RESTRICTED

WORLD TRADE ORGANIZATION

WT/DSB/M/30

28 April 1997

(97-1823)

DISPUTE SETTLEMENT BODY
20 March 1997

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 March 1997

Chairman: Mr. Wade Armstrong (New Zealand)

Prior to the adoption of the proposed Agenda, at the request of the United States, item 4 entitled: "European Communities - Duties on Imports of Grains - Request by the United States for the Establishment of a Panel"(WT/DS13/5) was removed from the Agenda.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB
   - United States - Standards for reformulated and conventional gasoline: status report by the United States (WT/DS2/10/Add.2)

The Chairman said that this item was on the Agenda pursuant to Article 21.6 of the DSU which stated that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He recalled that at the DSB meetings in January and February 1997, the United States had reported on this matter in accordance with the above-mentioned requirement. He drew attention to document WT/DS2/10/Add.2, which contained a further status report by the United States.

The representative of the United States said that as provided for in Article 21.6 of the DSU, his country had submitted its third report on the implementation of the DSB's recommendations. As noted in that report it was the expectation of the United States that the US Environmental Protection Agency (EPA) would be issuing in the near future a proposed revised regulation[1] for public comment. Consistent with the US regulatory procedures, the EPA would invite interested parties to comment on the specifics of its proposal. Such comments would be taken into consideration prior to the finalization of the regulation.

The representative of Brazil reminded Members that his country still awaited the publication of proposed amendments to the Gasoline Rule that would bring the United States into compliance with its WTO obligations. Brazil expected that the EPA's thorough evaluation of the compliance options would be concluded in the very near future.

The representative of Venezuela thanked the United States for the statement made. This was the third time that the United States had provided assurances that its domestic process was on track and that no delays were foreseen regarding the implementation of the amendments to the Gasoline Rule within the required 15-month period scheduled to expire in August 1997. His Government considered that it was important for the proposed amendments to be made available as soon as possible in order to enable an in-depth examination of their compatibility with the DSB's recommendations.

The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. United States - Restrictions on imports of cotton and man-made fibre underwear (WT/DS24/8)
   - Implementation of the recommendations of the DSB

The Chairman said 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 date of 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 25 February 1997, the DSB had adopted the Appellate Body report and the Panel report on this matter.

[1] "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline" (Gasoline Rule).

The representative of the United States said that his country's intention was to meet its WTO obligations with respect to this matter by withdrawing the safeguard measure in question by the end of April of 1997. This meant that the implementation would take place about 60 days after the date of adoption of the DSB's recommendations.

The representative of Costa Rica said that his delegation welcomed the intention of the United States to comply with its WTO obligations with regard to this matter. His country had hoped that the United States would comply with the DSB's recommendations immediately and withdraw the restraint earlier as the Costa Rican exporters continued to be adversely affected by the measure. He recalled that the safeguard measure would expire on 27 March 1997, and his Government believed that the most appropriate course of action would be to allow the measure to expire by that date rather than to renew it for the third quota year. His delegation was therefore surprised that the United States had announced its intention to withdraw the measure at the later date. This would imply the renewal of the measure for the third quota year which had been considered to be inconsistent with the ATC. Therefore, he urged the United States to comply immediately with the DSB's recommendations.

The Chairman said that since there was no agreement between the parties on the period of time within which the implementation of the DSB's recommendations should take place, a period of time mutually agreed by the parties to the dispute should be indicated within 45 days after the date of adoption of the recommendations as provided for Article 21.3 (b) of the DSU.

The DSB took note of the statements.

3. Guatemala - Anti-dumping investigation regarding portland cement from Mexico
- Request by Mexico for the establishment of a panel (WT/DS60/2)

The Chairman recalled that the DSB had considered this matter at its meeting on 25 February 1997, and had agreed to revert to it. He said that this item was on the Agenda of the present meeting at the request of Mexico. He drew attention to the communication from Mexico contained in WT/DS60/2.

The representative of Mexico recalled that at the previous meeting of the DSB, his delegation had requested the establishment of a panel for the first time. On that occasion he had outlined different elements which substantiated Mexico's request contained in WT/DS60/2. Since Guatemala had not been in a position to accept the establishment of a panel at that meeting, his delegation hoped that the panel could be established at the present meeting in accordance with the DSU provisions.

The representative of Guatemala said that on 9 January 1997, his country had held consultations with Mexico on this matter. Although a panel would be established at the present meeting, his authorities regretted that it had not been possible to further continue the consultations. Nevertheless, efforts to find a satisfactory solution for both parties would continue.

The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

The representatives of Canada and the United States reserved their third-party rights to participate in the panel proceedings.[2]

[2]After the meeting El Salvador and Honduras reserved their third-party rights.

4. United States - Import prohibition of certain shrimp and shrimp products
- Request by India for the establishment of a panel (WT/DS58/8)

The Chairman recalled that on 8 October 1996, India together with Malaysia, Thailand, and Pakistan had requested consultations with the United States concerning the latter's import prohibition of certain shrimp and shrimp products. Subsequently, at the request of Malaysia, Thailand and Pakistan, the DSB at its meeting on 25 February 1997, had established a single panel pursuant to Article 9.1 of the DSU. He drew attention to the communication from India in document WT/DS58/8 which contained its request for a panel on the same matter.

The representative of India said that his country requested the establishment of a panel to examine the US measure which had resulted in a restriction on imports of certain shrimp and shrimp products from India. This measure was inconsistent with the US obligations under the WTO, including the GATT 1994, and had therefore nullified and impaired India's rights and benefits under the WTO Agreement. Malaysia, Thailand and Pakistan as co-complainants in this dispute had provided the relevant details regarding this matter to the DSB at its meeting on 25 February 1997.

India had no objection if any Member took a measure aimed at protecting the environment within its territory. Indeed India had a very strong commitment, steeped in its culture and tradition, regarding the protection of the environment, including sea turtles. However, when the scope of the measure would became extra-territorial with arbitrary and discriminatory application, such a measure could not be consistent with the rules of the WTO Agreement.

On 8 October 1996, India had joined Malaysia, Thailand and Pakistan in an effort to resolve this matter and had requested consultations with the United States.[3] These consultations had been held on 19 November 1996, and subsequently letters had been exchanged regarding points which required further clarification. Unfortunately, no mutually acceptable solution had been found. In India's view, the US measure violated, *inter alia*, Articles I, IX and XIII of GATT 1994, nullified and impaired benefits accruing to India under the WTO Agreement. Consequently, his delegation requested that a panel be established in accordance with Article 6 of the DSU with the same terms of reference as those that had been agreed for the panel established at the requests of Malaysia, Thailand and Pakistan.

The representative of the United States said that his delegation was not yet in a position to agree to the establishment of a panel at the present meeting. At the DSB meeting on 25 February 1997, India had indicated its interest to participate as a third party in the panel established at the requests of Malaysia, Thailand and Pakistan. Since the issues in India's request were the same as those of the above-mentioned countries, his delegation requested India, in the interest of preserving the resources of all involved, to consider whether its third-party participation in this dispute could adequately protect its interest. If this was not the case, the United States would agree to the establishment of a panel at the next DSB meeting.

The representative of India said that it was necessary to clarify that any party that had reserved its third-party rights in a dispute, if so desired, could become a complainant in the same dispute at a later stage. In other words, being a third party in a dispute did not imply that India had lost its rights to become a complaining party in the same dispute as provided for in Article 10.4 of the DSU. Although the United States had not questioned this, it had asked India to consider whether it could participate in this dispute only as a third party without becoming a complainant in the interest of preserving the resources of all delegations concerned. Despite the fact that the resources of his delegation were very limited as compared to that of the United States, India's request for a panel had been made because

[3]WT/DS58/1

his delegation had considered the third-party option and had concluded that it did not adequately protect India's interest. However, his delegation recognized the right of the United States to delay this process. He would not request a special meeting of the DSB to consider India's complaint but wished to include this item on the agenda of the next meeting of the DSB.

The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

5. Australia - Measures affecting importation of salmon
- Request by Canada for the establishment of a panel (WT/DS18/2)

The Chairman drew attention to the communication from Canada contained in document WT/DS18/2.

The representative of Canada recalled that in October 1995, his Government had requested consultations with Australia regarding the latter's measures affecting the importation of salmon. Canada was disappointed that these consultations had not resolved this dispute. The measures which were unjustified and inconsistent with Australia's obligations under the WTO were still in force at present. Consequently, Canada requested the establishment of a panel to examine this matter.

The representative of Australia said that his delegation could not agree to Canada's request for a panel at the present meeting. Canada had not provided Australia the opportunity to consult on the salmon import risk analysis of 20 December 1996. This was a detailed document which had set out the scientific basis for the decision to maintain quarantine restrictions on uncooked salmon, consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). It was well known that Australia had a conservative approach to quarantine. This was perfectly in accord with his Government's rights under the SPS Agreement. Consultations with Canada on this issue had been last held in December 1995. Since then, Canada had not sought further consultations. In the absence of consultations on the December 1996 salmon import risk analysis, which formed the basis of the decision to maintain quarantine restrictions on uncooked salmon, Australia believed that Canada's action in seeking a panel was not in the spirit or the letter of the dispute settlement system.

The representative of Canada said that his Government had intended to request the establishment of a panel much earlier. However, at the request of Australia, his country had agreed to give time to the Australian authorities to conduct this risk assessment in the hope that this would lead to a removal of the measures. Since the restrictive measures remained in force, Canada therefore decided to proceed with its request for a panel.

The representative of the United States said that his country shared Canada's concerns with respect to Australia's ban on imports of salmon. The United States had also held consultations with Australia on this matter[4] and was currently reviewing the salmon import risk analysis of 20 December 1996.

The DSB took note of the statements and agreed to revert to this matter.

[4]WT/DS21/1

6. United Kingdom - Customs classification of certain computer equipment
   - Request by the United States for the establishment of a panel (WT/DS67/3)

7. Ireland - Customs classification of certain computer equipment
   - Request by the United States for the establishment of a panel (WT/DS68/2)

The Chairman proposed to take up items 6 and 7 of the Agenda together since they pertained to the same matter. These items were on the Agenda of the present meeting at the request of the United States.

The representative of the United States said that as a result of actions by customs authorities in Ireland and the United Kingdom of reclassifying certain computer equipment, imports of these products from the United States had become subject to duties in excess of those bound by the United Kingdom and Ireland under the EC Schedules of tariff concessions. The US understanding was that member States were not responsible for classification issues. Because the United Kingdom and Ireland had not met their commitments, the United States had no other recourse than to refer this matter to a panel. Consequently, the United States had recognized that to resolve this matter all relevant claims had to be addressed to the Communities as well as to the responsible member States to meet their commitments under Article II of GATT 1994. The United States had agreed with the Communities, acting on its own behalf and on behalf of the United Kingdom and Ireland, to request the DSB to incorporate the matters raised in the US requests as contained in WT/DS67/3 and WT/DS68/2, into the terms of reference contained in the mandate for the panel established at the request of the United States (WT/DS/62/4) on 25 February 1997.

The representative of the European Communities said that the issues raised in the request for a panel had to be properly addressed to the Communities as a whole. Application of the Common Customs Tariff with the Communities and the implementation of the EC Schedules were matters on which the Communities' had sole responsibility. Therefore, on 25 February 1997, the Communities had agreed to the establishment of a panel. To avoid all doubts he confirmed that in addressing the issues raised by the United States before the panel, the Communities would be acting on behalf of the member States, including in particular Ireland and the United Kingdom.

The Chairman proposed that, at the request of the parties to the dispute, the DSB agree to modify the terms of reference of the panel established at its meeting on 25 February 1997, pursuant to the US request contained in WT/DS62/4, so that the panel requests submitted for consideration at the present meeting might be incorporated into the mandate of the existing panel. The terms of reference, as modified, would read as follows: "To examine, in light of the relevant provisions in the GATT 1994, the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3, and WT/DS68/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that agreement."

He proposed that in light of this decision, the DSB agree not to establish separate panels pursuant to the US requests contained in documents WT/DS67/3 and WT/DS68/2. Furthermore, the DSB should take note that the parties had agreed that the panel established on 25 February 1997, with the terms of reference as modified at the present meeting, would be able to consider, and rule upon, any matter that might have been considered if separate panels had been established in response to those panel requests. The DSB should take note that the modification of the terms of reference of the panel established on 25 February 1997 was without prejudice to the interpretation of the Communities and their member States of the provisions of Article 4, paragraph 3, of the DSU with regard to the 30-day period referred to in the second sentence of that paragraph.

The DSB so agreed.

8. Brazil - Measures affecting desiccated coconut
- Report of the Appellate Body (WT/DS22/AB/R) and report of the Panel (WT/DS22/R)

The Chairman said that this item was on the agenda of the present meeting at the request of Brazil. He drew attention to the Appellate Body report contained in WT/DS22/AB/R. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1), the Appellate Body report and the Panel report had been issued as unrestricted documents. He drew attention to Article 17.14 of the DSU which stipulated 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 the Members. The adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

The representative of Brazil expressed appreciation for the work done by the members of the Panel and the Appellate Body as well as the Secretariat of the WTO and the Appellate Body. Brazil believed that this case was very important for the functioning of the dispute settlement mechanism since it had dealt with a key-issue of applicable law within an integrated multilateral trading system. It had provided an opportunity to further discuss the importance of terms of reference of panels. It should be highlighted that in this case the Philippines had not been deprived of legal options to redress alleged violations of their rights. Its recourse to legal options that were not available had been a matter of deliberate choice. In view of the findings and conclusions reached by the Panel which had been upheld by the Appellate Body, Brazil requested that the DSB adopt the reports as contained in WT/DS22/AB/R and WT/DS22/R.

The representative of the Philippines expressed disappointment with the recommendations of the Panel and the Appellate Body. More importantly, however, the Philippines was concerned with the denial of justice to a Member under the system which had been established precisely to uphold and preserve the rights of Members. This might have serious systemic implications for the credibility of the dispute settlement mechanism. Therefore, the Philippines believed that it was important to express views on these reports pursuant to Articles 16.4 and 17.14 of the DSU. In the Philippines' view the Panel and the Appellate Body had committed several basic errors.

First, there had been a failure to appreciate the fundamental distinction between the cause of action of the Philippines and the potential grounds upon which Brazil could have relied for its defense. As of 1 January 1995, pursuant to Articles I and II of GATT 1994, Brazil had assumed the obligation to accord m.f.n. treatment in favour of all Members, including the Philippines, and to maintain tariffs within the levels bound under its Schedule of Concessions. In August 1995, Brazil, in breach of such obligation, had imposed a countervailing duty of 121.5 percent on imports of desiccated coconut from the Philippines on grounds which it believed were unjustified.

In plain legalese, the cause of action of the Philippines was the breach by Brazil of its obligations under Articles I and II of GATT 1994. In this case, Article VI of GATT 1994 was the basis of defence for Brazil. The applicability of Article VI of GATT 1994 to this dispute was therefore crucial to Brazil, not to the Philippines. Article VI of GATT 1994 had been declared as non-applicable and, by virtue thereof, Articles I and II of GATT 1994 had likewise been not applicable. As a result, the Philippines had been effectively deprived of its rights under Articles I and II of GATT 1994, and Brazil had been absolved from its obligations thereunder. The flawed logic in both reports was that if a party challenged with an alleged offense could not invoke a defence available to it, the aggrieved party could not likewise enforce its rights. In effect, the enforceability of the cause of action of an aggrieved party depended on the availability of a defence to the offending party. This was both novel and incomprehensible.

Second, notwithstanding that Article VI of GATT 1994 was a matter of defence for Brazil, her delegation believed that the reasons alluded to in declaring Article VI of GATT 1994 as not applicable to this dispute were without firm legal foundations. The legal basis was as follows: (i) the Agreement on Subsidies and Countervailing Measures (SCM) was not applicable to the dispute because Article 32.3 thereof stated that such agreement applied to investigations initiated pursuant to applications for investigations filed after the entry into force of the WTO Agreement for a Member; (ii) pursuant to Article 10 of the SCM Agreement, Article VI of GATT 1994 could not be applied independently of the SCM Agreement; and (iii) since the SCM Agreement was not applicable, Article VI of GATT 1994 was likewise not applicable. A provision of an agreement which had been declared as non-applicable had thus been given force and effect. Furthermore, the phrase "this agreement" in Article 32.3 had been expanded to mean "this [Subsidies] [A]greement and GATT 1994". To justify this conclusion, allusion had been made to the WTO Agreement as one negotiated package and an integrated system. But, if one were indeed to be consistent with this concept, the conclusion should have been that from and after 1 January 1995, no Member could have imposed a countervailing duty except pursuant to an investigation conducted in accordance with the SCM Agreement in relation to Article VI of GATT 1994. More so, the Panel report had acknowledged that Article 32.1 of the SCM Agreement stated that no specific action against a subsidy of another Member could be taken except in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. When Brazil had thus imposed the measure in August 1995, it had been in violation of that specific interdiction.

In the Philippines' view an integrated system could not undermine the same rights which it was supposed to uphold and protect. It had been an error to effectively uphold Brazil's defence that its investigation could not be subject to scrutiny under the WTO norms, especially in the light of Article 32.1 of the SCM Agreement. In effect, what had been upheld was that the act of violation constituted the defence. What was at issue was not the investigation but the imposition of the measure. Since the initiation of the investigation was ordinarily non-actionable, no Member could claim impairment of its rights at that stage. However, the initiation of an investigation in accordance with applicable procedural law at the time the investigation was initiated did not accord a vested right to impose a measure contrary to substantive law applicable at the time such a measure was imposed.

It was her country's understanding that substantive law and procedural law were separate and distinct concepts. The Philippines had therefore expected that due regard should be given to this distinction. However, in a manner which might be regarded as "cavalier", the Panel report had dismissed all effort to distinguish between substantive law and procedural law on the ground that it would "generate considerable confusion and dispute, as the distinction between the two types of obligations in practice could prove extremely difficult". Her country believed that "difficulty" was neither an excuse nor a justification for the failure to discharge one's responsibility.

Third, there had been a failure to appreciate that under customary international law, each treaty had an integrity and existence of its own, independent of other treaties. This principle was encapsulated in the customary international law principle of *pacta sunt servanda*. Pursuant to this principle, if the pre-WTO agreements and the WTO Agreement had been represented by two straight lines, these would be parallel lines and never meet. Since they had co-existed during the transition period, a party to both separate and distinct treaties could choose which treaty to invoke. The essence of this transitory period was to enable all rights to be preserved, but definitely, not to hinder or delay the enforceability of a right, in particular a right under a later treaty.

Brazil's obligations under Articles I and II of GATT 1947 were separate and distinct from those under Articles I and II of GATT 1994. In the same manner, the Philippines' substantive rights under Article I and II of GATT 1947 were separate and distinct from those under Articles I and II of GATT 1994. The countervailing duty of 121.5 percent had been in violation of both, and the Philippines had a right to invoke either or both. One did not preclude the other. While it had been declared that

the Philippines had no immediate remedies under the GATT 1994, consolation was given that the Philippines had a remedy against Brazil under the Tokyo Round SCM Code. It was nevertheless no consolation to the Philippines that its co-existent rights under GATT 1994 had been nullified in the process.

Underlying all these, that there had been undue pre-occupation with what had been viewed as systemic policy considerations. If the contracting parties, signatories to the Tokyo Round SCM Code, and the WTO Members had been identical, they could have established a transition in the real sense of the term - as distinguished from co-existence. Under these circumstances, it would have been possible for one set of rights to come into force at a precise moment when the other set of rights had become unenforceable or non-existent. But this was not the case, and this could have never been the case, because the pre-WTO agreements had been binding only upon those contracting parties subscribing to them. In the same manner, the WTO agreements were binding only between Members.

The Panel report conjured a so-called transitional regime from the pre-WTO agreements to the WTO Agreement. In accordance with the Panel report's reasoning on a transitional regime, measures imposed after entry into force of the WTO Agreement pursuant to investigations which had been initiated prior to that date were not immediately subject to scrutiny under the WTO Agreement; rather, they were was subject to such scrutiny only in a so-called "phased-in" manner. While the Philippines had recognized that there could be different opinions on the most appropriate rules for such a transitional regime, it believed that for purposes of this dispute, what should have prevailed was solely the collective will of Members, as expressed in the WTO Agreement. Any attempt to go beyond such an expression of collective will was an encroachment on the sovereign rights of each Member. Any such attempt was *ultra vires*, beyond the limits of the jurisdiction conferred by Members. As if in justification, the Panel report had declared that the importance of the issues raised by the Philippines would abate since the transitional problems would disappear with the coming into force of the WTO Agreement. She believed that the effects of the countervailing duty of 121.5 percent would not abate, much less disappear, over time.

Fourth, there had been a failure to appreciate the fundamental distinction between the dispute settlement mechanism under the GATT and the WTO. In both mechanisms, panel reports were merely recommendatory; the CONTRACTING PARTIES then and Members of the WTO now, having the sole authority to interpret the GATT or WTO law, and to adopt such reports. But that, perhaps, was where the similarity ended. In so far as it had been possible to block recommendations of panels under the GATT, dispute settlement in that era had been essentially a political-diplomatic forum. On the other hand, the WTO Agreement had established a judicial or, at the very least, a quasi-judicial system, under which panel or the Appellate Body recommendations would be deemed adopted unless there was a consensus not to do so. Under the previous system, panel members therefore had more leeway and could bear in mind non-legal considerations, including policy considerations or even those affecting the collective will of the CONTRACTING PARTIES: after all, the CONTRACTING PARTIES had a final say. Under the present system, panel and the Appellate Body members had the power and responsibility of judges. The nature of such power and responsibility contained its inherent and cogent limitations. Judges interpreted the law, but had no power to make the law. In interpreting the law, judges could not impute their own views on what the law ought to have been. Panels and the Appellate Body under the WTO, had to uphold the collective will of Members, as clearly and unequivocally expressed in the agreements presented to them for their interpretation. The Philippines had expected that the prerogatives of judges in a judicial system would have been discharged judiciously. The results seemed to indicate that even in this, her country had great expectations. In the Philippines' view, deliberately or not, internal and non-legal institutional considerations had prevailed over the collective will of Members as expressed in the WTO Agreement.

Finally, it had been suggested that a right available to the Philippines was to seek a review of the disputed measure from the Brazilian authorities. Without going into her country's position on Article 21.2 of the SCM Agreement, such a review was probably a non-remedy. Under the circumstances, her Government doubted that redress could be obtained from the same authorities which had imposed the disputed measure. More importantly, however, this recommendation was contrary to the essence of the multilateral trading system and its neutral dispute settlement mechanism. It was a set-back since priority had been accorded to bilateralism on non-neutral grounds, outside the protective ambit of the multilateral system.

Her delegation could not overemphasize the importance of this issue. The coconut industry was one of the most neglected sectors of the Philippine economy, which had no quantitative restrictions or excessive tariffs to protect it. Furthermore, subsidies were not granted to this sector. On the contrary, as her country had repeatedly stated to the Brazilian authorities, this sector was subject to disproportionate taxes. She was proud that her country's coconut industry competed and succeeded purely on the basis of comparative advantage. The indifference that bureaucrats tended to show to a sector which did well on its own was perhaps endemic to many Members. But such indifference turned to indignation when such a sector was unjustly accused of something it could not even afford. Like other responsible Members the Philippines would abide by the DSB's decision to be taken at the present meeting.

The representative of the United States said that while his country did not agree with all aspects of the reports, it recognized that this case involved a set of circumstances that were quite unique. As a result, the United States could join in the consensus to adopt these reports.

The representative of Indonesia recalled that her country had participated in this dispute as a third party and, like the Philippines, had serious concerns with regard to the Panel report. In this light, she expressed her delegation's views in accordance with Articles 16.4 and 17.14 of the DSU. The Philippines had presented five reasons why the Panel report had not satisfactorily resolved this dispute and that this had raised systemic issues which not only the DSB but the General Council might be required to address. She drew attention to the following concerns. First, in Indonesia's view the Panel had committed an error of judgement when it had deprived the Philippines and all Members affected by the Brazilian measure of their rights under the GATT 1994. Her country being a WTO Member had rights under the GATT 1994 and the WTO. It would therefore raise serious concerns if anyone claimed that this was not the case. Second, the Panel and the Appellate Body had recommended that the remedy currently available to the Philippines was to seek a review of the measure under the Brazilian law pursuant to Article 21 of the SCM Agreement. By implication, this was also a remedy available to Indonesia and other Members affected by this measure. She was concerned that resort to Article 21.2 implied that the WTO had found that Brazilian countervailing duty was consistent with the SCM Agreement. Indonesia as a third party in this dispute had challenged the consistency of this measure with the SCM Agreement but the Panel had not even tested the consistency of the duty with the SCM Agreement. Furthermore, it was difficult to understand why Article 21.1 of the SCM Agreement should be invoked when the Panel had stated that the SCM Agreement was not applicable. The Panel report only raised more questions than it answered. Indonesia believed that the Panel report had not provided a remedy in a multilateral context. In adopting the reports, Indonesia hoped that Members would be aware of the serious flaws in law and error of judgement contained therein. To adopt them without a clear understanding of the systemic implications would be a disservice to the multilateral trading system.

The representative of Mexico said that the reasoning behind the Appellate Body report had been determined by the case which had its inherent particular characteristics. His delegation did not agree with certain points of the Appellate Body and shared some arguments made by the Philippines. However, having stated this position for the record his delegation would not oppose the adoption of the reports.

The representative of Malaysia said that his country had not been a signatory to the Tokyo Round SCM Code. The Panel had stated that the provisions of GATT 1994 did not apply to this dispute but by the time that it had begun its work in 1996, the GATT 1947 no longer applied. He asked what were the rights of Malaysia at present and whether it could invoke the SCM Agreement in this case. Since the Panel report had determined that the SCM Agreement did not apply in this case, his delegation shared the Philippines' view that a review of the measure by Brazil was hardly a remedy. Any panel report that placed a Member in such an awkward situation was, at best, "puzzling". He supported the statement made by Indonesia that in adopting the reports Members would do so with full knowledge of the fundamental and institutional inconsistencies contained therein.

The representative of Sri Lanka said that his delegation had followed with interest the developments of this dispute as a third party. His delegation shared some of the concerns expressed by the Philippines. Sri Lanka was one of the countries that had been adversely affected by the Brazilian measure. His delegation believed that the Panel's findings were prejudicial to countries like Sri Lanka that still wished to pursue action to safeguard their rights under the WTO system. His delegation wished to be associated with the statements made by the previous speakers.

The DSB took note of the statements and adopted the Appellate Body report in WT/DS22/AB/R and the Panel report in WT/DS22/R as modified by the Appellate Body report.