in the Agreements would be permitted. Otherwise, where was the limit? Chile wished to see prompt implementation of the recommendations of the Panel and the Appellate Body through an amendment to the Regulation to allow marketing in the EC of all species of sardines referred to in Codex Stan 94 and any amendments thereto. Restricting marketing to certain sardines would be to disregard the scope of the Reports under consideration and, consequently, one would be confronted with the situation in which a measure that was inconsistent with the EC's WTO's obligations was in place.

44. The representative of the United States said that her country was pleased that both the Panel and the Appellate Body had found that the EC's regulation was not based on the relevant international standard – a standard that was both effective and appropriate to achieve the EC's objectives – and was, therefore, inconsistent with the TBT Agreement. The United States had participated as a third party in this dispute in part because its sardines – which were covered by this international standard – could not be sold in the EC's market under a trade description that included the word "sardines". The United States encouraged the EC to come into compliance with its obligations under the TBT Agreement expeditiously, by amending its regulation to permit all species of sardines recognized under the international standard, from whatever source, to be marketed in the EC under a name containing the word "sardines". Even though the United States was satisfied with most aspects of the Report, it was concerned with the Appellate Body's statement that, for purposes of Article 2.4 of the TBT Agreement, an international standard did not have to be adopted by consensus. In the view of the United States, international standards did have to be adopted by consensus. The TBT Agreement was clear that it was only the standards disciplined by the TBT Agreement that might be non-consensual. Furthermore, the United States noted that this statement was unnecessary, because the international standard at issue had been adopted by consensus.

45. The representative of Venezuela said that his delegation supported the statement by Peru concerning the inconsistencies and procedural flows contained in the Panel and the Appellate Body Reports. Venezuela shared the concerns raised by Peru and believed that they should be taken into account during the DSU negotiations. Venezuela welcomed with satisfaction the decision of the Panel and the Appellate Body for several reasons. For more than four years, Venezuela had been consulting with the EC in an effort to find a solution to this dispute, but without success. The sardine industry was extremely important in Venezuela as it provided employment opportunities and enabled Venezuela to diversify its economy. Venezuela, therefore, urged the EC to comply with the rulings in this case and to allow its sardines, which complied with the Codex Standard, to be exported to the EC's market, in addition to the Peruvian sardines. Venezuela supported the finding that the EC should bring its Regulation into conformity with the TBT Agreement and welcomed the statement made by the EC that it would work towards this end.

46. The representative of Canada said that his country had participated in this case as a third party, and wished to take this opportunity to make a few observations about the Panel and the Appellate Body Reports. Canada had long been of the view that the EC's measure was WTO-inconsistent, and was pleased that this was the ultimate conclusion of both the Panel and the Appellate Body. In particular, Canada fully supported the findings of the Panel and the Appellate Body that the EC Regulation violated Article 2.4 of the TBT Agreement. Nevertheless, Canada had a couple of reservations concerning the Appellate Body's decision. First, the Appellate Body had reversed the findings of the Panel with respect to the burden of proof applicable under Article 2.4 of the TBT Agreement. In Canada's view, the Panel was correct in finding that under Article 2.4, the complainant should bear the burden of proving both the existence of the relevant international standard, and that the measure in question was not based on this standard. However, having established these two elements, the burden should then shift to the responding party to demonstrate why the relevant international standard would be ineffective or inappropriate for the fulfilment of the legitimate objectives pursued.

47. On the issue of unsolicited *amicus* briefs, Canada wished to register its concern that the Appellate Body had decided to accept two briefs submitted by a private individual and Morocco, a WTO Member that had not exercised its third-party rights at the Panel stage. Canada had frequently urged the Appellate Body to exercise caution when it addressed the issue of unsolicited *amicus* briefs submitted for its consideration. This caution was appropriate, given the view of Canada and of many other Members that amicus participation had important systemic and institutional implications for the WTO. It was clear that Members alone had the right to participate in the dispute settlement proceedings. Morocco had a clear right to participate as a party or a third party in this dispute. This, however, should not be confused with the issue of non-Member participation as amicus. With these comments, Canada was pleased to join in the consensus to adopt these Reports, and urged the EC to repeal its WTO-inconsistent Regulation as soon as possible.

48. The representative of Mexico said that this case represented an important victory for Peru. He noted that it was encouraging that developing countries were increasingly using the dispute settlement mechanism with success. At the present meeting, Mexico wished to raise two concerns with regard to two aspects of the Appellate Body Report: (i) the treatment of *amicus curiae* briefs; and (ii) the way in which the question of burden of proof had been dealt with. With regard to the first point, Mexico was concerned about the Appellate Body's trend towards accepting *amicus curiae* briefs against the views of the majority of Members, by using its findings in previous cases as the sole legal basis. According to the Appellate Body, its authority to accept *amicus curiae* briefs stemmed from the fact that neither the DSU nor the Working Procedures for Appellate Review specifically prohibited them. However, the proper criterion for interpreting the DSU was not the principle that "anything that is not expressly prohibited is permitted", because this was a civil law criterion designed to protect citizens' rights. In this case, the Appellate Body should have followed the general principle of interpretation of the Vienna Convention, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Appellate Body had recognized that the DSU did not contain any provisions that would give this authority and the acceptance of *amicus curiae* briefs did not comply with the object and purpose of the DSU. In addition, the concept of *amicus curiae* was not to be found in the Working Procedures for Appellate Review. These procedures concerned the complaining party, the party complained against, other complainants and third parties. Nothing in these rules implied that *amicus curiae* briefs were relevant. The fact that a communication from a Member had been accepted in no way changed the situation.

49. He drew attention to the Appellate Body's Report in the case on " United States – Import Measures on Certain Products from the European Communities" (WT/DS165/AB/R), in which the Appellate Body had recognized that the purpose of the WTO dispute settlement system was "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Moreover, after referring to the proposal by a group of Members to amend the DSU, the Appellate Body had stated that it was the responsibility of WTO Members to determine the rules and procedures of the DSU. In the context of the ongoing negotiations on improvements and clarifications of the DSU a number of proposals directly related to the question of *amicus curiae* had been submitted. It was, therefore, particularly inappropriate to accept this type of communication, as the Appellate Body had done in this case. With regard to the question of the burden of proof, Mexico supported the statement made by Canada.

50. The representative of Colombia said that the Panel Report which was before the DSB at the present meeting was particularly important as it reaffirmed the multilateral commitments prohibiting the adoption of regulations which, on the pretext of protecting legitimate interests, constituted barriers to trade. Colombia welcomed the findings of the Appellate Body on the nature of the technical standard of the EC Regulation, the clarification of the scope of commitments under Article 2.4 of the Agreement on Barriers to Trade, and the light thrown on the commitments of Members *vis-à-vis* measures adopted prior to the Uruguay Round. Colombia supported the findings of the Appellate Body on the nature of the Codex Standard. Colombia had participated as a third party at the Panel

stage. However, during the appeal, Colombia had decided to remain a passive observer. Two *amicus curiae* briefs had been received in this dispute, one from Professor Robert Howse and the other from Morocco, which was a WTO Member. In presenting these documents Morocco was not obliged to follow any procedure, while Colombia had to follow the Working Procedures for Appellate Review. Although *amicus curiae* briefs had been received prior to the expiry of the time-period for deciding on the type of participation by third parties, the existence of these briefs had only been revealed after the expiry of this time-period; i.e. after Colombia had taken the decision to be a passive observer. He noted that Colombia had taken its decision in strict compliance with the Working Procedures for Appellate Review. Although Colombia could have avoided the requirement to present a submission simply by reiterating its interest in this case, it had decided on the strictest interpretation of the procedures and had simply requested to be present at the oral hearing. During the oral hearing, Colombia had informed the Appellate Body Secretariat that it wished to refer to the question of *amicus curiae* briefs. Colombia had made it clear that it would not refer to the substance of the case because it had decided to be a passive observer. However, his delegation had not been able to express its views on this matter because it had been denied the opportunity to take the floor at the oral hearing, although it had raised its nameplate in order to request the floor.

51. It was difficult to understand why the Appellate Body, an institution which had been entrusted by Members with the task of protecting the integrity of its commitments, could disregard Colombia's rights in this dispute. There was an indirect reference to what had happened at the oral hearing in paragraph 164 and footnote 69 to the Report of the Appellate Body, which referred to the statements by Chile and Ecuador at the oral hearing drawing attention to the discriminatory treatment of Colombia. As a result of the Appellate Body's decision, one Member that had not even stated its interest as a third party was allowed to express its interest at the final stage of the dispute whereas Colombia, a country that had strictly followed the rules, was prevented from expressing its views on exceptional circumstances regarding the submission of two *amicus curiae* briefs. Colombia would have preferred that, based on the argument that the DSU did not prevent a WTO Member that had requested to be present at the oral hearing from referring to an exceptional circumstance, it had been allowed to take the floor on the question of *amicus curiae* briefs. Colombia would have hoped that in interpreting multilateral commitments, the Appellate Body was interpreting the rights given to Members under the DSU in line with other dispute settlement procedures. Colombia deeply regretted this and underlined that this showed the negative effects of accepting *amicus curiae* briefs.

52. The representative of Hong Kong, China said that his delegation wished to join others in thanking the panel and the Appellate Body for their work. His delegation had no difficulty with the substantive findings and conclusions of the Panel, as modified by the Appellate Body. It urged the EC to bring its Regulation into conformity with its obligations under the TBT Agreement as soon as possible. Nevertheless, his delegation would like to express its concern on a procedural issue raised by some delegations, namely, the Appellate Body's decision to admit two unsolicited *amicus curiae* briefs in this case. Hong Kong, China had all along held the view that there was no clear legal authority in the DSU to support accepting and considering unsolicited *amicus* briefs by panels and the Appellate Body. It maintained that the admission of *amicus curiae* briefs by the Appellate Body was not a procedural issue, but a substantive one which affected the rights and obligations of Members. The DSU provisions and by extension, the Appellate Body's Working Procedures, were not applicable in the consideration of this substantive issue. As some Members had stated, the fact that *amicus curiae* briefs were not specifically prohibited in the DSU could not be used to justify their admission.

53. At the 22 November 2000 meeting of the General Council, when the issue of *amicus curiae* briefs had been discussed, Hong Kong, China had stated that "it was unclear whether WTO Members who were not parties or third parties to the case could make use of this procedure. If they could not, then WTO Members were being put at a disadvantage compared to outside persons. If they could, then this was inconsistent with Articles 10.2 and 17.4 of the DSU." In the case under consideration, the Appellate Body had decided that non-third party Members could also make use of *amicus curiae* briefs. Ironically, as Colombia had described, this had put a third party in a disadvantageous position compared with a non-third party like Colombia which was a passive observer in the hearing because

of the Appellate Body's interpretation of Article 17.4 of the DSU. This was highly problematic and Colombia noticed that the Appellate Body had since amended its Working Procedures to rectify the problem of passive observers. At this stage, he wished to refrain from commenting on these amendments since the matter would be discussed under item 4 of the agenda of the present meeting. Nevertheless, the fact that such amendments had been made in a hasty manner seemed to reflect the fact that the Appellate Body had failed to consider thoroughly the systemic implications of admitting *amicus* briefs from non-third party Members on the balance of rights and obligations between WTO Members. Hong Kong, China remained of the view that under Article 10.2 and 17.4 of the DSU, only those Members who had reserved their third-party rights at the outset of the dispute settlement process had a legal right to participate in dispute settlement proceedings.

54. Finally, Hong Kong, China was concerned that the Appellate Body's decision could place an unexpected burden on parties and third parties, particularly developing-country Members, who might wish to comment on and respond to any briefs submitted, but would be limited by time and resources constraints. While it was of some comfort that briefs submitted at a very late stage in the Appellate Body proceedings might not be admitted, the uncertainty was still there. The principle of "promoting the fair, prompt and effective resolution of trade disputes" as cited by the Appellate Body was too broad and general and would provide no clear guidance as to how the Appellate Body would exercise its discretion in future.

55. The representative of India said that his country was neither a party nor a third party to this dispute. In India's view, the Appellate Body Report raised a few issues of systemic interest. First, the adequacy and conditional withdrawal of a notice of appeal. Second, the fact and the manner in which an *amicus curiae* brief had been admitted and accepted by the Appellate Body in this dispute. This was not the first case nor was it likely to be the last, where the issue of adequacy of notice of appeal had been raised. This issue had been raised in the Shrimp/turtle dispute. He noted that a group of countries had submitted proposals to the Special Session of the DSB on this issue. India hoped that the Appellate Body would address this issue in an appropriate manner.

56. The more serious issue was the conditional withdrawal by the EC of its appeal. The EC had filed a notice of appeal on 25 June 2002. On 27 June, Peru had sought preliminary rulings on four of nine points raised by the EC in its notice of appeal. In response to that, the EC had withdrawn its original notice of appeal and had replaced it by another notice of appeal on 28 June 2002. Again it was not the first time that a notice of appeal had been withdrawn. In the previous cases, notices of appeal had been withdrawn with the full knowledge and agreement of the appellees. In this case, the notice had been withdrawn conditionally in response to preliminary objection by the appellee. The Appellate Body had not addressed the broad issue of conditional withdrawal of notices of appeal. Instead it had adopted an ad hoc case-by-case approach.[1] India was concerned about the case-by-case approach being adopted by the Appellate Body to issues of systemic importance.

57. Another more serious systemic issue in this dispute was the admission and acceptance of *amicus* briefs by the Appellate Body. The Appellate Body had asserted that it had the legal authority to accept and consider *amicus* briefs. The basis for its assertion was in turn its assertion in the *Bismuth* steel case. In that case the Appellate Body had resorted to the negative reasoning saying that what was not prohibited was permissible. This assertion did not have any legal basis in the DSU or in the covered agreements. The Appellate Body was a body created by Members to help resolving disputes. Panels and the Appellate Body could neither receive/accept for consideration any submission directly, unless referred to them by the DSB, nor were their findings binding on the parties directly, like in courts, without being adopted by the DSB. The role and functions of the Appellate

[1] The Appellate Body did not consider the EC's conditional withdrawal of notice of appeal and its replacement by a new notice of appeal as abuse of process. Such withdrawal and replacement of notice of appeal would be subjected to two limitations: the Appellate Body's Working Procedures should be interpreted in such a way so as to promote effective resolution of disputes and that the Members should engage in dispute settlement procedures in good faith.

Body and Panels had been clearly laid down in the DSU. The Appellate Body had a limited mandate of clarifying legal issues raised in the panel reports; i.e. to clarify the covered agreements and make findings to help the DSB in making rulings on trade disputes. It was not a court of law and it did not have interpretative authority. Membership retained the interpretative authority under Article IX of the WTO Agreement. Nor did the Appellate Body had a ruling authority. It had only recommendatory authority. Its reports were not directly binding on the disputing parties. The Membership retained such ruling authority. It was the DSB which had the ruling authority and its rulings were binding on the disputing parties. Upon adoption by the DSB, the panel/Appellate Body reports acquired legal sanctity. Therefore, the Appellate Body could not assert that what was not prohibited was permitted. Given the structure of the system it was the Membership, and the Membership alone that had the residuary authority. A recommendatory body like the Appellate Body could have only those rights or authority, which had been granted to it explicitly by Members.

58. The Appellate Body in this dispute as well as in the *Bismuth steel* case stated that Members had the legal right to participate in panels and the Appellate Body proceedings and to make submissions. On the other hand panels/Appellate Body had the legal duty to consider those presentations. Thus a correlation between rights and duties seemed to have been accepted (and established) by the Appellate Body. The Appellate Body had also stated that non-parties had no such legal right and accordingly there was no corresponding or correlative legal duty on the Appellate Body to accept and consider those submissions. Having said that, the Appellate Body, however, had asserted that it had a legal authority because the DSU or its working procedures did not prohibit such authority. If there existed a legal authority, as asserted by the Appellate Body there should also exist a corresponding/correlative legal obedience. If so, whose legal obedience the Appellate Body was seeking? Certainly it could not seek the legal obedience of Members.

59. During the special session of the General Council on 22 November 2000, several Members had pointed out that the acceptance of *amicus* briefs was not a mere procedural issue and that this would affect the inter-governmental character of the WTO. They had also pointed out that *amicus* briefs would affect adversely the rights of Members. In the present case, the acceptance of *amicus* briefs by the Appellate Body had resulted in such imbalance in the rights and obligations of Members.

60. A Member wishing to present its views to panels/Appellate Body had to reserve third-party rights and to comply with certain procedures within specified time-periods. In addition, a third party had to graduate itself into a third participant under the Appellate Body's Working Procedures to be able to present its views to the Appellate Body at the oral hearing. This was indeed an additional obligation placed by the Appellate Body on Members through its working procedures. Members had not negotiated such an additional obligation during the Uruguay Round negotiations. However, *amicus* briefs did not have any such procedural hurdles or requirements. This would mean that amicus parties enjoyed more rights than Members without any obligations.

61. In the present case, Colombia, which had reserved third-party rights following the DSU procedures had not been allowed by Appellate Body to present its views. Colombia was a passive observer while the Appellate Body was considering *amicus* briefs. This unfortunate episode would not have occurred had the Appellate Body paid heed to the views expressed by Members at the 22 November 2000 General Council meeting. Moreover, if paragraphs 155, 169, 170 and 314 of the Appellate Body Report were to be read together, one would realise that the Appellate Body had accepted the *amicus* brief for the sake of asserting its so-called legal authority to accept such briefs. In the end it had found that the Moroccan *amicus* brief was not of any assistance to the case. Irrespective of whether that brief was relevant or not, it was his delegation's view that the Appellate Body did not have the authority to accept *amicus* briefs.

62. Pursuant to the Doha Ministerial Declaration, Members were engaged in negotiations on improvements and clarifications to the DSU, including on the issue of *amicus* briefs. The issue of *amicus* briefs was a contentious issue. The Appellate Body's decision in this regard was prejudicing the on-going DSU negotiations. He recalled that the Appellate Body in its Report on "United States-

Import Measures" (DS165) had recognized the then on-going efforts by Members to clarify the sequencing between Articles 21.5 and 22 of the DSU and had refrained from making any comment on them.[2] Likewise, the Appellate Body should have refrained from accepting the *amicus* briefs and left it to Members to resolve this issue.

63. In general on the issue of *amicus curiae* briefs submitted by NGOs, his delegation would like to place on record that the dispute settlement system of the WTO was of intergovernmental character. Allowing non-Members or non-parties to participate and submit *amicus curiae* briefs would undermine this character. Members would bring disputes to the WTO after consulting all the domestic stakeholders and taking overall interests of the state/territory they represented. Non-governmental entities would seek to represent and advance their own sectoral interests. If such non-governmental entities were allowed to influence the process and outcome of disputes, it would severely erode Members' authority and ability to participate effectively in the dispute settlement process. Furthermore, if Members were required to respond to the submissions of the *amicus curiae* briefs, it would add to their obligations, beyond what had been negotiated during the Uruguay Round. Given the requirement of responding to such submissions within the prescribed time-frame, this would be burdensome in particular to developing-country Members. In addition, constraints of financial resources would prevent non-governmental entities in developing countries from effectively participating in the dispute settlement process even if *amicus curiae* briefs were permitted. It would also be a burden on panels, the Appellate Body, Arbitrators and the Secretariat, which were required to meet strict deadlines.

64. The representative of Ecuador said that his country appreciated the work carried out by the Panel and the Appellate Body. Ecuador looked forward to the EC's prompt implementation of the recommendations and findings to be adopted at the present meeting. The illegal and discriminatory measure applied by the EC for several years had harmed Ecuador's exports of sardines. The outcome of this case constituted an important landmark in the hard struggle waged by developing countries to accede to markets that were closed due to the existence of protectionist policies disguised as technical standards or phytosanitary measures. The Appellate Body had confirmed that fully applicable international standards should be respected when drawing up technical control standards. Ecuador did not share the Appellate Body's view on reversal of the burden of proof, exempting the EC from their obligation to prove that international standards could be disregarded because they were deemed to be ineffective and inappropriate for the purposes of compliance with the objectives pursued by domestic regulations, in this particular case European Council Regulation (EEC) 2136/89. Ecuador considered that the fact that a relevant international standard existed, in this case the Codex Standard 94, was sufficient justification for the EC to modify the measure restricting imports of sardines of the species *sardinops sagax sagax* using the trade name "sardines". In any event, it was clear that Peru had submitted sufficient evidence and legal arguments to prove that Codex Stan 94 was neither ineffective nor inappropriate for the purpose of the objectives pursued by the EC Regulation. Therefore, this Regulation was inconsistent with Article 2.4 of the TBT Agreement and should be amended.

65. He noted that not everything in the Reports to be adopted at the present meeting was acceptable to his country. Ecuador considered that the Appellate Body had gone beyond its mandate in accepting *amicus curiae* briefs in this case. This situation had been repeated despite the fact that several Members had put forward a number of reasons why *amicus curiae* briefs should not be accepted. Apart from the general considerations, which were well-known, to the effect that there was no legal basis for the Appellate Body to accept unsolicited *amicus curiae* briefs, Ecuador had put forward additional arguments which clearly explained that the acceptance of *amicus curiae* briefs from a WTO Member, a non-party to the dispute, had led to discrimination against another Member and had been prejudicial to the position held by some Members regarding the on-going DSU negotiations. With regard to the Appellate Body's reasons for accepting *amicus curiae* briefs, Ecuador considered it was wrong to apply the principle that what was not explicitly prohibited was

[2] In paragraph 91 of the Appellate Body Report it was noted "that, on 10 October 2000, 11 Members of the WTO presented a proposal in the General Council to amend, *inter alia*, Articles 21 and 22 of the DSU".

allowed. The Appellate Body argued that nothing in the DSU prevented it from accepting such briefs and it was, therefore, empowered to receive any brief it considered relevant. This approach was incorrect because it should have been taken into account that Article 10.2 and Article 17.4 of the DSU laid down obligations and rights of those WTO Members participating as interested third parties in a dispute. Accepting a brief from a Member to which the provisions in these Articles did not apply meant disregarding the obligations and rights specifically indicated in the DSU. The Appellate Body's mistaken interpretation, supported by very few WTO Members made the situation worse when the Appellate Body, wrongly applying Rule 24 of the Working Procedures, did not allow a third party which was present at the oral hearing to express its views. At the same time it accepted the views of persons outside the WTO or a Member which was not a party to the dispute and which had deliberately chosen not to invoke its rights under Articles 10.2 and 17.4 of the DSU.

66. It was obvious that the above-mentioned situation had led to an imbalance between the rights and obligations of Members, which the Appellate Body had tried to resolve by amending Rule 24 of its Working Procedures. Although the Appellate Body attached importance to ensuring that its reports were consistent with past decisions, Ecuador noted with concern that in the Appellate Body's analysis and in its summary of the criteria put forward by Ecuador in its submission and its oral submission at the hearing, one argument presented by Ecuador had been omitted. At the oral hearing, Ecuador had recalled that the Appellate Body, in paragraphs 91 and 92 of its Report in the case on "United States – Import Measures on Certain Products from the European Communities" (DS 165), had recognized that several WTO Members had presented a proposal to amend the sequence between Articles 21.5 and 22 of the DSU, but had decided not to express any views on the discussions on the question of the sequence stating that: "Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels, it is clearly the responsibility solely of the Members of the WTO." By declining to express an opinion on the issue, the Appellate Body had quite rightly not prejudged the position of Members on the negotiations regarding the sequence issue. At the oral hearing, Ecuador had also stated that it considered that there was a great deal of similarity between what had happened in this case in relation to *amicus curiae* briefs and what had happened with regard to the sequencing issue, because the question of *amicus curiae* briefs was also on the negotiating table, which meant that the situation was now different from that on other occasions when the Appellate Body had taken a position on this issue. When it had made its finding in this particular case, the Appellate Body was not consistent with its position expressed in paragraphs 91 and 92 of its Report in the case on "United States – Import Measures on Certain Products from the European Community" (DS165). In this case, when taking a position on this issue, the Appellate Body had prejudged the position taken by Members regarding a negotiating issue even though it was aware that there were different positions. Ecuador was concerned about the way in which the Appellate Body had insisted on dealing with this issue even though it was aware of the majority opinion of Members. The Appellate Body was part of the WTO and, consequently, should not remain aloof from what was taking place therein, especially when this was reflected in the legal arguments put before the Appellate Body in some disputes.

67. The representative of Morocco said that his delegation wished to express its gratitude to the Panel and the Appellate Body for their findings and recommendations. While taking note of these recommendations and conclusions, his country also wished to state that it was not satisfied with the content of the Reports. He noted that the subject of the discussion at the present meeting was no longer related to the Sardines case, but to the procedure to which his country had legitimately resorted. He, therefore, wished to clarify some elements. He said that Morocco had not been able to participate in this dispute as a third party because it had not been able to comply with the 10-day deadline, which was the practice and not a written rule. Morocco noted with satisfaction that the Appellate Body had accepted and had taken into consideration its submission addressed to the Chairman of the Appellate Body at a sufficiently advanced stage of the discussions in the appeal procedure. Proceeding in this way, Morocco had not infringed nor side-stepped the relevant provisions of the DSU or the Working Procedures. Furthermore, the Appellate Body had pointed out that the acceptance of an *amicus curiae* brief was a matter to be decided at its discretion on a case-by-case basis. In addition, a country had to retain the right to defend its interests. Morocco respected the

rules, but considered that as a WTO Member it had the right to defend its interests, which placed an obligation on others to afford an opportunity to do so. The Appellate Body was not a court, but even in courts all parties had the right to defend themselves.

68. Second element that he wished to raise was that it had been stated that what was not prohibited was permitted. Peru had based its argument on the concept of what was not necessarily prohibited was not necessarily permitted. This procedure might have been legitimate for Peru to defend its interests, but there was no reason for the Appellate Body to resort to that procedure. It was a double standard that legal arguments would not be able to sustain. Morocco urged Peru to adopt a broader outlook on this and a more flexible approach to the possibility of resorting to an *amicus* brief procedure. His delegation believed that the issue of *amicus* briefs should be taken up in the negotiations on improvements and clarifications to the DSU. This would enable Members to respond to the concerns raised by several parties and perhaps then give certain indications to the Appellate Body. His delegation believed that the arguments against the procedures were not justified. It was not possible to give some independence to the Appellate Body and then when it made it findings and conclusion to state that this was not correct. Morocco believed that this was not the right approach.

69. The representative of Malaysia said that his delegation wished to express its views on one substantive aspect of this dispute, namely, the admission of *amicus curiae* briefs by the Appellate Body. Malaysia deeply regretted that the division of the Appellate Body accepted the two *amicus curiae* briefs in this dispute. To further exacerbate an already wrong assertion that the Appellate Body had the right to accept *amicus curiae* briefs. In this dispute the Appellate Body had done so at the expense of a third party which was a WTO Member. In doing so, it had provided greater rights to non-parties to the dispute. Apart from its long held view with respect to the admission of *amicus curiae* briefs by private individuals or NGOs, it had also been Malaysia's view that the DSU did not provide for such admissions by either panels or the Appellate Body. The decision by the Appellate Body to accept an *amicus curiae* brief from a Member who was neither a party to the dispute nor a third party to the dispute created a new category of Members which could circumvent the rules of the DSU. This should be of serious systemic concern to all Members. Malaysia deeply regretted that the Appellate Body did not take into account the overwhelming view of WTO Members expressed at the meeting of the General Council on 22 November 2000. While it might not have been a decision of the General Council, it was the overwhelming view of Members and the Appellate Body should have been more politically sensitive to this issue. Malaysia disagreed with the assertion by the Appellate Body of its authority to accept *amicus curiae* briefs in paragraph 157 of the Appellate Body Report. It was not the Appellate Body that had the right or discretion to make decisions on such matters. It was, as Malaysia and a large majority of WTO Members, the right of WTO Members and not the right of panels of the Appellate Body. What was equally disturbing was the presumption by the Appellate Body that what was not explicitly prohibited in the DSU was permissible. It was a well-accepted fact among legal experts that in adjudicating international law countries become signatories to an international treaty on the understanding that their sovereignty remained intact. International treaty shall be interpreted in a limited manner taking into account the sovereign rights of countries. Thus, the Appellate Body, although only an organ that adjudicated trade disputes between WTO Members should, at the least, respect the sovereign rights of all WTO Members. He reasserted Malaysia's view that the DSU did not allow for the admission of *amicus curiae* briefs.

70. The representative of Turkey said that his country was neither a party to the dispute, nor a third party, but wished to express its disagreement about the interpretation of the Appellate Body regarding the acceptance of *amicus curiae* briefs. He did not wish to reiterate the arguments made by Mexico, India and Malaysia. He wished to voice his country's concern that this trend on the part of the Appellate Body would result in drawing up new rules in place of WTO Members. Turkey did not object to the adoption of the Report, but believed that this should not be interpreted to mean that Turkey agreed with the interpretation of the Appellate Body regarding the acceptance of *amicus curiae* briefs.

71. The representative of Brazil said that, without pre-judging the results of the ongoing negotiations, the original concept of *amicus curiae* briefs was linked to the concept of friends of the court. That concept did not include briefs from lobbying groups that in practice were closely identified with the parties and who had usually exerted pressure domestically to bring a case or were involved in preparation of the defence of the case. However, the concept did not include the possibility for Members presenting briefs to the Appellate Body. The argument of the Appellate Body was that it could not treat WTO Members less favourably than non-WTO Members in respect of *amicus curiae* briefs seemed to be based on fallacious grounds. It would not treat Members less favourably because Members had other means of participation in the dispute proceedings as parties or third parties. It was rather the acceptance of *amicus curiae* from Members that seemed to circumvent the established rules. The Appellate Body should exercise caution in dealing with such situations. If not, other countries would be encouraged to start using the same strategy in other cases and this would not be constructive. A more positive step would be, in the context of the DSU negotiations, to allow third parties to participate in the proceedings even if they had not reserved their third-party rights at the panel stage. Finally, the decision of the Appellate Body, based on the legal ground that what was not prohibited was permitted contradicted the logic of Article 3.2 of the DSU, which stated that rulings of the DSB, the panel and the Appellate Body could not add or diminish the rights and obligations provided in the covered agreements.

72. The representative of Indonesia said that his country wished to raise its concern on the systemic issue of submission of unsolicited *amicus curiae* briefs. Indonesia had just heard the statement made by Colombia as to what had happened to it in the proceeding and regretted that Colombia's right had been infringed and that it could not make a statement during the Appellate Body's hearing. Indonesia did not agree with the interpretation of the Appellate Body that in the absence of specific guidance, the Appellate Body had the discretion to accept *amicus* brief. Indonesia believed that if there was no provision and there was not clear mandate of what the Appellate Body could do, then the Appellate Body should ask Members for clarification or interpretation. If Members did not provide guidance, then the Appellate Body could make a ruling. Indonesia also noted that a majority of Members had made their views clear that the acceptance of *amicus curiae* briefs was not the right approach to resolve this issue.

73. The representative of Egypt said that his country was not a party or third party in this dispute, but wished to express systemic concerns regarding the acceptance by the Appellate Body of *amicus curiae* briefs. This issue was not a mere procedural matter, but a substantive legal issue, which had serious implications and could undermine the balance of rights and obligations under the DSU. He did not wish to reiterate the arguments raised by other Members, in particular India, Ecuador, Malaysia, Turkey and Hong Kong, China regarding *amicus curiae* briefs. Egypt disagreed with the Appellate Body's findings and conclusions with respect to *amicus curiae* briefs.

74. The representative of Uruguay said that the position of his country on this issue was well-known and had already been expressed at the November 2000 General Council meeting. Uruguay had also conveyed its views on this matter in the context of the Special Session of the DSB dealing with the DSU negotiations. He recalled the statement made by Turkey, namely, that the great majority of the speakers would not wish the adoption of the Appellate Body Report to be understood as an acceptance on their part of the interpretation by the Appellate Body on *amicus curiae* briefs.

75. The representative of Malaysia said that his country supported the statement by Uruguay, and in particular its position that joining in the consensus on the adoption of the Reports did not mean that Members were accepting what the Appellate Body had done with regard to *amicus curiae* briefs.

76. The Chairman said that many delegations had stated that they did not support the Appellate Body's approach in this case. He further stated that the issue of *amicus* briefs had been raised in the Special Session of the DSB and would continue to be discussed. He hoped that it would be possible in the future to arrive at some conclusions regarding guidelines for panels and the Appellate Body in this regard.

77. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS231/AB/R and the Panel Report in WT/DS231/R and Corr.1, as modified by the Appellate Body Report.

## 4. Amendments to Rules 1, 24 and 27 of the Working Procedures for Appellate Review

78. The Chairman recalled that Mr. Pérez del Castillo, Chairman of the DSB, had held an informal consultation on 10 October 2002 on the amendments to Rules 1, 24 and 27 of the Working Procedures for Appellate Review. At that meeting delegations had had an opportunity to exchange views on the procedural issues involved. The Chairman had also stated that he would provide delegations with an opportunity to express their views on the substantive aspects of the amendments. Accordingly, this matter had been placed on the agenda of the present meeting. He then drew attention to the communication from the Chairman of the Appellate Body to the Chairman of the Dispute Settlement Body, dated 18 October 2002 contained in WT/DSB/28. He said that, at the present meeting, it was his intention to open the floor to delegations who wished to present their views on the amendments to Rules, 1, 24 and 27 of the Working Procedure for Appellate Review. He said that it was his understanding that Mr. Pérez del Castillo would conduct further consultations on the procedural aspects of this matter. In light of this, he requested delegations to limit their statements to substantive issues of the amendments. Finally, he noted that, as Members were aware, these amendments had already entered into force and were being applied.

79. The representative of Japan said that her delegation had noted the letter from the Chairman of the Appellate Body to the Chairman of the DSB, dated 18 October 2002 contained in document WT/DSB/28. She said that her delegation had only become aware of this communication at the present meeting and wished to seek some clarification with regard to the content thereof. Her delegation welcomed the suggestion of the Appellate Body members that they would be available to provide an additional explanation on the amendments and that they would be willing to take into consideration, to a certain extent, Members' views on the amendments. However, some elements of the content of this communication were not clear. First, it was suggested that a meeting might be held before the end of the year with the Chairman of the DSB, the Chairman of the Special Session of the DSB, the Deputy-Director General, the Director of Legal Affairs Division and that "others" might be invited as well. In this regard, she sought clarification as to what exactly the word "others" referred to. Second, she noted that in the second paragraph of this communications, the Appellate Body seemed to suggest that it would welcome Members' views not only on the amendments under consideration, but also on any of its Working Procedures. She, therefore, wished to know what procedure would be followed in this regard. Her delegation also welcomed a suggestion that the Appellate Body would be willing to provide an explanation, in writing, on the amendments under consideration. In this regard, she wished to know what time-frame and what kind of exchange of views would be envisaged, once such written responses had been provided. She said that, in light of the discussion, her delegation might revert to this matter at the present meeting or at a later stage.

80. With regard to the substance, Japan considered the amendments at issue to be a step in a right direction, as compared to the current practice of the so-called passive observer status of third parties in the Appellate Body's oral hearings. The practice prior to the amendments allowed third parties to be present at the oral hearings only with the agreement of the "participants" and "third participants" who had filed written submissions. Under the amended rules, third parties would have the right to appear at the oral hearing provided that they had notified their intention to do so. However, some technical elements would need to be clarified. First, under the amended Rule 24(2), a third party would be required to notify its intention to appear and to make an oral statement at the oral hearing within 25 days after the date of the filing of the notice of appeal: i.e. within the same time-frame as filing a third participant submission. However, a third-party might find it necessary to make comments or respond to questions at the oral hearing after notifying its intention to appear. As demonstrated during the discussion under item 3 of the agenda of the present meeting in relation to the "Sardines" case, a third party might have a compelling reason to make an oral statement, even

after it had decided not to do so. It was, therefore, puzzling that no explanation or background in this regard had been provided.

81. Second, according to the amended Rule 24(4), a third party who did not notify its intention either to appear or to make an oral statement might, "at the discretion of the division hearing the appeal", participate actively in the oral hearing. However, it was not clear from the amended Rule whether a third party that had only notified its intention to appear at the oral hearing would be subject to the division's discretion. Japan wished to have some clarification on this point.

82. Third, it seemed that the amended Rules were legally in effect, but it was not clear from which date, and to which case, these Rules had already been applied or would be applied. Since there were some ongoing cases under the Appellate Body review, her delegation sought clarification on this point and wished to know whether a communication had been circulated to inform Members of the date of entry into force of the amended Rules. Japan expected that these questions would be clarified in due course, as indicated in the letter from the Chairman of the Appellate Body, and that the views expressed at the present meeting would be taken into consideration by the Appellate Body.

83. The Chairman said that he would convey the views expressed at the present meeting to Mr. Pérez del Castillo so that he could take the appropriate course of action. He believed that Mr. Pérez del Castillo would meet with the Appellate Body members. However, at the present meeting, he did not wish to comment on these issues on behalf of Mr. Pérez del Castillo.

84. The representative of Colombia said that, as mentioned on previous occasions, his country had systemic concerns with the procedure that had been followed in making the amendments to the Working Procedures for Appellate Review. However, at the present meeting, he would only refer to substantive aspects of the amendments. Colombia considered that the amendments made to the Working Procedures for Appellate Review were positive since they had improved the current situation; i.e. any third party could now participate in the oral hearings and express its views, provided that it had informed the Secretariat, in writing, of its intention to do so within a specified deadline. However, it was Colombia's understanding that under the amended Rule 24, the Appellate Body had the discretion to determine the type of participation for a third party that had neither filed a written submission nor notified in writing its intention to appear at the oral hearing.

85. Colombia recognized that the Appellate Body wished to know in advance which countries wished to participate in the oral hearing and what type of participation they wished. This was a legitimate interest in order for the Appellate Body to prepare for the hearing. However, this should not prevail over the right of Members to be heard, which would happen if a precondition were to be placed that a written communication should be sent to the Appellate Body regarding participation. Article 17.4 of the DSU did not give such discretion to the Appellate Body. Colombia, therefore, wished to ask some questions, through the Chairman, to the Appellate Body: (i) Did the phrase in Article 17.4 of the DSU "and to be given an opportunity to be heard" permit discrimination between third parties according to whether or not they had met procedural requirements? (ii) What was the meaning of plural in this phrase - third parties? Did it indicate that it would be possible to discriminate between third parties? (iii) In exceptional circumstances, after a country stated that it would not make a statement, would this country be dependent on the Appellate Body's discretion in order to be able to make a statement, if it so wished? Would the Appellate Body indicate to this country the way in which it could make a statement or respond to questions or comments? (iv) Were there any circumstances in which the Appellate Body could limit the right of third parties to be heard during an oral hearing and, if so, what were those circumstances? Colombia wished to convey its concerns to the Appellate Body so that its working procedures provided for the possibility of Members to indicate the type of participation before an oral hearing without attaching any conditions regarding such participation. Colombia thanked the Chairman for this meeting and the Appellate Body for being available to consider and to take into account the concerns raised at the present meeting.

86. The representative of Canada said that his country welcomed the opportunity to provide its views on the amended working procedures recently adopted by the Appellate Body. During the informal consultations, Canada had expressed concern about the way in which the amendments were adopted and did not wish to repeat these concerns. He only wished to reiterate that Canada was satisfied with the draft text tabled by the Chairman providing for future consultations with the DSB on changes to the working procedures, and looked forward to working closely with the Chairman and other Members for early adoption of these procedures.

87. With regard to the substance, Canada believed that a balance had to be struck between the rights of third parties to participate in an appeal and the due process rights of disputing parties to know the arguments that would be presented at that hearing, including by the third participants. Canada did not seek to constrain the ability of a third participant to participate in the discussion during an appeal by responding to questions and commenting on the responses of other participants. However, the new Rules 24(2) and (4) appeared to provide for the possibility of a new line of argument being introduced through an oral statement at the appeal hearing without any prior notice to the disputing parties or the other participants. In this regard, Canada noted that the due process protection provided in Rule 24(1), by which a third party set out in writing the grounds and legal arguments in support of its position, was missing from Rules 24(2) and (4). If the discretion accorded to the Appellate Body's division in Rule 24(4) was designed to ensure that the due process rights of participants were upheld, then in Canada's view, such discretion was equally relevant under Rule 24(2).

88. He emphasized that Canada's concerns were neither academic nor speculative. They were very real. For example, in a recent appeal involving Canada, his country had been advised by a Member that did not intend to file a third party written submission, but intended to make an oral statement at the upcoming hearing. Therefore, Canada had been put in a position of having to guess what substantive submission this Member would make at next week's oral hearing. That Member knew what line of argument it would make, but Canada did not. This raised important questions of due process rights, which were fundamental. Indeed, as the Appellate Body stated in the "Chile Price Band" case adopted by the DSB under item 2 of the present meeting, "due process is an obligation inherent in the WTO dispute settlement system". Canada asked the Chairman to convey to the Appellate Body its expectation that the new rules would be applied in all appeals in a manner that would ensure the full protection of such due process rights.

89. The representative of Brazil said that his country had concerns similar to those expressed by Japan and Colombia, and would like to make comments with regard to the amended Rule 24(2) and 24(4). It was Brazil's understanding that Rule 24(2) allowed any third party to decide either to present a written submission or to notify its intention to appear at the oral hearing and to make an oral statement. However, it was possible that a party would notify its intention and then it would decide to do otherwise. This might encourage countries to notify their intention, but it would not prevent third participants from doing what they considered to be necessary in the oral hearing.

90. Under Rule 24(4) any third part might, at the discretion of the Appellate Body's division, make an oral statement. Although there might be good grounds to have such a rule it was possible that third participants that had not notified their intention to make an oral statement, would be in a position to comment on questions and answers or make an oral statement and even present new arguments. Arguments could be presented at any time in the proceedings as there was no limitation in this regard. It was, however, not possible to bring new facts or documents. He reiterated that arguments could be presented at any time during the proceeding even if a party had not notified its intention to do so. He said that these were only preliminary comments and that Brazil would continue to examine these issues.

91. The representative of India said that his country welcomed this opportunity to make comments on the amendments made by the Appellate Body to its working procedures. He said that any rule-making body would normally provide explanation as to why and what reason prompted it to

make amendments. In this regard, he noted that the 27 September letter from the Appellate Body Chairman stated what the content was and how it would operate, but did not give any explanation as to why and what prompted the Appellate Body to amendments. In the absence of such an explanation, one would think that the Sardines case, as explained by Colombia at the present meeting, could be the reason for these amendments. India also noted the letter from the Appellate Body Chairman, dated 18 October 2002, which stated that the Appellate Body members were ready to provide any additional explanation on these amendments. India welcomed this offer and looked forward to such additional explanation.

92. With regard to the substance of amended rule, India noted that there was a difference between Rule 24(2) and 24(4)of the amended Working Procedures. If a Member had reserved third-party rights and had notified the Secretariat in writing that it intended to make an oral statement would this mean that that Member could only make an oral submission under Rule 24(2). Rule 24(4) provided that if a Member were to participate at the discretion of the Appellate Body's division, it could not only make an oral statement, but could also respond to the questions posed by the division and comment on responses given by others. There was a difference between the wording of Rule 24(2) and 24(4). The letter from the Chairman of the Appellate Body, dated 27 September, explained that third parties who had notified the Appellate Body Secretariat in a timely manner of their intention to appear at the oral hearing might participate actively at the oral hearing. In addition even those parties who had neither filed written submissions nor notified in a timely manner their intention were also permitted to participate actively in the oral hearing. So the words "participate actively" were applicable to both parties. However, this was only explained in the letter from the Appellate Body Chairman. India would like to be specified in the Rule that all the third parties had equal rights to make oral submissions and comments.

93. There was also another fundamental issue. India was not comfortable with the distinction made by the Appellate Body regarding third parties and third participants. Once a Member reserved third-party rights at a DSB meeting or within 10 days after the establishment of a panel, why should it have to make any written notification to the Appellate Body Secretariat or why should participation be conditional upon making written submissions to the Appellate Body. India was not able to understand this and hoped that this would be rectified by the Appellate Body in the future.

94. The representative of Mexico said that his country believed that the amendments made by the Appellate Body constituted an important step in the right direction. Mexico wished to point out that the amended Rule eliminated the requirement of presenting a written submission in order to have the right to participate at an oral hearing, in particular since more often than not such submissions did not contain any substance. This amendment brought the rules closer to the underlying principle of the DSU provision. In addition it eliminated the phenomenon of passive observers, which had no legal basis in the DSU nor in the working procedures of the Appellate Body. It would also resolve situations in which a passive observer was not able to take the floor in the Appellate Body's hearing when new issues appeared to be of direct interest. Mexico also wished to make a comment of a practical nature. References had been made to a concern that new arguments might be raised in the course of oral hearings and that this would not be known to the parties prior to the hearing. This had always been possible as long as the requirement of presenting a written notification had been met. In practice, the time given to third parties to make an oral statement was limited: i.e. about five minutes. There was not very much that one could say during such a short period time. Mexico welcomed this Rule and looked forward to working with other Members and the Chairman of the DSB in order to ensure that the procedural problems which had occurred on this occasion would not be repeated in the future. Finally, his delegation noted the communication from the Chairman of the Appellate Body, and in particular the suggestion made to provide further explanations on the amendments in question. Mexico believed that this information would be extremely useful and supported the idea of requesting such information.

95. The representative of Paraguay said that his delegation had concerns with regard to the procedure that had been followed in order to make amendments to the Working Procedures for

Appellate Review. However, at the present meeting, he would only focus on the substance of these amendments. It was Paraguay's understanding that these rules were already in effect and would comment on them accordingly. In his delegation's view, the previous rules contained in WT/AB/WP/4 were sufficient in order to enable active participation of third parties, regardless of whether or not they had reserved their rights under the previous Rules 24 and 27. He noted that his delegation had had an opportunity when it had not filed a written submission to the Appellate Body to indicate that the previous rules had already given that right to third parties; i.e. there was no obligation to present written legal arguments, but there was a requirement to notify interest in participating as a third party in the appeal, and that gave third parties the right to make oral statements, if they so wished, in the course of Appellate Body's hearings. However, Paraguay recognized that the Appellate Body had certain powers, but believed that its authority was discretionary in nature. The Appellate Body had to carry out research to make its final rulings in order to resolve disputes. All Members had the right to express their views during the hearings of the Appellate Body, as they could do so during panel proceedings.

96. Paraguay believed that the amended rules might lead to some confusion since the new Rule 24(4) provided that "Any third party that has neither filed a written submission in accordance with paragraph (1), nor notified the Secretariat in accordance with paragraph (2), may, at the discretion of the division hearing the appeal, make an oral statement at the oral hearing, respond to questions posed by the division, and comment on responses given by others". If a Member did not express any interest in filing written submissions pursuant to Rule 24(1) or (2), and if it had not notified its interest to the Secretariat, how could such a Member be allowed to make an oral statement? His delegation would be surprised if, as a third party, it had communicated its interest, and then without any prior announcement, another third party appeared at the oral hearing and be allowed to make a statement, in particular in cases where those Members who had notified their interest were not allowed to speak. In the overall balance of rights and obligations this new rule made matters more confusing rather than clarifying. With regard to the communication from the Chairman of the Appellate Body, dated 18 October, he said that Paraguay welcomed the opportunity of discussing the amendments to the Working Procedures for Appellate Review.

97. The representative of the United States said that the changes to the Working Procedures raised several questions that, while perhaps technical in nature, in the US view deserved consideration. For example, the Appellate Body letter informed Members of the amendments, but did not state the effective date for those amendments or contain any transition provisions. This could create uncertainty. In addition, paragraph 4 of new Rule 24 would permit, at the discretion of the division, a third party to appear at the oral hearing if it had neither filed a written submission nor a notification that it intended to appear. The United States agreed that the Appellate Body could, in accordance with Article 17 of the DSU, require third parties to furnish advance notice of their intention to attend a hearing. The United States also thought that it was not burdensome for third parties to do so. However, it was unclear as to how and when this discretion would be exercised. For instance, if a third party could arrive at the hearing and seek a decision on its participation on the spot, that could distract the hearing of the appeal and reduce the time available for consideration of the merits. The United States also noted that the definition of "third participant" would not include a third party who appeared only at the discretion of the division. This had implications for the scope of other rules. For example, it would appear that they would not receive notice under Rule 16 of any special procedures adopted. Even more troubling, it would appear that the ban on *ex parte* communications in Rule 19 would not apply to communications with such a third party. Rule 28 was another example of where the exclusion from the definition led to an odd and presumably unintended result. These questions, as well as a number of questions that other Members had raised, would appear to indicate that the amendments could have benefitted from additional review before being adopted.

98. The representative of Costa Rica said that his delegation was aware that there would be further opportunities to express views on the draft text put forward by the Chairman concerning procedures for consultations in relation to amendments to the Working Procedures for Appellate Review. However, at the present meeting he wished to state his delegation's view that it was

imperative for Members to be consulted on any proposed amendments to the Working Procedures for Appellate Review and their views should be taken into account. Regarding the substance of the amendments, Costa Rica, like other delegations, welcomed the amendments which appeared to be moving in the right direction. The discussion under item 3 of the agenda of the present meeting concerning third-party rights and *amicus curiae* briefs were logical consequences of two interpretations made by the Appellate Body, which Costa Rica considered to be erroneous. The amendments to Rules 1, 24 and 27 of the Working Procedures for Appellate Review were an attempt to correct one of these cases. Nevertheless, Costa Rica continued to be concerned by the fact that the rights of third parties, which had indicated their interest under Article 10.2 of the DSU, were being amended and that conditions were being imposed on the exercise of those rights at the appellate stage where there was no such basis under the DSU. Similarly, Costa Rica was concerned about the amended version of Rule 24(4) which allowed the division hearing the appeal to decide at its discretion on the participation in the oral hearing of any third party that had neither filed a written submission nor notified the Secretariat of its intention to appear at the hearing. In this connection, Article 17.4 of the DSU stated that third parties might make written submissions to, and be given an opportunity to be heard by, the Appellate Body, and no distinction was made between those who had filed a submission and those who had not, nor were any categories established in that respect. As pointed out by many other delegations, the power to amend the DSU or any other WTO Agreement was exclusively the prerogative of WTO Members, and the Appellate Body could not amend those rights through its rules of procedure.

99. The representative of Australia said that his country's principal concern was in relation to the discretionary authority to accept third-party participation in situations where no written submission had been made and no notification had been provided. Like others, Australia would like to suggest that the Chairman of the DSB seek clarification from the Appellate Body on the rationale for the discretionary authority, including in relation to the criteria for the exercise of such authority and how the exercise of such authority might impact on the parties to the dispute and the potential impact on transparency and equity for other WTO Members involved in a dispute. Australia was also concerned about the differences in procedural requirements for third party participation in a panel as compared to the Appellate Body processes. There was no reason why the procedures should be substantively different and this was also a question that could be raised by the DSB Chairman with the Appellate Body. Australia would like to seek an explanation for the reasons why the Appellate Body considered its processes might warrant more flexibility on the part of the Appellate Body compared to the authority of a panel. He also observed that a number of proposals in the DSU review related to third-party rights. Finally, Australia would like to register its transparency concerns and seek clarification of the disputes to which the new procedures had been applied, including any discretionary provisions. Australia found it difficult to understand how the new procedures could be applied prior to the issue of formal amending documentation in three languages.

100. The representative of Israel said that her country was carefully examining the new provisions resulting from the amendments to Rules 1, 24 and 27 of the Working Procedures for Appellate Review and, like other Members, considered them to be a step in the right direction. Israel wished to share with Members some questions of a practical nature. Some of those questions had already been raised by previous speakers. First, when notifying the Secretariat of its intention to appear at an oral hearing under Rule 24(2), would a third party be obliged to state whether it also intended to make an oral statement? If it remained silent in this respect, would that be considered as a negative answer? In this case, would that Member still be subject to the provisions of Rule 24(4). Second, in a hypothetical situation of a Member having notified its intention to make an oral statement, what would happen if that Member decided, for whatever reason, not to make a statement during the oral hearing? Finally, according to Rule 1 on definitions, a third participant meant any third party that had either filed a submission pursuant to Rule 24(1) or had notified the Secretariat pursuant to Rule 24(2) that it intended to appear at the oral hearing. This issue had already been raised by the United States and Paraguay, namely, what would be the status of a third party that had not complied with the above-mentioned requirements, but appeared at the oral hearing and was given the right to make an oral statement at the discretion of the Appellate Body division? Would that Member still be considered as

a third participant in accordance with the definition provided under Rule 1? She said that these practical questions had been raised in an internal discussion when her delegation was trying to fully understand the implications of the new changes. Israel would like to have further clarifications on them and would be grateful if the Chairman could transmit the views expressed by her delegation to the Appellate Body.

101. The representative of the European Communities said that his delegation welcomed the amendments, which had appropriately put an end to the controversial practice of passive observers and reflected the correct interpretation of the DSU provisions with regard to third-party rights, notably, Article 17 of the DSU. He noted that in the communication from the Appellate Body Chairman, the Appellate Body indicated its willingness to provide additional explanation. The EC welcomed this opportunity. There was one aspect of the new rules with regard to which the EC, like many other countries, would like to have further explanation on Rule 24(4): (i) Could it be confirmed that when the Appellate Body exercised its discretion to allow a third party to participate under this new Rule, that third party would be treated as any other third party participant; i.e. would have all the rights listed in the rule to make an oral statement at the oral hearing, respond to questions posed by the division and comments on responses given by others? Or could the division limit its authorization to only some of these rights? (ii) Could it be explained in what circumstances the division would exercise its discretion under new Rule 24(4)? Would the third party need to provide a reason why it did not make a request within 25 days? What other reasons would be relevant?

102. The Chairman proposed that the DSB take note of the statements made regarding the amendments to the Rules 1, 24 and 27 of the Working Procedures for Appellate Review. He further proposed that, as requested at the present meeting, he would inform Mr. Peréz del Castillo that the views expressed by Members on this matter be duly communicated to the Appellate Body.

103. The DSB so agreed.