WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/50
14 December 1998

(98-5046)

Dispute Settlement Body
6 November 1998

MINUTES OF MEETING

Held in the Centre William Rappard
on 6 November 1998

Chairman: Mr. Kamel Morjane (Tunisia)

Subjects discussed: Page

1. United States - Import Prohibition of Certain Shrimp and Shrimp Products

(a) Report of the Appellate Body (WT/DS58/AB/R) and Report of the Panel (WT/DS58/R and Corr. 1)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS58/13 transmitting the Appellate Body Report in "United States - Import Prohibition of Certain Shrimp and Shrimp Products", which had been circulated in document WT/DS58/AB/R in accordance with Article 17.5 of the DSU. He said that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He recalled that under Article 17.14 of the DSU "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

The representative of Thailand said that the long and arduous legal proceedings regarding this case had reached an important stage in the dispute settlement process. He thanked the Panel and the Appellate Body for their effort and contribution as well as the Secretariat for its work and assistance. He recalled that Thailand had brought this case to the DSB not so much for its economic interest, but as a matter which involved the fundamental principle of the multilateral trading system. As a result of a unilateral action by one Member, Thailand had to reflect seriously upon the principle enshrined in the basic philosophy of GATT, namely the respect for multilateralism and trade without discrimination. Thailand believed that the application of unilateral and extraterritorial measures was unacceptable and incompatible with the multilateral trading system. Both the reputation and credibility of the WTO, as a result of many years of negotiations and the observed disciplines which had established a delicate balance of rights and obligations among Members, could be undermined

and weakened by such measures. Under the multilateral trading system, no country could impose unilaterally its trade policies on other trading partners through a restrictive embargo. The unilateral application of Section 609 had brought to the fore the arbitrary and discriminatory effects of such import prohibition.

Thailand attached importance to the conservation issues and believed that sea turtles were worthy of conservation. However, its real concern was the manner in which conservation had been carried out and whether the US measure was consistent with the basic GATT-principles. The scope of application of this measure, in the context of Article XX of GATT 1994, had raised a number of important questions. Thailand had stated before the Panel that any decision with regard to this case would have profound systemic implications, consequences and repercussions for the conduct of world trade and the behaviour of trading nations. His country was pleased with the conclusion reached and upheld by the Appellate Body that "…this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination....., contrary to the requirements of the chapeau of Article XX" (paragraph 186). Thailand supported the Panel's ruling that the US embargo constituted a "threat to the multilateral trading system", and that it was inconsistent with Article XI:1 of GATT 1994 and could not be justified under Article XX. The Panel had rightly stated in paragraph 7.45 of its Report that if the interpretation of Article XX were to be followed which would allow a Member to provide market access contingent upon the adoption by the exporting Members of certain policies, including conservation policies, the GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members, as security and predictability of trade relations under those agreements would be threatened. In its concluding remarks contained in part IX of its Report, the Panel had stated that Members were bound by obligations to implement their policy objectives in such a way that "is consistent with their WTO objectives, not depriving the WTO Agreement of its object and purpose".

He wished to express his country's views, in particular with regard to the Appellate Body Report, in the light of what it perceived as grave and legitimate concerns arising out of the observations and decision of the Appellate Body. It was necessary to express the views upon the adoption of the Reports in the interest of long-term viability and sanctity of the dispute settlement system, which was vital for preserving the balance of rights and obligations embodied in the rule-based multilateral trading system. His delegation's concerns related to both procedural and substantive issues.

With regard to the procedural issues, it was apparent that the Appellate Body had used this case to extend its authority beyond that granted to it under the WTO Agreement. Article 17.6 of the DSU limited the jurisdiction of the Appellate Body to issues of law covered in panel reports and legal interpretations developed by panels. Article 19.2 of the DSU prohibited the Appellate Body from adding to or diminishing the rights and obligations provided in the covered agreements. However, the Appellate Body had failed to respect these negotiated limitations in several instances. He drew attention to the fact that the Appellate Body had made at least six new findings of facts, based on its oral hearing which had then been used in its interpretation of the chapeau of Article XX. Although in each instance the findings had supported the appellees, the Appellate Body might have exceeded its jurisdictional limits under Article 17.6 of the DSU. In the Appellate Body Report on "Australia - Measures Affecting Importation of Salmon", which had recently been circulated, a different approach to the same problem had been taken by another Appellate Body's division. In paragraph 193 of that Report, the Appellate Body had refrained from making new factual findings on a sanitary and phytosanitary issue, due to the absence of factual findings at the Panel level and/or facts that had not been disputed by the parties.

Another procedural flaw concerned the Appellate Body's treatment of *amicus curiae* briefs submitted by non-governmental organizations (NGOs). His delegation believed that Members, not the Appellate Body, should decide the extent to which NGOs might be involved in a dispute settlement process. Thailand's long-standing position was that the WTO Agreement did not give

NGOs the right to submit *amicus* briefs, nor did it allow Members to attach *amicus* briefs to their submissions that did not reflect their point of view. The Appellate Body's conclusion in paragraph 107 of its Report had defied the rights and obligations of Members and the basic intention under the DSU. The argument contained therein indicated that the Appellate Body had taken into consideration more than the issues of law and legal interpretation. By ruling against the appellees, the Appellate Body had given NGOs the right to make submissions that had exceeded the rights of Members not participating in this dispute. It had thus diminished the rights of Members under the WTO Agreement in contravention of Article 19.2 of the DSU. It had also intruded upon Members' prerogative as negotiators to establish the bounds of participation in the WTO. Such issues should be decided by Members. The Appellate Body, which was only a judiciary, was in this case writing the rules of participation with Members standing in judgement of its actions. This reversal of roles was anomalous and unforeseen.

The Appellate Body's decision with respect to the *amicus* briefs involved one element which was not clear. The Appellate Body had issued a preliminary ruling accepting three *amicus* briefs attached to the US submission from various environmental organisations. One further brief had been sent directly to the Appellate Body. The Appellate Body had undertaken in its preliminary ruling to explain the legal basis for its decision to accept this brief. But this had not been done. No reference had been made to this brief in its final decision, despite a letter sent to the Appellate Body by three Ambassadors complaining about this preliminary ruling. The letter had been entirely ignored. The Appellate Body did not have the authority nor was entitled within the parameter of the DSU to receive this *amicus* brief. It had a responsibility to respond to the letter and to discuss its legal grounds for accepting this brief. The Appellate Body had not only demonstrated its lack of respect for Members by accepting this brief without explanation or legal justification. Furthermore, by ignoring the legal arguments raised in the letter it had diminished the rights of Members under the WTO Agreement, while adding unreasonably to the rights of NGOs. The DSU did not grant the Appellate Body the right "to seek" information. Instead, the Appellate Body had arbitrarily assumed this right to the detriment of the system.

Thailand was also concerned that the "evolutionary" interpretative approach newly adopted by the Appellate Body was a formula for adding to or diminishing the rights and obligations of Members. The WTO Agreement was a finely balanced and carefully negotiated document containing clear commitments. It was therefore disconcerting that the Appellate Body had adopted an interpretative formula that could lead to unpredictable results. As demonstrated by the results in this case, this had diminished business confidence and had affected the interpretation of rights and obligations of Members in ways which were not contemplated under the WTO Agreement.

With regard to substantive issues, his delegation regretted that the Appellate Body's decision seemed to be oriented towards political factors at the expense of legal principles. Unlike the Panel Report, which had shown great sensitivity to the needs of the multilateral trading system, the Appellate Body Report had deferred to underlying political concerns. While the WTO should not operate in a public relations vacuum, their concerns should not be used to invalidate negotiated treaty obligations. External factors should not be allowed to destabilise and undermine the balance of rights and obligations achieved. It was evident to the complaining parties and to the United States, that this case could have been resolved on the basis of the chapeau of Article XX. The US failure to seek a multilateral cooperative solution to the environmental problem before implementing a unilateral solution, had also been cited by the Appellate Body in the *Gasoline* case[1]. That case had also been resolved on the basis of the chapeau of Article XX. Thailand believed that the Appellate Body's analysis of Article XX(g) had not been called for. While his country supported environmental causes in general, and acknowledged that the new environmental awareness in the WTO was positive, it was deeply concerned that given the breadth of the Appellate Body's decision on Article XX, this case

[1] WT/DS2AB/R

could be viewed as an invitation to unilateral actions instead of encouraging greater multilateral cooperation on environmental issues.

He wished to draw attention to two other problematic points with regard to the Appellate Body's decision on Article XX(g). First, this decision permitted Members to discriminate against products based on non-product related processes and production methods (PPMs). This was a fundamental and impermissible alteration of the present balance of the rights and obligations of Members under the WTO Agreement. Thailand considered that this would result in explosive growth in the number of environmental, and perhaps labour measures applied to PPMs and justified under Article XX. The right to discriminate based on like products had not been negotiated in the Uruguay Round. The Appellate Body, upon its own will, had altered the balance of rights and obligations under the WTO Agreement.

Second, the Appellate Body's theory of "evolutionary" interpretation had been applied to render Article XX(b) and the "necessary" test therein meaningless. Despite its findings in other cases with regard to its respect for the principle of "effectiveness", if the Appellate Body had wished to give meaning to Article XX(b), it would not have clung to an interpretation of Article XX(g) that rendered most, if not all of Article XX(b), meaningless. It was possible that the Appellate Body would soon conclude that human beings were exhaustible natural resources, if not, animal life would enjoy greater protection than humans. His delegation was gravely concerned that the Appellate Body's decision would have serious systemic implications for the future application of the WTO rules and disciplines. The decision might have already opened a floodgate of greater abusive use of trade-related environmental measures in future. Regrettably, as a result of the Appellate Body's questionable judgment, the number of trade-related environment disputes was likely to multiply. Thailand hoped that in future the Appellate Body would demonstrate greater sensitivity with respect to the limits imposed on its jurisdiction, and greater respect for the sensitivity of Members.

The DSU would only be effective if it had Members' confidence. Confidence in the dispute settlement mechanism was linked both to the decision-making process and to compliance with the decisions of the Appellate Body and panels. Without compliance, the validity and worth of the DSU would be put into doubt. Thailand believed that compliance with the Appellate Body's decision in this case meant the removal of the US embargo. The Appellate Body had found that this should be done prior to any discussions on a multilateral agreement for the protection of sea turtles. His country supported this finding and wished that this unilateral shrimp embargo be removed immediately. If, as a last resort, trade-related environmental measures were to be imposed, the application of regulatory schemes to assure due process and the equal treatment of all Members would be required. Whether these shortcomings or short-sightedness were unintentional or deliberate, there was a need for them to be rectified to the benefit and viability of the system. In order for the system to remain credible, effective and viable, such a system should not only be able to adjust to an undergoing evolution with time, but also be objective in its functioning as well as prudent and judicious in assuring due process, while evading political pressure. Thus far the dispute settlement mechanism had proven to be the success of the WTO. However, its success did not imply that it was without faults or shortcomings. He believed that the ability to address and rectify these shortcomings would enable the system to achieve greater success. This matter should be further pursued and seriously examined in the DSU review. Thailand joined the consensus in favour of the adoption of the Reports and requested that the United States bring its measure into full compliance with the Appellate Body's ruling.

The representative of Pakistan thanked the Appellate Body's members for their time and effort devoted to this case. Both the Panel and the Appellate Body had reached the right conclusion that the measure of the United States prohibiting imports of shrimp and shrimp products from some countries was inconsistent with its obligations under the GATT 1994. Pakistan appreciated the fact that the Appellate Body Report had delved into a broad range of legal and factual issues pertaining to this case, but was disappointed with the reasoning contained in the Report. His country was particularly concerned about the implications of this Report for the dispute settlement system and the WTO. It

was also concerned that the Appellate Body had used this case as an instrument for extending its powers beyond those that permitted under the DSU.

Under Article 17.6 of the DSU appeals were limited to issues of law covered in panel reports and legal interpretations developed by panels. Furthermore, under Article 19.2 of the DSU, the Appellate Body was not allowed to add or subtract the rights and obligations of Members provided in the covered agreements. He regretted that in both respects, the Appellate Body had exceeded its authority. The Appellate Body, by giving a new interpretation to certain DSU provisions had overstepped the bounds of its authority by undermining the balance of rights and obligations of Members. For example, the DSU did not give NGOs the right to submit *amicus* briefs or to give Members permission to attach briefs to their submissions that did not reflect their views. The DSU did not give NGOs greater rights to make submissions than those enjoyed by Members. The Appellate Body had disregarded the jurisdictional limits agreed by Members. In Pakistan's view, the "evolutionary" interpretative approach of the Appellate Body was a recipe for adding to and diminishing the rights and obligations of Members. The WTO system was based on certain rights and obligations that had been carefully negotiated in successive rounds of trade negotiations. These rights and obligations should be preserved and protected.

The Report raised serious questions concerning the scope of the Appellate Body's authority and these issues should be addressed in the DSU review. The Appellate Body had encroached upon the authority of both Members and negotiators of the WTO Agreement. Furthermore, it had tried to expand its authority beyond that mandated to it in the Uruguay Round negotiations. At the present meeting, he wished to elaborate on some important concerns regarding the Appellate Body Report. First, Pakistan was concerned about the Appellate Body's increasing power and the selective enforcement of the DSU provisions. In this case, the Appellate Body had clearly exceeded its limited mandate set forth in Article 17 of the DSU to examine issues of law covered in panel reports and legal interpretations developed by the Panel. Second, the Panel's factual findings that the United States had violated the chapeau of Article XX by failing to pursue a cooperative solution before the imposition of its unilateral embargo had been upheld by the Appellate Body and would have been sufficient to resolve this case. The Appellate Body did not need to make new and independent findings of the facts reflected in the footnotes to its decision nor to examine Article XX(g). By examining Article XX(g), the Appellate Body had opened the door to similar unilateral actions. Third, the Appellate Body's theory of "evolutionary" interpretations to justify its findings that animal life fell within Article XX(g), had rendered Article XX(b) and the higher standards contained therein meaningless. The Appellate Body's adoption of the theory of evolutionary interpretations had undermined the predictability of the dispute settlement system. Fourth, the logical result of the Appellate Body's interpretation was to expand Article XX(g) dangerously, thereby opening the door to trade-related environmental measures that would threaten the viability of other commitments negotiated in the Uruguay Round. Members would now appear to have a limitless discretion to invoke Article XX(g) regardless of jurisdictional and sovereignty considerations and the intent of drafters of the WTO Agreement. Effectively, the Appellate Body's decision permitted Members to discriminate against products based on non-product related PPMs. Finally, the Appellate Body had also undermined the authority of Members on issues concerning the participation of NGOs. Those Members who had negotiated the DSU were aware that it had never been intended to permit NGOs to submit *amicus* briefs to panels and to the Appellate Body. Pakistan strongly believed that Members, not the Appellate Body, should determine the extent to which NGOs might participate in the dispute settlement process.

His delegation was concerned that the Appellate Body had issued a preliminary ruling regarding the *amicus* brief but had ignored the Appellees' request to make a timely ruling on a more fundamental issue, namely whether the US notice of appeal had satisfied the DSU requirements. The Appellate Body had not only ignored two requests by three Appellees for a preliminary ruling on this matter, it had also failed to appreciate that its decision on this question should have been made before the issue of the *amicus* brief had been addressed. Pakistan was committed to the protection of

environment, including the protection of endangered species. Its environmental protection programme dated as far back as the 1960s. However, Pakistan did not believe that the Uruguay Round Agreement had elevated environmental concerns to the extent raised by the Appellate Body. His country was concerned that the Appellate Body's decision might lead to more frequent use of trade-related environmental measures. Notwithstanding these concerns, Pakistan supported the conclusions of the Appellate Body Report and, like other complaining parties, requested that the DSB adopt the Report and that the United States bring its measure into compliance with the Appellate Body's ruling.

The representative of Malaysia welcomed the rulings of both the Panel and the Appellate Body that the measure of the United States was inconsistent with its obligations under the WTO Agreement. It was therefore imperative that this import prohibition be removed immediately and unconditionally. In this regard, in paragraph 188 of its Report, the Appellate Body had recommended that the DSB request the United States to bring its measure -- the import ban on shrimp and shrimp products -- found by the Panel to be inconsistent with Article XI of GATT 1994, and found by the Appellate Body not to be justified under Article XX of GATT 1994, into conformity with its obligations under the WTO Agreement. Malaysia expected that the United States would lift its import ban. The United States should also, *inter alia* eliminate all conditions that had caused the measure to be applied in a manner that constituted "unjustifiable discrimination" and "arbitrary discrimination" between countries where those conditions prevailed. Since May 1996, when the prohibition had come into effect, Malaysian exports of wild harvest shrimp had ceased. His country therefore urged the United States to remove immediately the import prohibition as recommended by the Panel and the Appellate Body. The United States, like other Members, had an obligation to bring its laws and policies into conformity with its obligations under the WTO Agreement.

A number of issues with regard to the Appellate Body's decision had raised systemic questions and should therefore be addressed by Members in order to preserve the credibility of the dispute settlement mechanism. In particular, Malaysia was concerned about the issue of *amicus* briefs submitted by NGOs which had been raised on two occasions in this dispute. First, during the Panel proceedings on 28 July 1997 when the Panel had received a brief directly from the Center for Marine Conservation (CMC), the Center for International Environmental Law (CIEL) and the World Wild Fund for Nature (WWF) on 16 September 1997, with similar copies to the complainants. For the second time this matter had been raised during the Appellate Body proceedings when the United States had attached to its submission of 23 July 1998, three Exhibits: i.e., *amicus* briefs from three groups of NGOs (paragraph 79 of the Appellate Body Report). In addition, on 3 August 1998, CIEL had sent a revised version of its brief directly to the Appellate Body.

Malaysia considered that the legal reasoning of the Appellate Body in paragraphs 99 to 110 of its Report was flawed. In paragraph 101, the Appellate Body had stressed two basic legal propositions: (i) only Members had access to the dispute settlement process of the WTO and not individuals or international organizations whether governmental or non-governmental; and (ii) only Members who were parties to a dispute or third parties had a legal right to make submissions, and had a legal right to have those submissions considered by a panel. It was therefore difficult to understand the Appellate Body's interpretation that NGOs which were not parties or third parties to the dispute, could make submissions to the Panel or the Appellate Body in the form of *amicus* briefs. In particular, after the Appellate Body had stated that the first issue of appeal -- whether the Panel had erred in finding that accepting non-requested information from NGOs would be incompatible with the DSU provisions -- raised by the appellant "is most appropriately addressed" by examining what a panel was authorized to do under the DSU. The term "most" implied that the two basic legal propositions mentioned above should be taken into consideration by the Appellate Body.

In its examination of what the panel was authorized to do under the DSU, the Appellate Body had referred to Article 13 of the DSU. It had recognized that the Panel, based on Articles 12 and 13 of the DSU, had "ample and extensive authority to undertake and to control the process by which it

informs itself both of the relevant facts of the dispute and of the legal points and principles applicable to such facts" (paragraph 106). Then the Appellate Body had stated that it believed that "…the word 'seek' "must not necessarily be read in too literal a manner as the Panel did". In order to substantiate this point, the Appellate Body had referred to a hypothetical case in paragraph 107, which in Malaysia's view was far-fetched, because an individual or a body would never ask a panel for permission to file a statement or a brief if the two basic legal propositions had been taken into account. The Appellate Body's view that the distinction between "requested" and "non-requested" information vanished was untenable. It should not be permitted for NGOs to submit *amicus* briefs directly to a panel. Malaysia requested that the DSB adopt the Report at the present meeting and that the import ban on shrimp and shrimp products be lifted immediately by the United States. He wished to join previous speakers in requesting that the Appellate Body's failure to act within the bounds of its jurisdiction be examined during the DSU review.

The representative of India said that the issues raised in both Reports were of fundamental importance to WTO law since they concerned Articles XI and XX of GATT 1994. The findings of the Panel and the Appellate Body had impinged on the crucial relationship between trade and environment, a matter that was the subject of ongoing debate and discussion in the WTO. India was pleased with the final outcome of this dispute, namely that the US measure had been found to be inconsistent with the WTO rules. His country's main concern related to the manner in which the Appellate Body had treated the dispute and had arrived at some untenable conclusions based on its flawed reasoning. He requested that India's views be fully recorded in the minutes of the meeting in accordance with Article 16.3 of the DSU.

The Panel Report had stated in no uncertain terms that the US measure was in violation of Article XI:1 of GATT 1994. Since this issue had not been raised before the Appellate Body, this Panel's finding had been accepted by the appellant. The Appellate Body had recommended that the DSB request the United States to bring its measure found by the Panel to be inconsistent with Article XI of GATT 1994 into conformity with its obligations under that agreement. India fully supported this finding of the Panel as endorsed by the Appellate Body and expected that the United States would comply with this unequivocal recommendation.

The Panel had emphatically stated, based on sound legal reasoning, that accepting non-requested information from non-governmental sources would be incompatible with the DSU provisions. It had explained that the initiative to seek information and to select the source of information rested with the Panel, and the Panel alone. It had stated that only the parties to the dispute and third parties could submit information directly to panels. His delegation fully agreed with the Panel's reasoning on this matter. However, India believed that the Panel had erred in prompting the parties to the dispute, at the end of the second hearing, to consider submitting documents sent to the Panel by NGOs as their own submissions. Panels were not expected to influence parties as to what should or should not form part of their submissions. In doing so, the Panel might have acted inconsistently with both the letter and spirit of the DSU.

The Appellate Body had reversed the Panel's finding that accepting non-requested information from NGOs was incompatible with the DSU provisions. However, the Appellate Body's findings and conclusions on this issue had not been based on sound legal reasoning but on its belief that the word "seek" in Article 13 of the DSU had been read by the Panel in too literal a manner. India disagreed with this reasoning. The Panel had interpreted the word "seek" in Article 13 of the DSU fully in accordance with the general rule of interpretation of the Vienna Convention on the Law of Treaties: i.e., that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms contained therein. The word "seek", in its ordinary meaning, implied a pro-active search on the part of the subject, which in this case was the Panel. Therefore, the right for the Panel to seek information which was different from NGOs having the unimpeded right to submit information to panels. The Appellate Body had alleged that the Panels' reading of the word "seek" was too formal and technical. His delegation considered it unusual that the Appellate Body

had stated this, because the discipline of law was both formal and technical, and the WTO constituted a forum in which legally binding commitments had been undertaken by Members. He wished to point out that the Appellate Body had blurred the distinction between a request for information (i.e, to seek) and acceptance or rejection thereof which both, logically and legally, represented two different steps. When the DSU referred to "seeking" this implied the first step. It was obvious that information first sought by a panel could later be accepted or rejected. While the Panel had the right to accept or reject information, it was incorrect to reason like the Appellate Body that it did not matter whether information had been specifically sought or not. If the contention of the Appellate Body was correct then the word would not have been "seek". India, therefore, believed that the Appellate Body might have interpreted one of the important provisions of DSU loosely and wrongly, which could upset the balance of rights and obligations of Members. It was India's understanding that the DSU negotiators had never envisaged a situation under which non-Members could send unsolicited information to a panel, much less a situation in which a panel would acknowledge such unsolicited information.

He drew attention to the Appellate Body's ruling on the admissibility of the briefs by NGOs appended to the US submission. The Appellate Body had first issued a preliminary ruling that it had decided to accept for consideration, insofar as they might be pertinent, the legal arguments made by the various NGOs in the three briefs attached to the appellant's submission as well as the revised version of one particular NGO brief sent directly to it. Subsequently, the Appellate Body had asked the United States to what extent it agreed with the legal arguments set out in the briefs appended to its submission. The United States had, inter alia, stated that (i) it was not adopting these views as separate matters to which the Appellate Body had to respond; and (ii) it agreed with the legal arguments in the NGOs' submissions to the extent that those arguments concurred with its arguments set out in its main submission. The US position with regard to the annexes to its own submission had been far from unequivocal. However, the Appellate Body had decided to take into account these briefs prior to being informed of the US approach. India was concerned that in taking into account these briefs, the Appellate Body had acted without proper authority. Furthermore, the Appellate Body had not responded to the objections raised by the Appellees with regard to its preliminary ruling which had rendered the Appellate Body to assume, at least partly, the role of the Appellant.

The Panel had made a clear and unambiguous finding that the US measure was not within the scope of measures permitted under the chapeau of Article XX. After the burden of proof had been placed on the United States as a party asserting the affirmative defence, the Panel had interpreted the chapeau of Article XX in accordance with the Vienna Convention. India believed that the Panel was right in examining the object and purpose of the WTO Agreement as well as the context of the term "unjustifiable". The Panel was also right in interpreting Article XX narrowly, and in stating that if Article XX were interpreted to permit countries to take trade measures so as to force other countries to change their policies within their jurisdiction, the balance of rights and obligations of Members would be seriously impaired. The Panels' reasoning was irreproachable when it had found that a measure could not be considered as falling within the scope of Article XX if it was so operated as to affect other government's policies in a way that threatened the multilateral trading system. The Panel had further explained that if the interpretation of the chapeau of Article XX were to be followed, which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, then GATT 1994 and WTO would no longer serve as a multilateral framework for trade among Members because the security and predictability of trade relations under those agreements would be threatened. If one Member were allowed to adopt measures similar to the US measure, then other Members would have the equal right to adopt such measures with different or even conflicting requirements. If this were to be taken to its logical conclusion this would lead to the end of the multilateral trading system. Finally, the Panel had referred to incontrovertible evidence that there was a broad preference for internationally negotiated multilateral environmental agreements over unilateral measures such as the one taken by the United States. India fully shared both the Panel's legal reasoning and its findings in this regard.

The Appellate Body had reversed the Panels' finding that the US measure was not within the scope of measures permitted under the chapeau of Article XX. In doing so, the Appellate Body had suggested that the Panel had not followed all the steps in its application of the customary rules of interpretation of public international law. India believed that the Panel had interpreted the words in the chapeau in accordance with the ordinary meaning in the light of the object and purpose of the treaty involved. The Appellate Body had faulted the Panel for failing to scrutinize the immediate context of the chapeau and for not examining the object and purpose of the chapeau of Article XX. However, India believed that the Appellate Body might have erred in its application of the Vienna Convention. First, the context in accordance with Article 31 of the Vienna Convention was the text, preamble and annexes of the Treaty (Agreement) as a whole. Also, the object and purpose referred to in the Vienna Convention would appear to apply to the whole Treaty (Agreement) rather than specific parts thereof, as suggested by the Appellate Body. It is difficult to deny that the object and purpose of GATT 1994 (of which Article XX was an integral part) was the smooth functioning of the multilateral trading system. Article XX was a limited and conditional exception to GATT 1994. It could not have an overarching object and purpose as suggested by the Appellate Body. If this was true, almost any measure taken by a Member could be justified under Article XX. This certainly was not the intention of the drafters of this Article. His delegation, therefore, believed that the Panel was right in examining the US measure vis-à-vis its impact on the multilateral trading system.

The Appellate Body had faulted the Panel for following the wrong sequence i.e, proceeding from the chapeau rather than first examining the US measure vis-à-vis the paragraphs (b) or (g) of Article XX. The Appellate Body had stated that the "appropriate method" had been suggested in the *Gasoline* case through the two-tiered approach. First, provisional justification of the measure through the provisions (a) to (j) of Article XX; and second, appraisal of the same measure under the chapeau of Article XX. However, the Appellate Body had previously stated that each case had to be considered on its own merit and on an individual basis. It therefore seemed unusual that a strait-jacket approach had to be advocated by the Appellate Body with respect to all cases involving Article XX. He noted that in its submission, the United States had not objected to the Panel's approach of proceeding from the chapeau and that during an oral hearing, the United States had not seriously questioned the Panel's methodology.

The Appellate Body had then proceeded to examine an issue not considered by the Panel; i.e, the US measure vis-à-vis Article XX(g). It had justified this as it had to complete the legal analysis not done by the Panel. The Appellate Body's decision could be questioned both on the grounds of judicial economy -- a concept expounded by the Appellate Body -- and whether there was a need to do this in this case. With regard to the issue of lack of justification of the US measure vis-à-vis the chapeau of Article XX, the Appellate Body had reached the same conclusion as the Panel. He drew attention to the fact that in the *Salmon* case, the Appellate Body had refrained from making new factual findings on a sanitary and phytosanitary issue, in the absence of factual findings made at the Panel level and/or facts that were not disputed by the parties. The same logic could have guided the Appellate Body in this case. Instead, the Appellate Body had decided to examine the US measure vis-à-vis paragraph(g) in Article XX. In so doing, the Appellate Body had made the point that the words of Article XX(g) "exhaustible natural resources" had been crafted more than 50 years ago and that they should therefore be read by a treaty interpreter in "the light of contemporary concerns of the community of nations about the protection and conservation of the environment". This notion expounded by the Appellate Body based on its evolutionary approach to interpretation was dangerous and not agreed by Members. Reference to "contemporary concerns" to justify a changed interpretation of the words "exhaustible natural resources" had amounted to either an amendment or an authoritative interpretation of the existing agreement which could only be done by Members. The Appellate Body had acknowledged this fact in its report on "US-Measure Affecting Imports of Woven Wool Shirts and Blouses from India". In that report the Appellate Body had noted that Article IX of the WTO Agreement provided that the Ministerial Conference and the General Council had the exclusive authority to adopt interpretations of the WTO Agreements. Therefore, in the

present case, India believed that the Appellate Body had clearly overstepped its authority and its mandate under the DSU.

Furthermore, Members taking measures under Article XX preferred paragraph (g) to (b) thereof. This was due to the "necessity" test incorporated in paragraph (b) which was difficult to meet. This explained the US preference for assessing its measures pursuant to Article XX(g). The Appellate Body had found that the US measure was made effective in conjunction with domestic restrictions, as required by Article XX(g). But in doing this, the Appellate Body had expanded the scope of paragraph (g) well beyond the intention of its drafters. If the present decision of the Appellate Body were deemed applicable to all future measures, then the door would open to unilateral measures aimed at discrimination based on non-product related PPMs. This decision had the unfortunate effect of rendering paragraph (b) of Article XX totally redundant and meaningless which had not been intended either by the original drafters or the Uruguay Round negotiators. While the Appellate Body had taken considerable efforts to explain why it had considered the US measure as falling within the scope of Article XX(g), it had not responded to the point of the appellees that if animal life were deemed to fall both within Article XX(b) and XX(g), most of Article XX(b) would be rendered meaningless.

He noted that the Appellate Body had cited the Preamble to the WTO Agreement which included references to environmental protection and sustainable development and had asserted that this should "add colour, texture and shading" to its interpretation of WTO Agreements. He underlined that the very next paragraph in the preamble referred to a "need for positive efforts designed to ensure that developing countries and especially the least developing among them, secure a share in the growth in international trade commensurate with the needs of their economic development". India hoped that future panels and the Appellate Body would ensure that this preambular provision also added "colour, texture and shading" to their interpretation of special and differential treatment provisions of various WTO Agreements.

His delegation shared the concern expressed by some other delegations that the Appellate Body had not appeared to have adequately dealt with the issue of the notice of appeal. His delegation believed that the Appellate Body had acted out of political considerations and had strayed away from an objective consideration of issues of law. The Appellate Body had been established under the DSU as the supreme judicial authority of the WTO with the specific mandate to examine issues of law contained in panel reports and to review legal interpretations developed by panels. The Appellate Body was an organ of the DSU and not vice versa. It appeared that by this approach the Appellate Body had transcended the strict boundaries of law and had entered into the political domain strictly preserved for Members. With regard to *amicus* briefs, the Appellate Body had appeared to have let itself to be overawed by the campaign of NGOs of major trading entities. India had consistently maintained that NGOs had a useful role to play in their respective countries but in the WTO, which was characterised by a contractual relationship between governments, NGOs could not have a direct role and could not be accorded privileges greater than those enjoyed by Members, as the Appellate Body had done in this case. The Appellate Body had an important role, but if it exceeded its mandate and authority under the DSU, like in this case, this would have the effect of adding to or diminishing the rights and obligations of Members under the various Agreements. This would not be in the interest of either Members or the dispute settlement mechanism.

He wished to reiterate India's firm and irrevocable commitment to the goals of environmental protection and sustainable development. However, his country believed that it was up to Members and not within the mandate of the Appellate Body to try to meet environmental concerns. In this regard, important work was currently underway in the Committee on Trade and Environment (CTE). For many centuries, the essential harmony between the environment and the man had been a central precept in Indian society. India had a well-established history of protecting endangered species, including sea turtles. In his country's view, environmental concerns were best met through internationally negotiated multilateral environmental agreements, rather than by unilateral trade

measures such as the US measure in this case. India expected the United States to fully comply with the recommendations of the Panel and the Appellate Body in order to bring its measure into conformity with its obligations under the WTO Agreement. He expressed his country's appreciation for the work of the Panel and the Appellate Body and for the assistance of the Secretariat.

The representative of the United States said that her country had appealed the Panel's findings regarding the application of Article XX to the US shrimp-turtle law and the discretion of panels under the DSU to accept information that had not been requested. The United States was pleased that the Appellate Body both had reversed the Panel's analysis of Article XX in its entirety, and had found that nothing in the DSU limited the ability of panels to accept and consider non-requested information, including *amicus curiae* briefs. The Appellate Body had found no inconsistency between the United States' legislation and its WTO obligations. However, it had found fault with certain aspects of the administration of the law. The United States disagreed with the Appellate Body's conclusion that the administration of the law constituted arbitrary and unjustifiable discrimination. However, the Appellate Body had also made a number of important and positive findings that helped clarify the critical relationship between WTO rules and measures taken to protect the environment. With these considerations, the United States could agree to the adoption of the Appellate Body Report. At the present meeting, she wished to underline a number of important findings made by the Appellate Body.

The Appellate Body had found that the Panel had erred in creating a test for excluding certain measures from the scope of Article XX that had no basis in the text of the Article and had rejected the Panel's findings that measures encouraging exporting countries to comply with certain policies were *a priori* incapable of justification under Article XX. In its analysis, the Appellate Body had underlined the importance of the interpretation of the WTO Agreement of the Preamble's emphasis on the goal of supporting sustainable development, including the protection and preservation of the environment. Applying this approach with respect to Article XX(g), the Appellate Body had agreed with the United States that Article XX(g) applied to renewable biological resources, and was not limited, as complainants had claimed, to depletable mineral resources. It had also found that the US shrimp-turtle law, by encouraging exporting countries to adopt sea turtle conservation programmes, was directly connected with the policy of sea turtle conservation, and thus was a measure "relating" to conservation. It was also of considerable significance that the Appellate Body had not accepted the complainants' argument that some sort of jurisdictional limitations would prevent the use of Article XX(g) with respect to the measures in question. The United States was pleased that the Appellate Body had emphasized that Article XX had to be "read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment."

For these reasons, the United States believed that the Appellate Body Report had far-reaching importance with respect to the evolving relationship between the WTO rules of trade and environmental conservation measures adopted by Members. Throughout this dispute settlement proceeding, all parties to the dispute had emphasized the importance they attached to the protection of sea turtles, recognized internationally as being threatened with extinction. The United States appreciated this and hoped that it would be possible to build upon it to work together in addressing this critical conservation issue effectively and comprehensively. In this regard, her country welcomed the Appellate Body's statement that sovereign states could and should "adopt effective measures to protect endangered species, such as sea turtles."

The representative of the European Communities said that his delegation, which had participated in the proceedings of the Panel and the Appellate Body as a third party, welcomed the Appellate Body Report. At the present meeting, he did not wish to enter into details regarding the various legal points addressed and clarified by the Appellate Body. He would only stress that the Appellate Body had given important guidance on how Article XX should be understood and used when dealing with environment and conservation related measures, thereby shedding some light on the scope for the use of those measures in relation to the WTO rules. The Community was pleased

that the Appellate Body had not only implicitly upheld the EC's suggestion to read the chapeau in the light of a "reasonable" test, but had also confirmed what constituted a proper relationship between the chapeau and the subparagraphs in Article XX.

With regard to environmental and conservation problems, the Community strongly supported the Appellate Body's reasoning which encouraged Members to make genuine efforts to reach negotiated solutions. This had consistently been the EC's approach. This reasoning had inspired the EC suggestions to further clarify the relationship between the trade provisions in Multilateral Environmental Agreements (MEAs) and WTO rules as a disincentive to unilateral action in the environmental and conservation area. The Community believed that this ruling provided important legal clarification and guidance to those wishing to take measures for the protection of the environment or for conservation purposes, which required respect for Article XX of GATT 1994. The Community hoped that the ruling of the Appellate Body would create momentum for an open, frank and non-polarised discussion on the relationship between environment-related measures and WTO rules.

The representative of Brazil said that his delegation wished to make a statement at the present meeting since it believed that the DSB was an appropriate forum to discuss the function of the dispute settlement mechanism. It was well-known that in practice any decision of a panel or the Appellate Body with regard to a specific case would go beyond such a specific case. Although no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement. Therefore, in light of these systemic implications of decisions and recommendations pertaining to a specific case, Brazil wished to state its position with regard to certain findings of the Appellate Body. His delegation was exercising the right under Article 17.14 of the DSU, that the adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report.

Brazil wished to refer to the Appellate Body's interpretation of Article 13 of the DSU. This interpretation had modified the Panel's correct decision which had dealt appropriately with this issue. In Brazil's understanding, the terms of Article 13 of the DSU were very clear. It was up to a panel, solely on its own initiative, to seek additional information to that already provided by the parties and the third parties to the dispute. The panel decided where to seek information and what information was required. He underlined that there was nothing new in this interpretation of Article 13 of the DSU, and Brazil had stated the same position and its concerns at the DSB meeting on 25 September 1997 with regard to an amicus brief sent by the WWF to the panel and to several Heads of Delegation. This position had also been expressed by Brazil in the consultations on the Agreement between the WTO and the IMF.

Brazil did not believe that the word: "to seek" and its Spanish and French translations, "recabar" or "demander" was equivalent to the word: "to accept", "aceptar" or "accepter". This was not a faithful interpretation of the simple and clear terms of the Agreement. In Brazil's view this still applied even beyond an interpretation which the Appellate Body had characterized as too literal and unnecessarily formal and technical, and had considered the context and purpose of Article 13 of the DSU. As stated by the Panel, "Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied." (paragraph 7.8). The fundamental issue was not the nature of the information or the source of the information received by the Panel. The essential point was the consequence of the Appellate Body's finding. In Brazil's view, the interpretation of the Appellate Body had placed on the Panel the burden of explaining why it had considered that a particular piece of information it had received which had not been requested was relevant while another, also not requested, was irrelevant. As stated by the Appellate Body, in this task of trying to sort out a large number of unsolicited information, the Panel might deviate its attention from the issues of the case and incur in a violation of its jurisdiction beyond its terms of reference. Brazil believed that it would not be just to place this burden on the

Panel. His country did not consider that the "ample and extensive authority" of the Panel, which was necessary for it to exercise its functions adequately would be affected by a literal interpretation of the terms of Article 13 of the DSU. On the contrary, it would be preserved. As stated by the Appellate Body, " a panel's authority includes the authority to decide *not to seek* such information or advice at all" (paragraph 104). This did not mean that Article 13 could not be modified. It was another matter if in the context of the DSU review Members decided to change the DSU provisions. This issue was still open and it would be up to Members through the collective judgement to assume the political responsibility of such a juridical innovation. The standard of interpretation in the DSU was that of strict interpretation. As stated in Article 3.2 of the DSU, the aim of this strict interpretation was to preserve the rights and obligations of Members. Therefore, decisions and recommendations of the DSB "could not add to or diminish the rights and obligations provided in the covered agreements."

The representative of Australia said that this dispute had generated considerable public interest and there was a great need for a balanced consideration of the issues involved. Australia, which had participated in this dispute as a third party, had direct trade interests in access to the US shrimp market. At the same time, it recognized the significance of the findings of the Reports for discussions on the relationship between the WTO rules and environmental policies. It would be unfortunate if this case was represented as evidence of a conflict between trade and environmental objectives. A careful analysis of the issues had demonstrated that this was not so. The Appellate Body's findings did not call into question the legitimacy of the environmental objectives of protecting sea turtles involved in the US measure. The Appellate Body's findings had affirmed that such an objective could be accommodated under Article XX of GATT 1994. In particular, the Appellate Body had affirmed that the WTO rules appeared to be compatible with the Rio Declaration's emphasis on the importance of international cooperation to address transboundary and global environmental problems. The findings had confirmed that a key consideration in the determination of the existence of unjustifiable discrimination under Article XX was whether cooperative approaches had been pursued, or whether a measure reflected a unilateral, non-consensual approach to addressing the environmental problem of concern. In this respect, the WTO rules seemed to strongly reinforce the importance of intergovernmental dialogue on global and transboundary environmental problems. This was a key ingredient in avoiding unnecessary or inappropriate trade-restrictive measures.

The Appellate Body's findings had also highlighted the importance of basic fairness and due process, and appropriate flexibility in the administration of any measure that was to meet the requirements of Article XX. This was a significant guiding principle which deserved careful attention. Strict adherence to this principle could play a major role in promoting mutually supportive trade and environment policies. Article XX contained a set of carefully constructed legal texts. Their application in this case indicated their continuing robustness. The Appellate Body's finding had pointed to some important aspects of these tests which deserved further consideration. He reiterated that the overriding issue in this case was the means used to advance the environmental objectives. The findings highlighted important considerations that should guide Members in designing measures that complied with the requirements of Article XX.

The representative of Mexico said that, like other Members, his country welcomed the overall outcome of the Appellate Body Report. Mexico considered that it was correct to reach the conclusion that the measure imposed by the United States was incompatible with Article XI:1 of GATT 1994 and that it was not included among the general exceptions provided for in Article XX of GATT 1994. It also considered that the Appellate Body had rightly recommended that the United States bring its measure into conformity with its WTO obligations. Mexico shared the concerns expressed by Thailand, Pakistan, Malaysia and India. In particular, his country was concerned about three conclusions of the Appellate Body. First, the conclusion that "exhaustible natural resources" within the meaning of GATT Article XX(g) included living species threatened with extinction. In Mexico's view, this interpretation was contrary to the letter and spirit of that sub-paragraph, and the Appellate Body had overstepped its authority in a manner that was damaging to the dispute settlement system. Second, Mexico was concerned about the Appellate Body's interpretation with regard to PPMs.

Members might now impose restrictions based on PPMs that were not related to a product. Third, the Appellate Body's conclusion with regard to the role of NGOs had represented a great danger for future dispute settlement cases. The Appellate Body's findings, in particular in paragraphs 107 to 110 of its Report, that non-requested information might be included in the dispute, was contrary to the DSU provisions and had paved the way for diverse groups not related to the WTO to become active participants in proceedings, with the result that cases would be discussed at a political level at the expense of argumentation of a legal nature. Mexico wished to join in the consensus in favour of the adoption of the Appellate Body Report. However, in view of the systemic concerns expressed at the present meeting, his country wished to request that Members take the necessary steps to avoid any distortion of the nature of the matters referred to the dispute settlement system.

The representative of Switzerland said that her delegation welcomed the Appellate Body Report. She noted that the Appellate Body had upheld the Panel's conclusion that the US measure aimed at prohibiting imports of shrimps from certain states was not consistent with the WTO rules. The significance of this decision was clear since it reiterated the importance of the respect of the fundamental principle of non-discrimination of trade measures. The Appellate Body's decision had demonstrated several interesting elements. First, in order to interpret Article XX of GATT 1994, the Appellate Body had decided to follow the approach developed in the *Gasoline* case. The method of interpretation which had been applied had a dual advantage. It had respected the structure and underlying logic of Article XX and had abided by the rules of the interpretation of international treaties. The interpretation of Article XX by the Appellate Body had provided some useful interpretative aspects concerning the amount of freedom for Members in ensuring conservation of exhaustible natural resources. In particular, her delegation welcomed the fact that the Appellate Body had specifically referred to international environmental legislation in reaching its conclusion that sea turtles were exhaustible natural resources in the sense of Article XX(g) and therefore they were covered by special measures of protection. This openness had demonstrated that the multilateral trading system was not closed with regard to other legal regulations at the multilateral level.

The representative of the Philippines wished to state his country's position on the Appellate Body Report. The Philippines agreed with the methodology adopted by the Appellate Body, namely (i) provisional justification by reason of characterization of the measure under the exceptions specified under Article XX; and (ii) if necessary, further appraisal of the same measure under the introductory clauses of Article XX. The Appellate Body had found that the US measure fell within the exceptions specified in Article XX, in particular paragraph (g) thereof relating to the conservation of exhaustible natural resources. The Appellate Body had found it necessary to refer to international conventions and declarations such as the 1982 UN Convention on the Law of the Sea, the Resolution on Assistance to Developing Countries and the Convention on the Conservation of Migratory Species of Wild Animals. However, treaties and declarations entered into, or formulated in other international forums were not part of WTO law. Members were subject to the provisions of the WTO law and the customary rules of international law. These treaties and declarations did not constitute part of customary international law. Members might have obligations under those treaties and declarations in other international forums but not in the WTO. The Philippines believed that, by referring to those treaties and declarations, the Appellate Body had not taken into consideration the basic customary international law principle of *pacta sunt servanda*. The body of international treaties did not constitute one single code of conduct, they were instead an accumulation, each treaty separate and independent from the other. It might seem that environmental concerns had been advanced as a result of the Appellate Body's findings. However, closer examination would suggest the opposite. Members would now act more prudently in assuming new commitments in other international forums because of their possible implications for the WTO. In the Philippines' view, the Appellate Body's findings would not serve environmental concerns and could have long term adverse effects on such concerns. The Appellate Body, having decided to examine the issue of the exceptions specified in Article XX should have also examined Article XX(b) in relation of Article XX(g). However, it had failed to do so. Thus, even assuming that human beings, plants and animals were exhaustible natural resources, Article XX (b) provided a specific rule in the context of the totality of the exceptions under

Article XX. In this regard, the disciplines of the SPS Agreement should have been applied. At this stage, the Philippines did not wish to further elaborate on this matter.

The representative of Hong Kong, China said that his authorities attached great importance to the objectives of sustainable development and the protection of endangered species including sea turtles. However, he could not agree that these objectives should be achieved through unilateral measures in breach of the WTO rules, like the US measure examined in this case. Hong Kong, China had participated as a third party in the proceedings of the Panel and the Appellate Body. His delegation welcomed the Appellate Body's recommendations that the United States should be requested to bring its measure, which had been found to be inconsistent with Article XI of GATT 1994 and was not justified under Article XX of GATT 1994, into conformity with its obligations under the WTO Agreement. In its 1996 report, the CTE had endorsed and had supported multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to deal with environmental problems of a transboundary or global nature. Hong Kong, China reaffirmed its commitment to such solutions and was prepared to work constructively with all governments including the United States towards their achievement. Many aspects of the Appellate Body Report merited further consideration by Members in the CTE or other appropriate WTO bodies. Hong Kong, China wished to highlight some of the key findings in the Report which it believed had important systemic implications for the WTO.

First, Hong Kong, China was pleased that the Appellate Body had recognized that the WTO rules and multilateral environmental solutions could be complementary. In particular, it had underscored the importance of all economies acting together bilaterally, plurilaterally or multilaterally either in the WTO or in other international forums to protect the endangered species and the environment. However, the Appellate Body had not addressed the crucial question of under what circumstances and against what criteria the use of trade pursuant to MEAs might be regarded as fully consistent with the WTO rules. Future panels might still have to rely on their own judgment and consider each case on its own merit having regard to the relevant factors and circumstances. Hong Kong, China considered that this important issue should be further discussed in the CTE and/or other appropriate WTO bodies.

Second, Hong Kong, China welcomed the guidance provided by the Appellate Body on the legal interpretation of the chapeau of Article XX of GATT 1994. He noted that in applying the legal interpretation to the facts of the case, the Appellate Body had had regard to a number of relevant considerations, including the need to consider available alternatives, to ensure basic fairness and due process of administration of the measure, and to identify and reach multilateral solutions. Hong Kong, China agreed with the Appellate Body that a balance had to be struck between the right of a Member to invoke the exception under Article XX and the duty of that Member to respect the treaty rights of other Members, and that the language of the chapeau made clear that each of the sub-paragraphs of the Article was a limited and conditional exception from the GATT obligations. The usefulness of the notion of a moving line of equilibrium would be further tested in future disputes involving this Article.

Third, his delegation noted and respected the Appellate Body's ruling that exhaustible natural resources, whether living on or non-living, might fall within Article XX(g). That ruling was however at variance with the view taken by Hong Kong, China and many other Members in the light of its understanding of the customary rules of interpretation of public international law. One consequence of the ruling was that sub-paragraphs (b) and (g) of Article XX would be overlapping in coverage notwithstanding that their legal requirements were different ("necessary" versus "relating to").

Finally, his delegation welcomed the fact that the Appellate Body had not questioned that under the DSU only the parties to the dispute and third parties had the legal right to make submissions to, and have their submissions considered by panels and the Appellate Body. His delegation had also noted the guidance provided by the Appellate Body on the interpretation and application of Article 13

of the DSU pertaining to submissions by NGOs. While Hong Kong, China reluctantly agreed that panels should in general have the discretion to accept or reject non-requested information, it was concerned that the ruling might open up the floodgate of non-requested submissions which would in turn have serious implications on the work of future panels in terms of workload and efficiency. His delegation considered that the issue should be thoroughly and carefully considered by the DSB in the future. In doing so, Members should be mindful of rendering NGOs any treatment which was more favorable than that of Members and the rule-based and inter-governmental nature of the WTO. Hong Kong, China's efforts to protect sea turtles went beyond the enforcement of domestic legislation to give effect to the requirements of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In September 1998, his Government had successfully released back to the sea 70 baby Green Turtles (one of the species of the US measure aimed to protect artificially incubated and hatched)[2]. Being a small and highly urbanised city, Hong Kong, China's contribution to global conservation efforts might not be very significant but nonetheless spirited and determined. His delegation supported the adoption of the Appellate Body Report in accordance with Article 17 of the DSU and looked forward to contributing to the surveillance of the implementation of the Appellate Body's recommendations in future DSB meetings.

The representative of Japan said that the objective of trade liberalization pursued by the WTO together with the legitimate efforts for environmental protection, including the protection of endangered species should be mutually supportive. Japan demonstrated this position through the efforts towards its work carried out by the CTE such as the guideline for interpreting of Article XX. Japan also believed that the Panel in its conclusions should take into account all the relevant information. Japan was concerned about some legal arguments in the findings and rulings of the Appellate Body in this case.

Japan did not agree with the Appellate Body's finding that "the Panel erred in its legal interpretations that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU" (paragraph 110). His country did not share the Appellate Body's view that the "authority to seek information [under Article 13.1 of the DSU] is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or reject information and advice submitted to it, whether requested by a panel or not." (paragraph 108).

The Appellate Body also found that "[t] he amplitude of the authority vested in panels ….. makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged" (paragraph 108). Japan did not agree. The Appellate Body's findings with regard to non-requested information, if accepted, could lead to a deluge in the submission of information at various stages of the panel proceedings. If the Appellate Body's ruling were to be followed, the panel would be obliged to present reasons for its rejection of information. The Appellate Body had stated that a panel might reject information on the grounds of "unduly delaying the panel process", as provided for in Article 12.2 of the DSU. However, for non-requested information submitted at a time that would not result in "unduly delaying the panel process", there were no procedural criteria for rejection referred to by the Appellate Body. A panel would be forced to consider the substance of information in view of its acceptance or rejection. Japan believed that such an action would considerably add to the already excessively heavy workload of panels.

Japan supported the Panel's view that in accepting non-requested information only from parties and third parties, the parties to the dispute "would have two weeks to respond to the additional material submitted by the other parties". Allowing non-requested information from non-governmental sources to be directly submitted could pave the way for parties and subsequently the panel to deal

[2] The eggs, which were earlier found laid at locations which might be affected by high-tide waves, were rescued and transferred to the government's artificial incubation facility.

with such information within a short period of time and placed an additional burden for both the parties and the panel, in particular since such non-requested information might include, like in this case, a number of arguments, regardless of a panel's terms of reference. Japan supported the treatment of information from non-governmental sources by the Panel as approved by the Appellate Body, namely that if any party in this dispute had wished to put forward any documents or information it considered relevant to support its arguments as part of its submission to the Panel would be free to do so.

Another serious problem was that the Appellate Body had failed to consider the balance between the rights and obligations of Members. One of the logical consequences of the Appellate Body's findings might be that even those Members who were not third parties to the dispute would be allowed to submit their views to a panel at their own convenient time. Any Member had a right to participate in a dispute as a third party. However, if such a party had failed to follow the relevant procedures and practices of the DSU it could not claim to be a third party. The Panel had also observed that "only parties and third parties are allowed to submit information directly to the Panel" (paragraph 7.8). It was regrettable that the Appellate Body remained silent on this issue.

The Appellate Body had found that the Panel's reading of the word "seek" was "in too literal a manner" and "unnecessarily formal and technical in nature" (paragraph 107). However, the Appellate Body had not sufficiently clarified the meaning and the implication of the word "seek". Japan also noted that when the Appellate Body had confirmed its interpretation of GATT Article XX by referring to the negotiating history of this Article, it had not explored at all the negotiating history of Article 13.1 of the DSU. This did not seem to be a balanced approach.

The Appellate Body had found that the manner in which the United States applied Section 609 was an "unjustifiable discrimination" and "arbitrary discrimination", and had recommended that the US measure be brought into conformity with Article XX of GATT 1994. However, it had maintained that "Section 609 does come within the terms of Article XX(g)" (paragraph 146). Japan considered that this lack of clarity in the reasoning of Article XX in terms of the jurisdictional limitations and the relationship between the means and ends of measures considered as exceptions.

The Appellate Body had noted that "there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)" (paragraph 133). Without an in-depth elaboration of its argument, Japan was not convinced whether such nexus was well-founded.

The Appellate Body's views that "Section 609 is a measure 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g) of GATT 1994" (paragraph 142) because its general structure and design was fairly narrowly focused, namely it "is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences of the mode of harvesting employed…" (paragraph 141). However, the Appellate Body had not considered whether the measures taken under Section 609 on the import ban of shrimps had contributed to the preservation of sea turtles or that the utilisation of turtle excluder devices (TED) had actually been promoted in the exporting countries. Therefore, Japan was not fully convinced of the Appellate Body's findings that "the means and ends relationship between Section 609 and the legitimate policy of conserving…. endangered species … is…substantial…" (paragraph 141). Furthermore, with regard to the approval of measures requiring compliance by exporting countries with, or adoption of, certain policies under the chapeau of Article XX, the Appellate Body had limited its observations only to the application of the measures. It had not considered the measures in relation to the specific exceptions under the chapeau, namely (g).

Japan wished to point out that the relationship between trade measures and environmental objectives within the WTO Agreement was currently under discussion in the CTE. He drew attention

to the fact the Appellate Body was alluding the direction of an increased import restrictions on products in the name of environmental protection other than those which were subject to environmental protection or conservation, without clearly developing its argument.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS58/AB/R and the Panel Report in WT/DS58/R and Corr.1, as modified by the Appellate Body Report.

2. Australia – Measures Affecting Importation of Salmon

(a) Report of the Appellate Body (WT/DS18/AB/R) and Report of the Panel (WT/DS18/R and Corr. 1)

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS18/7 transmitting the Appellate Body Report in "Australia – Measures Affecting Importation of Salmon", which had been circulated in document WT/DS18/AB/R in accordance with Article 17.5 of the DSU. He said that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1 the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He said that under Article 17.14 of the DSU "An Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body Report".

The representative of Canada said that her country was very pleased with the Appellate Body's Report. Both the Panel and the Appellate Body had clarified and reaffirmed key principles of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Both Reports had reaffirmed that the SPS measures should not be maintained without sufficient scientific evidence and that quarantine measures must be based on a risk assessment that evaluated the probability of the entry, establishment or spread of diseases according to the SPS measures which might be applied. Both Reports had reaffirmed the obligations under Article 5.5 of the SPS Agreement relating to consistency in the application of appropriate levels of protection. Canada commended the Appellate Body for: (i) clarifying the principle of judicial economy, which would contribute greatly to the efficient operation of the dispute settlement process; (ii) clarifying the relationship between Articles 2.3 and 5.5 of the SPS Agreement; (iii) confirming the requisite elements of a quarantine risk assessment; and (iv) affirming that under the SPS Agreement, Members had an implicit obligation to determine their appropriate level of protection and to do so before establishing of maintaining a measure.

The Appellate Body had found that Australia's measure prohibiting the importation of fresh, chilled or frozen salmon from Canada was not based on a risk assessment and was maintained without sufficient scientific evidence, inconsistent with Articles 5.1 and 2.2 of the SPS Agreement. The Appellate body had also found that by maintaining its measure Australia had acted inconsistently with Articles 5.5 and 2.3 of the SPS Agreement, namely that its measure reflected an arbitrary or unjustifiable distinction in levels of protection that resulted in discrimination or a disguised restriction on international trade. There could be only one legitimate course of action to comply with these rulings. Australia had to remove its prohibition on the importation of Canadian salmon. Canada looked forward to Australia's statement concerning its intentions in regard to implementation of the DSB's recommendations and to reaching a mutual agreement on the time-period for implementation.

The representative of Australia said that the implications of the Reports, read together, were currently being carefully examined. In accordance with Article 21.3 of the DSU, Australia would

indicate, within the next 30 days, its intentions in respect of the implementation of the DSB's recommendations to be adopted at the present meeting. Australia wished to make some observations of a general nature relating to the general application of the SPS Agreement by all Members, and to certain procedural issues. He wished to express Australia's appreciation to the members of the Panel, the experts advising the Panel and the Secretariat. They had been faced with an exceedingly complex task, in both matters of law and science, as well as in regard to the examination of evidence which had not been the subject of consultations.

With regard to the scientific matters involved in this case, the diseases of aquatic animals, their interaction between different species and the severity of biological and economic consequences between many different species, together with the widely different biological and economic asset values attached by different countries to different fish, were possibly one of the most complex areas of animal health. They were also possibly the most under-researched in the animal science field. The Panel had therefore been obliged to consider matters of scientific opinion rather than factual issues. Notwithstanding the views of scientific experts advising the Panel that they could not make judgments on different risks to salmon pertaining between different fish in the absence of risk assessments on all relevant products, the Panel had the unenviable mandate of reaching legal findings in this respect. In this context, it might be useful to consider whether future panels dealing with complex SPS issues could be enlarged in composition to include panelists with appropriate background, who could contribute to interpreting the scientific evidence before panels. This issue could be discussed in the context of the DSU review.

A procedural issue that might also be taken up in a DSU context related to the relationship between the consultations and panel stages and the degree of precision in regard to panel requests. Australia considered that, in this case, the Panel had been faced with a particularly difficult evidentiary task, given that the bulk of evidentiary matters had taken placed between the consultations in 1995 and the 1997 panel request. Under these circumstances, the measure, which was important to the legal claims and arguments and to the Panel's legal reasoning, had not been ultimately resolved until the Appellate Body stage of proceedings.

The interpretive guidance provided by the Appellate Body in relation to Articles 2 and 5 of the SPS Agreement would appear to have wide ranging implications for all Members, in relation to the domestic processes and practices for the conduct of risk assessments, the way in which risks were evaluated and the technical and resource capacity of Members to undertake a number of complex risk assessments in parallel. This was particularly relevant to Article 5.5 of the SPS Agreement, which addressed the objective of consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection. Notwithstanding these observations, Australia supported the adoption of the Panel and the Appellate Body Reports.

The representative of Norway said that her country, which had participated as a third party in this case, welcomed the Appellate Body Report. In general, Norway agreed and supported the findings and the conclusions contained therein. However, it believed that there was an inconsistency with regard to the Appellate Body's treatment of Article 5.5 of the SPS Agreement as the Appellate Body had authorized a comparison of levels of protection which had been based on a comparison of measures applied to different hosts carrying the same disease. In Norway's view, if different measures to combat the same disease existed, this did not necessarily constitute a difference in the level of protection, but only a difference with regard to the measures chosen to combat the disease. The comparison of measures should have related only to Article 5.6 of the SPS Agreement, and not to Article 5.5 thereof. Norway considered that the Appellate Body had made the correct interpretation of the relationship between the level of protection and the measure, when it had discussed Article 5.6 of the SPS Agreement. It was unfortunate that the clarity of that discussion had not transcended into its discussion on Article 5.5.

The representative of the United States said that her country, due to its interest in access to Australia's market, had requested and had held separate consultations with Australia on the same matter. The United States had also participated as a third party in the proceeding of this dispute. Her delegation urged Australia to comply promptly with the DSB's recommendations and looked forward to discussions with Australia concerning implementation and to working with both Australia and Canada.

The representative of the European Communities said that due to its systemic reasons concerning the interpretation of the SPS Agreement, the Community had participated as a third party in the proceedings of this case. The Community welcomed the Appellate Body Report which provided further guidance on the interpretation and application of the SPS Agreement.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS18/AB/R and the Panel Report in WT/DS18/R and Corr.1, as modified by the Appellate Body Report.