WORLD TRADE ORGANIZATION

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General Council
22 November 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 November 2000

Chairman: Mr. Kåre Bryn (Norway)

1. Communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities – Measures affecting asbestos and asbestos-containing products"

1. The Chairman said that the present meeting had been convened at the request of Egypt, on behalf of the Informal Group of Developing Countries in order to discuss the communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities – Measures affecting asbestos and asbestos-containing products" (WT/DS135/9). He then drew attention to the following points contained in his statement circulated to delegations in Job(00)/7343:

> In order to facilitate the discussion I decided to request the Secretariat to prepare a factual note on what has transpired.[1] The note contains three parts: (i) considerations taken into account by the Appellate Body in the adoption of the additional procedure; (ii) the more general systemic experience in the WTO with *amicus* briefs; and (iii) The nature of the WTO Secretariat's contacts with the NGO community in connection with this additional procedures.
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> While I think it is important to have the relevant facts clearly established, I hope we can concentrate our discussion on the question of principle and the systemic issue involved, rather than the specific case. I will, therefore, fully associate myself with the Chairman of the Dispute Settlement Body who stated in the DSB meeting on 17 November that "I am absolutely sure that no delegation wants to do any harm to the standing of this Organization, or to the Dispute Settlement System or to the Appellate Body. And all are interlinked – anything which affects an integral part of the system affects the system as a whole."
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> If we bring this observation with us into the debate and focus our comments on how to deal with an area of the DSU now subject to differing interpretations, I am convinced that the Organization and the Dispute Settlement System will benefit from addressing the systemic issue we are confronted with.

2. The Chairman said that since the representative of Egypt was not present he would first offer the floor to the representative of Uruguay.

3. All representatives who spoke thanked the Chairman for convening the present meeting.

[1] Circulated in Job(00)/7343.

4. The representative of Uruguay thanked the Chairman and the Secretariat for the factual background note submitted to Members, which had proved useful for his delegation's analysis, although it had not essentially changed it. In fact the note had given rise to additional concerns and had identified the moment in the process when, in his delegations's opinion, a different procedure should have been followed. He also thanked the Ambassador of Egypt who, in her capacity as coordinator of the Informal Group of Developing Countries, had requested this meeting. Uruguay had supported the calling of this special meeting of the General Council, since it believed that the matter at hand was of fundamental systemic importance for the WTO. The General Council was the proper forum to discuss this issue, since it was the highest WTO body when the Ministerial Conference was not in session, and the only body authorized to interpret the agreements. The WTO dispute settlement system had been described as the "jewel" of the results of the Uruguay Round and Members should not allow this jewel to lose its brilliance or value. If Members ceased to have confidence in the dispute settlement system, which was unique at the international level, they would lose a fundamental tool for the defence of their interests and would find themselves worse off than before. It was for this reason that he viewed this debate not as a means of questioning the DSU, nor as an attempt to weaken the institutions that governed this process, but as way of clarifying and reaffirming the powers or terms of reference of each of the parts that allowed the multilateral trading system to operate. In concrete terms, Members were initiating a process which he hoped would help them carry out the task of interpreting the agreements and consequently strengthen the WTO.

5. The WTO was an agreement of a contractual nature that was qualitatively different from other international agreements in the sense that the obligations that stemmed from this contract included the strict fulfilment of the decisions of the DSB to the extent of diminishing the decision-making capacity of Members. Insofar as Members were mainly states, the political effect of this situation was of no little consequence. It was for this reason that any decision taken by the bodies that made up the system could not be taken lightly, but had to be firmly based on the provisions of the agreements, duly signed and ratified by the respective governments and parliaments. In this context, Uruguay viewed with great concern the appearance and mass circulation outside the WTO of the Appellate Body communication establishing the additional procedure for the submission of written briefs from persons or institutions that were neither parties nor third parties in a particular dispute at the appeal stage. Uruguay's concern was based on the fact that notwithstanding the positive intention that inspired this document, its form, its substance and the way it had been handled affected the rights and obligations of WTO Members and altered the relationship between the bodies within the system.

6. Uruguay considered the following points: (1) Article V.2 of the Agreement Establishing the WTO stated that "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". This meant that it was the General Council which had the statutory right to decide the forms that relations with NGOs would take, including those concerning the settlement of disputes. (2) Article IX.2 of the same Agreement provided that the General Council shall have "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". (3) Article 17.3 of the DSU stated that the Members shall elect to the Appellate Body "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered Agreements generally". Uruguay had no doubt whatsoever as to the suitability and expertise of those persons presently serving on the Appellate Body. (4) Article 17.6 of the DSU also stated that an appeal shall be limited to "issues of law covered in the panel report and legal interpretations developed by the panel". The concrete and specific function of the Appellate Body was thus clearly determined. (5) Article 17.9 of the DSU stated that the working procedures of the Appellate Body shall be drawn up in consultation with the Chairman of the DSB and the Director-General. The application of this provision was a matter of great importance. Looking at the situation with these provisions in mind, he said that although this document was presented to Members as an explanatory note under Article 16(1) of the working procedures, its practical effect was that the Appellate Body was adopting decisions on relations with NGOs while such decisions statutorily

belonged to the General Council. Consequently, this was not a matter of clarifying procedures, but of upsetting the balance of the functions of each body involved. In view of this practical outcome, it was not a matter of procedure but rather a matter of substance which affected the working procedures, and which should at least be subject to consultation with the Chairman of the DSB and the Director-General in accordance with Article 17.9.

7. As for substance, Uruguay believed that the practical effect had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess. This procedure allowed such individuals or institutions to present their point of view and possibly even influence a purely legal and interpretative decision on the rules in a specific case, while that right was reserved solely to the parties and third parties to a dispute, and was even refused to other WTO Members. This was highly inappropriate, as it altered an agreement negotiated and adopted multilaterally, and in particular since this subject was discussed during the negotiations of the Uruguay Round but was not incorporated in the DSU. Furthermore, this procedure limited the rights of parties and third parties. The last paragraph of section 1 of the factual background note stated that the decision gave the parties and third parties a full and adequate opportunity to comment on and respond to submissions. However, this was not possible within the short and mandatory time-limits which the Appellate Body had to meet in its work. Moreover, the members of the Appellate Body had the capacity, knowledge and experience necessary to take the legal decisions incumbent upon them without any outside help.

8. With regard to the way the Appellate Body's communication had been handled, the Secretariat in its factual background note drew attention to its own procedures for increasing the knowledge and understanding of interested individuals and institutions. Uruguay was not questioning these procedures *per se*, but believed that the Secretariat could not act on "automatic pilot" in relation to sensitive issues, especially in the case of procedures for the settlement of disputes. Secretariat officials needed to have a fine sense of how to adapt their communications to needs, and should know when to be proactive, exercise self-control, or show moderation. The different divisions could not act in ignorance of what was happening in the areas of competence of other divisions and even less in ignorance of the atmosphere prevailing in the WTO and the feelings of its Members.

9. The preceding analysis, although extensive, was necessary to justify the following conclusions. First, despite its praise-worthy intentions, the decision of the Appellate Body Division in this case, together with premature action on the part of the Secretariat, had had the practical effect of altering the agreements, something which was not in its terms of reference. Second, the Appellate Body had to restrict itself in establishing whether a panel had correctly applied or interpreted the rules in a specific case. However, insofar as it knew that its decisions would set precedent, the Appellate Body should inform the General Council when it identified difficulties that arose from the wider interpretation of the agreements, so that the General Council could take the decisions incumbent upon it. Thus, in the US shrimps case referred to in the Secretariat factual background note, when the Appellate Body decided to reject the Panel's interpretation of its powers under Article 13 of the DSU, it should have informed the General Council of this situation, so as to obtain an interpretation that could have been applied in other cases. Thirdly, the General Council had just begun, at the present meeting, its consideration of the *amicus curiae* submissions to panels and the Appellate Body. This was a matter of interpretation with systemic effects and was the responsibility of the General Council. Consequently, Uruguay requested that this matter be placed on the regular agenda of the General Council and that the Chairman take the appropriate measures in this case so that the General Council could adopt an interpretation of general application. Fourthly, panels and the Appellate Body should refrain from acting in this matter until the General Council had given its interpretation. Uruguay requested that its statement be published as an official document of the General Council and

circulated as a background document when this matter was discussed at forthcoming General Council meetings[2].

10. The representative of Egypt, on behalf of the Informal Group of Developing Countries (IGDC), said that this meeting had provided an opportunity to address and discuss the recent communication from the Appellate Body to the Chairman of the Dispute Settlement Body, which set out an additional procedure for filing of *amicus curiae* briefs by NGOs in the dispute on "Measures affecting asbestos and asbestos-containing products."

11. During the meeting of the IGDC on 10 November 2000, it was strongly felt that the actions of the WTO Appellate Body and the Secretariat needed serious consideration by the whole WTO membership and at the level of the General Council, as the highest legislative and policy authority in the organization in the intervals between Ministerial Conferences, in order that such actions be rectified. The issue under consideration was of a systemic nature and of serious concern, not only to the IGDC, but also to a very large number of developed countries, practically to almost the totality of the WTO membership. The Group could easily associate itself with the Chairmen of the General Council and the DSB in stating that no delegation wanted to do any harm to the standing of the organization, the Dispute Settlement System, or to the Appellate Body itself.

12. The Group believed that the decision that had been taken by the Division of the Appellate Body hearing the appeal in the asbestos case to adopt an additional procedure to deal with written briefs received from persons other than a party or a third party to the dispute, went far beyond the Appellate Body's mandate and powers for the following reasons. First, although the Appellate Body was entitled to adopt its own working procedures, its recent decision went beyond those procedures, to an outreach activity that sought information from individuals without any basis in the DSU for such an action. The question was therefore a substantive rather than a procedural one, as it related to the substantive functioning of the Appellate Body. Hence, the Appellate Body might have acted in a way that de facto amended the DSU.

13. Second, Article 13 of the DSU gave a panel the right to seek information and technical advice from any individual or body it deemed appropriate, with respect to factual issues or scientific matters within the jurisdiction of a Member and after informing that Member. This was the kind of information or facts that might be needed to allow a panel to reach a fair finding. However, the situation was different with regard to the Appellate Body, since its consideration of a case was limited to issues of law covered in the panel report and legal interpretations developed by the panel, as stipulated in Article 17.6 of the DSU. Moreover, the Appellate Body members were of a recognized authority with demonstrated expertise in law, international trade and WTO agreements. It was therefore difficult to contemplate the need for the Appellate Body to receive briefs concerning issues of law.

14. Third, it was ironic that the decision under consideration had been conveyed to Members one day before the overall relationship with the NGOs was to be considered in the informal consultations on external transparency in the General Council. However, the matter was not a transparency issue but was about the Appellate Body crossing its limits.

15. Fourth, the Appellate Body was part of the WTO and was therefore governed by the rules agreed to and delicately negotiated by Members. Those were the same rules that had given the Appellate Body its mandate. The Appellate Body was not a *supra* body within the organization. Furthermore, it was for the General Council to make appropriate arrangements for consultation and cooperation with NGOs, as stipulated in Article V of the Agreement Establishing the WTO.

[2] The statement by Uruguay was subsequently circulated as document WT/GC/38 and Corr.1.

16. Fifth, it was clear that there was no agreement among Members on the issue of *amicus curiae* briefs. This had been demonstrated in a number of occasions, including during the DSU review process before Seattle and, in particular, when the reports on the shrimp/turtle and the US-British steel cases were considered by the DSB. A wide range of Members had then criticized the Appellate Body for encroaching and infringing upon the rights of Members to decide on these questions. The WTO was a Member-driven, as well as an intergovernmental organization and this basic fundamental nature of the organization had to, and would, remain as such. If in the future the Appellate Body could not to find a positive provision of this nature in the current rules, then the matter should be referred to the Members.

17. Sixth, the Appellate Body Division had based its decision on "the interest of fairness". However, nothing in the current rules seemed contrary to achieving this goal through the work methods agreed upon. Moreover, the Division had not brought to the attention and consideration of Members any prevailing circumstances that warranted modification.

18. Seventh, if the implementation of this decision was permitted, a severe harm and a grave imbalance would be done to the rights of Members *vis-à-vis* external parties or individuals who were not even contractually committed to the obligations of the system. Individuals, NGOs, the business community and other interest groups would have the right, under this decision, to communicate their views in a case known at the appeal stage, while that very particular right was not even available to WTO Members who were not a third party at the panel stage. In addition, it was not expected, nor accepted, that Members would do so as a legal person through the new procedure adopted by the Division. This would result in an extremely serious situation where Members would be at a disadvantage and such a situation was flagrantly inconsistent with Article 10.2 of the DSU.

19. Eighth, the Group could not digest the argument that the additional procedure would limit the number of briefs filed, since its point of departure was to invite and solicit such briefs, as well as to pave a legal basis for them.

20. Ninth, while the Division pledged that the decision was for the purpose of the asbestos appeal only, it introduced an additional procedure which, if allowed to apply, would certainly create pressure for future cases and might in fact set a precedent or jurisprudence.

21. Tenth, the likely beneficiaries of such a decision were those individuals and NGOs who had the capacity in terms of resources and time. Those were entities which had more access to WTO work and documents, and were operating mainly in the developed world with few in developing countries. Electronic means did not help the disadvantaged in remote areas, who were increasing in number with the further widening of the digital divide. Finally, and in view of the above, the Group believed that this action by the Appellate Body had to be resented and reversed.

22. The representative of Hong Kong, China said that the convening of this formal meeting urgently underlined the seriousness of the matter and the grave concerns that many Members had expressed in the last two weeks. Hong Kong, China fully agreed with the Chairman that Members should concentrate their discussion on the question of principle and the systemic issues involved, rather than on the specific case. The views of his delegation should be interpreted as constructive criticism over this unfortunate situation, rather than as attacking the standing and integrity of the Appellate Body, both as an institution and as individual members. The issue before the General Council was systemic and probably constitutional. The heart of the issue was that an important and substantive matter such as the submission of *amicus* briefs should only be decided by Members themselves. The Appellate Body's decision to solicit *amicus* briefs affected the existing rights and obligations of WTO Members, which the dispute settlement system precisely served to preserve, as stated in Article 3.2 of the DSU.

23. The issue of submission of *amicus* briefs was an old issue and dated its history to the Uruguay Round, when relevant proposals were raised, negotiated and rejected. Similar proposals were again raised by a few Members during the DSU review, which did not produce any consensus results. When the relevant reports on the shrimp/turtle and the US-British steel cases were considered by the DSB, a significant number of delegations had also expressed dissenting views against the Appellate Body's own creative interpretation of the issue and these views were fully recorded. All of this led to one question, namely whether the submission of *amicus* briefs was a procedural issue only, or rather a substantive one. In his opinion, the answer was obvious. While Members were invited not to concentrate on the specific case itself, Hong Kong, China felt that it was not possible to appreciate the systemic problems created by the Appellate Body without touching upon certain aspects of the case.

24. He recalled that in adopting the additional procedure, the Appellate Body relied on Rule 16(1) of the Working Procedures for Appellate Review and that the first condition for invoking this provision was that a procedural question had arisen. The Appellate Body had not provided any explanation in its communication as to when, how and from whom a procedural question had arisen. Although the Secretariat provided the answer later in the factual note, it occurred to his delegation that none of the parties to the dispute, nor the third parties, had raised this procedural question with the Appellate Body and therefore the Appellate Body itself had drawn this conclusion. In fact, according to his information both parties to the dispute had been against the Appellate Body's decision.

25. The key condition for invoking Rule 16(1) was whether soliciting *amicus curiae* briefs was in fact a procedural question. The background of the issue and the political overtone certainly argued that it was not, but the Appellate Body had had a different view. Hong Kong, China could not find any relevant provision in the DSU that explicitly provided for the Appellate Body to solicit, receive or consider *amicus curiae* briefs. Article 13 of DSU explicitly referred to panels only, and not to the Appellate Body. Moreover, this provision referred to "seeking information", not "soliciting legal arguments". The reliance on Rule 16(1) to make new rules of substantive or systemic significance, as and when it pleased the Appellate Body, without going through the proper legislative process, would certainly undermine the fundamental objectives of the DSU, namely "to provide security and predictability to the multilateral trading system".

26. The consideration for invoking Rule 16(1) was based on "the interests of fairness and orderly procedure in the conduct of an appeal" and this was indeed the only reason given by the Appellate Body in their current decision. However, the Appellate Body failed to explain why fair and orderly conduct of the current appeal would not have been possible without making the current decision to adopt a new procedure under Rule 16(1). Indeed the Appellate Body could have decided not to accept nor solicit any *amicus* briefs. While the Appellate Body pledged that the additional procedure was "for the purpose of this appeal only", the Appellate Body's decision would create pressure for future appeal cases and may in fact set a precedent. It was difficult to envisage how the Appellate Body could decide not to establish the same procedure in any future appeal cases, given that their consideration of the interests of fairness and orderly conduct of an appeal should prevail in each and every case and that they should be acting in a consistent manner.

27. The Appellate Body's invitation was extended to "any person, whether natural or legal, other than a party or a third party to this dispute". It was unclear whether WTO Members who were not parties or third parties to the case could make use of this procedure. If they could not, then WTO Members were being put at a disadvantage compared to outside persons. If they could, then it was inconsistent with Articles 10.2 and 17.4 of the DSU. For Hong Kong, China, it was problematic either way. The Appellate Body decision could create an impossible burden on developing country Members, and indeed any Member, who may wish to comment on and respond to any briefs submitted but would be limited by time and resources constraints. He noted that if only 20 *amicus curiae* briefs were submitted this would represent more than 400 pages of legal arguments, which would require a response within a few days. He also noted that the invitation was intended to be

open-ended, because of the reference to "any persons, natural or legal". However, from the factual background note it resulted that the invitation was only drawn to the attention of a restricted group of NGOs, which happened to be subscribers of the Secretariat's NGO bulletin. This was prejudicial to those who did not have effective electronic access to the WTO website or were not subscribers to the Secretariat's NGO bulletin.

28. Hong Kong, China strongly believed that Members should send the strongest signal to the Appellate Body, and for that matter to any panel, that submission of *amicus* briefs was a substantive matter. It was a matter for Members, and Members only and the Appellate Body and panels should not do anything that may prejudice the outcome of deliberations by WTO Members on this substantive issue. He believed that a lesson had been learned, and that history should not repeat itself.

29. The representative of India said that the disquiet and anxiety generated among the Membership by the Appellate Body's communication was so great that convening this special meeting of the General Council on short notice was more than justified. He also thanked the Chairman for arranging to make available to Members a factual background note prepared by the Secretariat. He also associated his delegation with the statement of the Chairman of the Dispute Settlement Body at its meeting of 17 November and said that he definitely did not want to harm the standing of the WTO, the dispute settlement system or the Appellate Body. However, at the same time, he hoped that the present debate would make sure that no harm would be caused to the rights of Members. In his statement, the Chairman had mentioned that Members should focus their comments on how to deal with an area of the DSU now subject to differing interpretations. In his opinion, as far as the Membership was concerned, there were not many differing views on the interpretation of the DSU, as it stood now, on this subject.

30. India said that the debate at the present meeting was not about the specifics of the *EC-*Asbestos dispute. Nor was it about the desirability or otherwise of providing for *amicus curiae* briefs in the WTO dispute settlement system, or about the so-called transparency issues, which were both matters for Members to deal with if they so desired. His delegation perceived the debate as one essentially dealing with the competence of the Appellate Body to accept unsolicited *amicus curiae* briefs and to solicit such briefs.

31. Tracing the evolution of the Appellate Body's approach to the subject of *amicus curiae* briefs, he recalled that the issue of *amicus curiae* briefs first came into sharp focus in the shrimp-turtle case. In that case, the panel considered that it was not entitled to accept *amicus curiae* briefs under Article 13 of the DSU and observed that accepting non-requested information from non-governmental sources would be, in their opinion, incompatible with the provisions of the DSU as currently applied. The Appellate Body overruled the panel by saying that the panel's reading of the word "seek" was unnecessarily formal and technical in nature and that a panel had discretionary authority, either to accept and consider, or to reject information and advice submitted to it whether requested by a panel or not. When the relevant report had come up for adoption, a large number of Members pointed out that by giving a new interpretation to certain DSU provisions, the Appellate Body had overstepped the bounds of its authority, thereby undermining the balance of rights and obligations of Members. He recalled that subsequently, in the bismuth carbon steel case, the Appellate Body stated that neither the DSU nor the working procedures explicitly prohibited acceptance or consideration of such briefs. On the basis of this curious logic, the Appellate Body said that it considered it had the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it found it pertinent and useful to do so. Again, when this report had come up for adoption, a number of delegations had expressed serious concern regarding the Appellate Body's interpretation of the treatment of *amicus curiae* briefs. Many delegations had also pointed out that acceptance by the Appellate Body of *amicus curiae* briefs was not a procedural but a substantive matter, which therefore could not be dealt with under Rule 16(1) of the Working Procedures. The Appellate Body had unfortunately ignored the overwhelming sentiment of Members against acceptance of unsolicited *amicus curiae* briefs. By

introducing this additional procedure, which amounted to soliciting *amicus curiae* briefs from NGOs, the Appellate Body had indicated that it wanted to go one step further in total disregard of the views of the overwhelming majority of the WTO Membership.

32. Turning to certain aspects of the communication under consideration, he recalled that Rule 16(1) of the Working Procedures for Appellate Review, pursuant to which the Appellate Body was acting, was basically a residuary rule enabling a division to adopt an appropriate procedure for the purposes of that appeal only, provided that it was not inconsistent with the DSU, other covered agreements and the rules of the working procedures. A large number of delegations had pointed out, at the time of adoption of the bismuth carbon steel reports, that acceptance of *amicus curiae* briefs by the Appellate Body changed the intergovernmental nature of the organization, as well as Members' rights and obligations and therefore Article 17.9 of the DSU, and by extension the Working Procedures for Appellate Review, were not applicable to substantive issues. The Appellate Body had chosen to ignore this powerful argument and was having recourse to Rule 16(1) to justify its latest communication. When an overwhelming number of Members were clearly of the view that even accepting unsolicited *amicus curiae* briefs was a substantive issue that could not be dealt with under Rule 16(1), it was totally unjustified for the Appellate Body to proceed on the basis that soliciting *amicus curiae* briefs was not a substantive matter and that they could deal with it under Rule 16(1).

33. The communication from the Appellate Body indicated that they had adopted the additional procedure under Rule 16(1) "after consultation with the parties and third parties to the dispute." As pointed out by other delegations, there was a misleading impression given here.

34. The argument was made in the factual background note that the additional procedure adopted in this particular appeal was designed to "discipline the process and allow the division hearing this appeal to manage in a fair, legal and orderly manner a difficult practical situation which the members of the Appellate Body anticipated would arise in this appeal." However, the Appellate Body was not acting exactly within the confines of the law, namely the DSU, when it decided that the panels and the Appellate Body could accept unsolicited *amicus curiae* briefs, nor when it decided to adopt the additional procedure, whose real effect was to virtually seek or invite *amicus curiae* briefs. The difficult practical situation alluded to by the Appellate Body had been created by the Appellate Body through its own rulings in the shrimp and bismuth carbon steel cases. A large number of Members had expressed strong reservations about the systemic implications of these rulings and today, a more difficult situation was being created for the Membership by the Appellate Body virtually inviting *amicus curiae* briefs in the name of managing in a fair, legal and orderly manner, a difficult practical situation. In the light of the Appellate Body's approach to the issue of *amicus curiae* briefs in shrimp turtle and bismuth carbon steel cases, and against the backdrop of systemic concerns expressed by a large number of Members, the argument that the additional procedure adopted in this appeal was designed to discipline the process was far from convincing.

35. The next important point of the Appellate Body's communication related to certain procedural aspects. The Secretariat's factual background note stated that the Appellate Body's letter had been circulated on 8 November 2000 as a communication to WTO Members. It further stated that in the evening of that day and only after the communication from the Chairman of the Appellate Body had been circulated to Members, the additional procedure adopted by the Appellate Body division in this appeal had been posted on the WTO website. It was not clear from the Secretariat's note what reasons had led the Appellate Body to post the additional procedure on the WTO website, especially when the stated intention of this procedure was to discipline the process though a procedure that was relevant only for this particular case. The Secretariat note said that the "announcement" by the Appellate Body of the additional procedure appeared on the WTO website and an e-mail was sent to the subscribers of the NGO bulletin as per the established procedure. It was unlikely that the Appellate Body Secretariat was not aware of the steps that would automatically be taken by the External Relations Division once the additional procedure was put on the website, obviously at the insistence of the Appellate Body

itself. Therefore, it was not unfair to conclude that the Appellate Body knew, or at least should have known, that putting the additional procedure on the WTO website, which was said to have been designed to discipline the process and was supposed to have been adopted for the particular appeal only, would virtually amount to an invitation to hundreds of NGOs to file *amicus curiae* briefs.

36. India noted that there were clear provisions in the DSU about the rights of third parties in Appellate Body proceedings. For example, a Member which was not a third party before the panel could not become a third party before the Appellate Body. There were also prescribed time-limits for third party submissions before the Appellate Body. However, those who wanted to file a written brief under the new additional procedure did not need to have previously filed any brief before the panel. Moreover, as paragraph 2 of the additional procedure referred to legal persons, it had been suggested that a WTO Member could also file briefs before the Appellate Body, describing itself as a legal or juridical person for the purpose of the additional procedure. India did not think that any WTO Member would be particularly pleased at the prospect of having to characterize itself as something other than a Member, just for the sake of getting privileges which non-Members were being given by the Appellate Body. Furthermore, paragraph 3(e) of the additional procedure called upon those who applied for "leave to file", to identity specific issues of law covered in the panel report and legal interpretation developed by the panel that were subject to the appeal. In his view, it was rather ironical that the Appellate Body, which comprised persons of recognized authority, should be looking for legal guidance in the form of *amicus curiae* briefs. Also, paragraph 3(f) of the additional procedure required any applicant for leave to file to state why it would be desirable for the Appellate Body to grant such leave in the interests of achieving a satisfactory settlement of the matter at issue, "in accordance with the rights and obligations of WTO Members …". In his view, if there was any intention to respect the rights and obligations of WTO Members under the DSU, the additional procedure should not have been adopted. In the second half of paragraph 3(f), the applicants were asked to indicate how they would make submissions that would not be repetitive of what had been submitted by a party or a third party. India did not understand how any applicant for leave to file could respond to this requirement, unless the applicant had access to submissions of parties or third parties. On the basis of what it had said so far, India reiterated that it was extremely concerned with the way the Appellate Body was approaching the issue of *amicus curiae* briefs.

37. In summarizing, the reasons why India felt that the approach of the Appellate Body was inconsistent with the DSU provisions were the following: First, that according to Article 17 of the DSU, the role of the Appellate Body was to deal with appeals which had to be limited to issues of law. Again, it was difficult to see why the Appellate Body, comprising persons of recognized authority, should seek inputs from any person, natural or legal, other than parties and third parties, when its task was simply to rule on issues of law. Second, Article 17.4 clearly laid down that, apart from the parties to a dispute, only third parties could make submissions to the Appellate Body. The Appellate Body would appear to be violating both paragraphs 4 and 6 by accepting or inviting briefs from those who were not parties or third parties to a dispute. Third, any procedure that the Appellate Body may prescribe, could not and should not affect the integrity of the dispute settlement mechanism. In fact, the residuary Rule 16(1) said itself that such a rule should not be inconsistent with the DSU. However, by accepting and inviting *amicus curiae* briefs, the Appellate Body violated Article 3.2 of the DSU, which provided that the DSU served to preserve the rights and obligations of Members under covered agreements, a phrase which included the DSU itself.

38. Fourth, the question of providing for the possibility of *amicus curiae* briefs in the dispute settlement system of the WTO had been actively considered in the Informal Group on Institutional Issues established during the Uruguay Round. In November 1993, one major participant had made a negotiating proposal to the effect that the panel may invite interested persons, other than parties or third parties to the dispute, to present their view in writing. This proposal had not been accepted because of overwhelming opposition. What the Appellate Body had done through its communication was to introduce into the dispute settlement system of the WTO an element which had been

considered and rejected by Members during the negotiations. Fifth, the DSU consisted of both procedural and substantive aspects. During the Uruguay Round negotiations, it was consciously decided that a Member could take recourse to dispute settlement rules and procedures even if there was only a violation of the procedural aspect, as came out of the relevant provisions of the DSU. Since the procedures of the DSU themselves were subject to dispute settlement, Members negotiated these procedures with great care and after much deliberation. By changing these procedures, the Appellate Body changed the rights and obligations of WTO Members while the stated objective of the DSU was to preserve the rights and obligations of Members. Sixth, if one Member violated the DSU procedures, the aggrieved Member could initiate panel procedures and if necessary, go to the Appellate Body. The question now raised was what the Members should do if the Appellate Body itself chose to go beyond its mandate and virtually amend the DSU. Seventh, the effect of the Appellate Body's approach to *amicus curiae* briefs was to strike at the intergovernmental nature of the WTO. The approach of the Appellate Body to accept unsolicited briefs, as well as to invite submissions from any non-governmental source on the most sensitive of all issues in the WTO, namely disputes, certainly amounted to changing the intergovernmental character of the WTO. For one thing, ultimate compliance was to be done by governments, not by others. Furthermore, governmental positions in disputes were arrived at after consultations with all domestic stake holders. If governments knew that their non-governmental agencies had a further chance to influence the dispute settlement mechanism, then they would pay less attention to finalizing their positions and there could even be implications for compliance by governments themselves. Eighth, the Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.

39. In conclusion, India was of the view that the Appellate Body had no competence or mandate under the DSU to deal with unsolicited *amicus curiae* briefs or to seek such briefs. It was rather surprising that in spite of an overwhelming number of delegations expressing strong reservations on the approach of the Appellate Body to *amicus curiae* briefs at the time of the adoption of the shrimp turtle and the bismuth carbon steel reports, the Appellate Body had totally ignored these sentiments, thus raising doubts about the very utility of Articles 16.3, 16.4 and 17.14 of the DSU, which enabled Members to express their views on the panel and the Appellate Body reports. These provisions provided for communication channels between the membership and the judicial organs of the WTO and were meant to serve a purpose.

40. The present meeting was a difficult one for his delegation. Although he was conscious of the good work done by the Appellate Body, he could not remain a silent spectator when the Appellate Body was acting without a mandate. On the *amicus curiae* briefs issue, India had spoken on a number of occasions in the DSB. It was most disconcerting that the Appellate Body, which was always very rigorous and intense in the analysis of the provisions of various agreements and which took into account various elements, such as the ordinary meaning of the words, the Vienna Convention on the Law of Treaties, the object, purpose and context of the agreement as well as the negotiating history, should be arguing that it had the authority to deal with unsolicited *amicus curiae* briefs, as well as to seek *amicus curiae* briefs, in the absence of a prohibition in the DSU. A rule-based system meant that everybody in the system, including the judicial organs, functioned within the framework of the existing rules. In his view, the Appellate Body was at its best when it confined itself to its mandate, namely to deal with issues of law and legal interpretation. When it went beyond its mandate and started making or amending rules, thus encroaching into what was admittedly Members' territory, it created a problem for itself and the entire Membership. What the Appellate Body decided had commercial, economic and social implications for 139 countries in the world. The Membership had created this powerful institution in good faith, in the expectation of common good for all Members, and had always shown well-merited deference to the Appellate Body. India asked whether it was too much to expect from the powerful Appellate Body to show deference to the conviction of almost the

entire Membership that in accepting unsolicited *amicus curiae* briefs and seeking *amicus curiae* briefs, the Appellate Body was acting without a mandate and it was necessary to take appropriate measures to remedy this situation.

41. The representative of Brazil associated his delegation with the words of the Chairman concerning the objectives of the meeting. He also supported the statement made by Egypt on behalf of the Informal Group of Developing Countries. He did not see the present discussion as having anything to do with transparency or the participation of NGOs or civil society in WTO procedures, nor did he see it as a North-South issue, although the issue could have some North-South reverberations. The General Council was really faced with an essentially legal issue, with potential constitutional implications.

42. The crux of the issue lay in the way the Appellate Body had interpreted what constituted "working procedures" within the meaning of Articles 12.1 and 17.9 of the DSU. The Appellate Body's findings regarding *amicus curiae* briefs relied heavily on the authority Members granted to panels and the Appellate Body to draw up their own working procedures. However, Brazil said that the Appellate Body had read in this mandate more than what was actually in it. To the negotiators of the DSU during the Uruguay Round, "working procedures" meant precisely what the words denoted. The dictionary entry for the word "procedure", in its legal usage, was defined as "the formal steps to be taken in a legal action" or "the mode of conducting judicial proceedings". The introduction of the word "working" before the word "procedures" in Articles 12.1 and 17.9 of the DSU further limited the already narrow scope of the word "procedures". Therefore, when Members gave panels and the Appellate Body the authority to draw up their "working procedures", such authority was circumscribed to the "formal steps" or the "mode of conducting" the proceedings of the dispute. This was a very limited mandate. The scope Members intended for the term "working procedures" was further clarified by the contents of Appendix 3. Nowhere in the "working procedures" outlined by the Members in the Appendix was there a hint that a panel could accept documents other than those submitted by parties or third parties, or that Members had left to the panels the discretion to set out procedures such as the "leave to file written briefs" adopted by the Division hearing EC – asbestos case. Nevertheless, it was on the basis of the authority granted to panels to set out their own "working procedures" that the Appellate Body, in US – shrimp case, found that panels must not read the word "seek" in Article 13 of the DSU in "too literal a manner". This, in his view, was a noteworthy departure from the principles of treaty interpretation established in the Vienna Convention on the Law of Treaties. There was no reason to believe that negotiators intended to give the word "seek" any sense other than the precise meaning it had in dictionaries and in ordinary usage. Nonetheless, given its broad interpretation of the term "working procedures", the Appellate Body had actually changed the meaning of the word "seek" as Brazil understood it in the DSU. In US – shrimp case, the Appellate Body report pointed out that, given the ample authority of panels to define their "working procedures", under certain circumstances, "for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes". This distinction was, however, essential.

43. In its US - hot-rolled steel report, the Appellate Body concluded it had the authority to "adopt procedural rules that do not conflict with the rules and procedures in the DSU or the covered agreements." This could be a very broad self-ascribed mandate indeed, depending on how one interpreted the words "procedural rules". Brazil noted that the question of who could be heard by panels and the Appellate Body was not a "procedural rule", but rather a very substantive component of the DSU rules, which affected the way the system operated and significantly altered the rights and obligations Members negotiated under the Uruguay Round. A Member's obligation, for example, would now include the need to read and respond to written briefs of "any person, whether natural or legal" that had been accepted by a panel or the Appellate Body in a given dispute. Moreover, Members would now likely be obliged to make sure that their own natural or legal persons who filed briefs had their rights fully observed by panels and the Appellate Body and that the system would not

operate in a way that tilted the field in favour of Members whose natural or legal persons were better funded and more influential in the international community, not necessarily for legitimate reasons.

44. In sum, Brazil stressed its understanding that, when exercising the authority to draw up their own working procedures, the Appellate Body and panels should proceed with special circumspection, bearing in mind the distinction between procedural and substantive matters. He found that the WTO jurisprudence should not consolidate the notion that in the process of drawing up working procedures, panels and the Appellate Body may add or subtract to Members' rights and obligations.

45. Brazil was also concerned that the evolution of the jurisprudence on this issue would bring Members into grey and problematic areas. After the US - shrimp case, only panels, not the Appellate Body, were authorized to accept non-requested documents. It could be argued, though Brazil did not share this view, that this could be justified in light of the fact that panels may need assistance and further technical expertise to deal with complex aspects of a particular case. Then, in US - hot-rolled steel case, the Appellate Body decided that it also had such authority. Given the fact that the Appellate Body could only look into issues of law, not facts, he did not see how, given the prominent credentials of the Appellate Body members, the introduction of *amicus* briefs would contribute to the interpretation of WTO or international law. Now, in the EC - asbestos case, he found that for all practical purposes an invitation was extended, by means of e-mail and posting of the Appellate Body communication to the DSB on the WTO website, for all natural and legal persons to file briefs. The system was now, not only accepting *amicus curiae* briefs, it was also actively inviting them. From his perspective, these events were objectionable.

46. Apart from the reality that the number of applications to file briefs would multiply exponentially, Brazil was also concerned with the notion that panels and the Appellate Body would be deciding who had a right to file written briefs on the basis of the applicant's membership, legal status, objectives, interests, nature of activities, sources of financing, or relationship with parties or third-parties to the dispute. If jurisprudence advanced in this direction, the dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism.

47. Finally, the health of the system also hinged on the ability of the Appellate Body to act in an impartial way uninfluenced by Members. The Appellate Body may have felt it had enough guidance in the DSU on how to deal with the *amicus curiae* briefs that were submitted and that its interpretation of the DSU was correct. Although Brazil did not agree with this position, it could not blame the Appellate Body for thinking in such a way. However, Brazil expected that when exercising the discretionary authority granted in Article 17.9 of the DSU, the Appellate Body would use the consultation provision of that same Article whenever it faced an issue that could be either substantive in nature, or otherwise had systemic implications, particularly those that were reputedly controversial among Members. Brazil may have disagreed in the past with the way the Appellate Body had interpreted particular provisions of the WTO Agreements, but it had always valued the high quality of the reports issued by the Appellate Body and respected the efforts of its Members to dispose of their duties in an impartial and fair manner. Yet, Members were dealing with a matter that had to be decided by themselves. Brazil, on its part, was ready to engage in any process that ultimately pointed in this direction.

48. The representative of Mexico said that the convening of this special meeting of the General Council clearly reflected the importance of the matter for WTO Members. His delegation agreed with the Chairman's remark in the introduction of his statement that Members should concentrate their discussion on the question of principle and the systemic issue involved rather than on the specific case. However, it would be logical to believe that the discussion would also have implications for the specific case before the Members.

49. According to Mexico, the decision of the Appellate Body Division in the asbestos case to adopt an additional procedure to deal with any written briefs received from natural or legal persons other than parties and third parties to the dispute, not only lacked any legal basis, but also created serious problems that should not arise. It appeared from the communication by the Appellate Body Division that their decision was based on Rule 16(1) of the Working Procedures for Appellate Review, which could only be invoked where a procedural question not covered by the working procedures arose, provided that such a procedure was not inconsistent with the DSU, the covered agreements and the working procedures themselves. Neither the communication from the Division nor the Secretariat's factual note circulated before the meeting had clearly explained how this procedural issue had arisen. As far as he knew, the parties directly involved in the dispute and one third party had not raised the issue and, when consulted in this respect, had not agreed with the procedure finally adopted by the Appellate Body. If this information was correct, it would mean that the said procedural question had not been raised by the participants in the appeal and therefore, Members could not know on what grounds the Appellate Body Division had decided to resort to Rule 16(1). Mexico raised the question as to whether it should be understood from this that the Division decided that the said procedural issue had been raised by those natural or legal persons which had filed written submissions with the panel.

50. The dispute settlement mechanism only created rights and obligations for the WTO Members who were entitled to take part in it. Among the many provisions that supported this concept were Articles 1.1, 3.2, 3.4 and 19.2 and, in particular, 17.4. In the British steel case, the Appellate Body itself had acknowledged that individuals and organizations which were not Members of the WTO had no legal right to make submissions or be heard by the Appellate Body. Mexico did not see what circumstances had changed so as to justify a different view in the present case. According to Article 17.4 of the DSU, only the parties to the dispute, with the exclusion of third parties, could appeal a panel report. Third parties which had notified the DSB of a substantial interest in the matter pursuant to Article 10.2 of the DSU could make written submissions and be given the opportunity to be heard by the Appellate Body. This provision was very clear as to who could appeal and who could make written submissions in the appeal. There was no provision which provided at any point, even implicitly, for submissions from any person or entity other than the parties or third parties to the appeal. To issue an open invitation to any natural or legal person to make written submissions to the Appellate Body was not a mere procedural question. It was tantamount to amending Article 17.4 of the DSU. Consequently, this issue could not and should not be solved through the Working Procedures for Appellate Review but by WTO Members themselves, in accordance with the provisions of the WTO Agreement for the adoption of amendments to the agreements. It was difficult to understand why the Appellate Body Division had decided to proceed in this way, as it was not a new issue, which had taken them by surprise or to which WTO Members had shown themselves to be indifferent. Any person interested in WTO matters, and especially the Appellate Body, knew that the question of *amicus curiae* briefs was a highly sensitive one for WTO Members. To act as if it was a mere procedural matter did not take into account either the background to this issue, or the expressions of concern or open rejection that many Members had voiced in this connection. When the DSU provisions were being negotiated in the Uruguay Round, there were already proposals that panels should be able to receive *amicus curiae* briefs. If such a possibility had not been included in the DSU provisions, it was because WTO Members had decided that it was not appropriate. In other words, Members were not faced with a situation where they had accidentally created a legal lacuna as a result of not having foreseen that this kind of problem might arise in the future. Members had deliberately decided not to include that possibility in the DSU. Therefore, any interpretation of the terms or the preparatory work of the DSU under the Vienna Convention on the Law of Treaties would necessarily lead to a different conclusion. The Appellate Body Division should not have decided in the way it did. Apart from the fact that it did not have the power to do so, by issuing an open invitation to any natural or legal person to make written submissions to the Appellate Body, it arrogated to itself a right that belonged solely to WTO Members acting collectively. And it did so, despite the many expressions of concern and even the open opposition to this course of action voiced

by many WTO Members, as reflected in minutes of DSB meetings. It was a cause of great concern that the Appellate Body had given precedence to the submissions from interests outside of the WTO over the concerns expressed by many WTO Members. In fact, by imposing such conditions, the Appellate Body had taken a decision that Members themselves had not adopted, thereby clearly contravening Article IX of the WTO Agreement and diminishing the rights and obligations of Members, in contravention of Article 19.2 of the DSU.

51. The only justification for the Appellate Body Division to have acted in the way it did would have been the impossibility to give its ruling without the relevant additional procedural rules. It was clearly not the case here, as the Appellate Body Division was not obliged to act as it did in order to be able to give its ruling on the points of law and interpretation that were submitted to it by the parties to the appeal. In fact, in all the appeals it had heard so far, the Appellate Body had ruled without the need to receive *amicus curiae* briefs from non-WTO Members. The only reason given by the Division for invoking Rule 16(1) of the working procedures was that the additional procedure was adopted "in the interest of fairness and the orderly procedure in the conduct of this appeal". Apart from the fact that it was insufficient to fulfil all the requirements laid down in Rule 16(1), this reason established a treatment for non-WTO Members to which they were not entitled. The "fairness" referred to in Rule 16(1) only applied to WTO Members that were parties in the appeal or to third parties entitled to participate. Mexico raised the question as to how one could still speak of "fairness" when it had become possible for non- WTO Members to make written submissions to the Appellate Body, while Members that were not parties or third parties in the appeal could not do so themselves under the DSU provisions. Far from being fair, the additional procedure adopted by the Appellate Body Division put WTO Members that were not parties to an appeal at a disadvantage *vis-à-vis* any natural or legal person authorized to make a written submission to the Appellate Body. With regard to the question of orderly procedure, Mexico could not see how the additional procedure adopted by the Division could be of benefit to the examination of the appeal. An open invitation to any natural or legal person in any part of the world could lead to the reception of an unmanageable number of requests for leave to file written briefs to the Appellate Body, which might only delay its work. For such requests to be treated fairly, they would all have to be translated so that the Appellate Body could examine them and decide whether to authorize the submission. Conversely, the dispute settlement system was already experiencing serious problems in translating the communications from WTO Members, as well as reports of the panels and the Appellate Body itself. Moreover, it was not clear what would happen in the case of natural or legal persons that did not have the electronic means to receive this invitation, and especially to reply in time. He asked whether the date when such a submission was posted would be counted as the delivery date, or whether this procedure would only be available to those natural or legal persons that had sufficient economic resources to be able to communicate by electronic means. Besides the fact that it would be unfair, it would also have the effect of discriminating against the natural or legal persons that did not have the economic resources necessary to be able to communicate electronically. Furthermore, it would be logical to believe that the parties and third parties in the appeal would have the opportunity to respond to the arguments put forward in the written submissions which would finally be accepted by the Appellate Body Division, and this could also involve the need to translate such submissions and to give sufficient time to the parties and third parties to the dispute to study them and prepare their own response. All this would have to be done within the 60 days laid down by the DSU for the Appellate Body to circulate its report to WTO Members.

52. In conclusion, Mexico highlighted first that the rights and obligations of the DSU applied solely to WTO Members. The omission of any right or obligation for natural or legal persons under the DSU was not an oversight by Members in drawing up the DSU provisions. It was clear from the background that the Members deliberately decided not to include such a possibility in the DSU. Second, to issue an open invitation to any natural or legal person to make a written submission to the Appellate Body was not a mere procedural issue that could or should be solved through the Working Procedures for Appellate Review. The working procedures could only resolve procedural questions,

if and when their own rules in this respect were followed. Even though, in the case in question, the requirements of these rules had not been met, what was really important was that the submission of *amicus curiae* briefs was not a question of procedure, but of substance. Third, to allow the submission of *amicus curiae* briefs to the Appellate Body in order to obtain information on points of law or legal interpretations was something that had to be decided by WTO Members in accordance with the relevant decision-making procedures on such matters. The Appellate Body should not arrogate to itself a right that belonged solely to Members. Finally, even if Members decided to allow *amicus curiae* submissions, the panels and Appellate Body would still have to act in conformity with Article 19.2 of the DSU, which stated that in accordance with Article 3.2, in their findings and recommendations, the panels and the Appellate Body could not add to or diminish the rights and obligations provided in the covered agreements.

53. The representative of Colombia, on behalf of the ANDEAN Members, said that the current debate should be directed to answering the question of whether, from a strictly legal standpoint, it was possible for the Appellate Body to make room for contributions to be received from natural or legal persons other than parties or third parties to a dispute. According to the communication from the Appellate Body to the Chairman of the DSB, the decision adopted by the Appellate Body Division was based on two factors. First, fairness and second, consultation with the parties and third parties to the dispute with regard to the special procedure.

54. As far as fairness was concerned, he believed that if this concept could be applied within the multilateral system, it should operate between WTO Members, principally to maintain a balance between their rights and obligations. Fairness was a concept that had so far been absent from the interpretation of the legal texts. Therefore, it would be strange if fairness was supposed to serve as the basis for making room for natural or legal persons to be able to make suggestions to the Appellate Body concerning satisfactory solutions to a dispute. According to the DSU, the parties themselves determined the scope of a dispute and therefore, they alone could bring forward arguments into the debate. As for the extent to which parties and third parties to a dispute could give their approval to the special procedure, Colombia was of the view that they did not have the power to create this kind of arrangement, which belonged to WTO Members. The parties should act in accordance with the DSU provisions and the establishment of this new arrangement exceeded the powers granted to the Appellate Body by virtue of Article 17.6 of the DSU. The fact that the rules of the Appellate Body allowed for the establishment of special procedures did not mean that this function could override the specific powers assigned to the different bodies by the agreements. Otherwise, there would be a danger, as was the case here, that non-Members would have more rights than WTO Members. This was even more serious, considering the fact that until very recently *amicus curiae* briefs had been considered in a dispute insofar as there was a clear relationship between the arguments set forth in the briefs and those presented by the parties. However, in this case, it was precisely on the basis of their difference from the arguments presented by the parties that *amicus curiae* submissions were invited by the Appellate Body Division.

55. In light of the above, and echoing the Chairmen of the General Council and the Dispute Settlement Body, all Members had a responsibility towards their country and should work to preserve the WTO. In order to protect the system, Members had to make sure that each body acted in accordance with its powers. Therefore, the procedure adopted by the Appellate Body had to be abolished and the case settled in accordance with the powers granted under the DSU. The power to create a procedure such as the one proposed rested exclusively with Members. If in the future, and as a result of a thorough debate on its advisability, it were decided to make a place for third parties, co-defendants or for *amicus curiae* briefs, it would then become essential to take steps to amend the existing Agreements.

56. The representative of Zimbabwe associated himself with the statement made by Egypt on behalf of the Informal Group of Developing Countries and said that the case in question was one of

eight in the history of the WTO, where the issue of *amicus* briefs had featured. Members would therefore have to focus not only on this case but also on the issue of development of WTO jurisprudence, as well as to address the issue of interpretation of WTO agreements by panels and the Appellate Body.

57. In his delegation's view, Rule16(1) of the Working Procedures for Appellate Review was fundamentally flawed and usurped Members' authority by taking a decision on the issue of participation in the dispute settlement process. Under that rule, decisions could be taken without consulting the membership, even if these affected the overall balance of Members' rights and obligations in the WTO. As the situation stood, NGOs and other non-Members enjoyed greater rights in making submissions to panels and the Appellate Body than Members who were not parties to a dispute. NGOs were not even obliged to meet the strict deadlines that Members, participating in a dispute, had to meet in making their submissions.

58. A permanent negotiated procedure for the submission and acceptance of *amicus* briefs within the WTO dispute settlement process should be put in place, as *amicus* briefs appeared to be emerging as an important feature of WTO jurisprudence. His delegation was concerned at the ad hoc approach adopted so far and at the disturbing manner in which panels and the Appellate Body, with the assistance of the Secretariat had taken it upon themselves to undertake the task of substantive interpretation of WTO agreements, which in certain cases had resulted in altering Members' rights and obligations. Any such interpretation should be subjected to scrutiny by the General Council as it was the Ministerial Conference and the General Council that had the exclusive authority to adopt interpretations of the WTO agreements. In this regard Members should put in place a procedure to guide panels and the Appellate Body in seeking an authoritative interpretation from the General Council. Members had to reassert their rights. The dispute settlement system appeared to be running away from Members, increasing their obligations and reducing their rights in the process. Members should not continue to watch bad jurisprudence being created.

59. The representative of Singapore, on behalf of the ASEAN Members, said that this issue had systemic implications and involved all Members, thereby warranting discussion in an open forum. The procedures adopted by the Appellate Body allowed non-parties to the dispute, including non-Members, to participate in it by inviting them to submit written briefs. This procedure had been adopted after the Appellate Body had consulted with the parties to the dispute and despite their objections as well as the objection of a third party. At the outset, ASEAN wished to state that it recognized the important role of the Appellate Body in resolving disputes in the WTO and was not detracting from it. However, its statement was to safeguard the integrity of the WTO as an intergovernmental organization.

60. The issue of *amicus* briefs and the participation of non-Members in dispute settlement cases was not new. It had been discussed in the Uruguay Round negotiations on the Dispute Settlement Understanding and in the DSU review. In both instances, the overwhelming sentiment of Members, as reflected in the rules, was that only parties and third parties had the right to participate in disputes. On repeated occasions, however, briefs from non-parties to the dispute had been accepted by either panels or the Appellate Body. In all such instances, Members had registered their strong disapproval. It was thus with great disquiet that ASEAN noted that, notwithstanding the strong negative sentiment on this issue from the majority of Members, the Appellate Body had chosen to proceed with the adoption of the procedure in document WT/DS135/9. Since this procedure was contrary to the prevailing sentiment of the majority of Members, the Appellate Body should withdraw it.

61. There was no consensus on the issue of *amicus* briefs. The WTO was a Member-driven organization and only Members could decide on the merits of proposals in order to determine what was acceptable to the membership. If there was any ambiguity in the DSU or in the working procedures governing panels and appeals, Article IX.2 of the WTO Agreement clearly stated that

Members had the exclusive authority to adopt interpretations of the WTO agreements. Moreover, in cases where there was no expressed prohibition and where, in the perception of panels or the Appellate Body, they were authorized to adopt a particular procedure, they should be sensitive to the sentiments of the majority of Members. As the rules stood, only parties and third parties had the right to participate in disputes and only Members could clarify and formulate rules.

62. The representative of Switzerland said that his delegation set a high value on the dispute settlement system and its integrity, which was one of the corner stones of the WTO. The dispute settlement system had functioned well on the whole and it would be a mistake to question these procedures and its principles, which were fundamental, on the basis of this incident. The present discussion should be limited to the specific issues raised by the Appellate Body decision of 7 November 2000.

63. The issue of *amicus curiae* briefs was not a new one. Panels had already had to deal with them. Some parties to disputes had used different means to include them in the dispute settlement procedures. Panels had handled such submissions in various ways, accepting them in some instances, and rejecting them in other. When the Appellate Body found itself confronted with such submissions, it had considered it necessary to establish guidelines in order to deal with *amicus curiae* briefs in a coherent way. In his delegation's view, however, the Appellate Body's decision did not relate to a procedural issue and could not be considered under Rule 16(1) of the Working Procedures for Appellate Review. Article 12 of the DSU and paragraphs 4 and 6 of Appendix 3 of the DSU expressly mentioned that only parties and third-parties to a dispute were authorized to present their arguments. It was true that Article 13 of the DSU authorized panels to request technical information from groups or organizations they would deem fit to do so. However, the content of the second paragraph of the Appellate Body's decision could not be justified under that Article. Leaving legal considerations aside, what had occurred revealed Members' incapacity to fill the gaps in the system and to solve problems as they arose.

64. The issue of *amicus curiae* briefs should be solved through negotiations and it was Members' responsibility to legislate on it within the framework of the DSU review. Failing to do this, the division between the legislative and the judicial functions would remain blurry and would be most unsatisfactory to all.

65. The representative of Pakistan said that the Appellate Body's decision had obliged Members to deal with the issue of the *amicus curiae* briefs that had plagued them for some time. Pakistan had no intention of casting doubt on the WTO dispute settlement system and recognized its importance. At the same time, it was important that Members retained confidence in the dispute settlement system. Without such confidence, recourse to that system would become questionable. The Appellate Body and all Members were aware of the controversial and sensitive nature of the issue of *amicus curiae* briefs, especially from NGOs. This matter had been raised in the Uruguay Round and had subsequently been opposed by the majority of membership. Under the provisions of Article 10 of the DSU, only parties and third parties could participate in the dispute, including at the level of panels. The Appellate Body had to consider legal issues only and therefore it did not need to have recourse to *amicus curiae* briefs. Moreover, Article 17.4 of the DSU restricted appeals in the Appellate Body only to the parties, not even to third parties. To invite *amicus curiae* briefs from NGOs was giving them a higher status than the majority of Members. *Amicus curiae* briefs should be invited only if the parties concerned agreed thereon. In the case in question, the Appellate Body Division had consulted the parties to the dispute, which had both opposed the invitation of *amicus curiae* briefs.

66. With regard to the manner in which this communication had been sent, i.e., to NGOs on the WTO e-mailing list, there was clearly an inherent discrimination since the largest number of NGOs from developing countries did not have access to the internet and were not on the WTO e-mailing list. In addition, this was not a procedural matter, but a substantive one which should have been settled in

accordance with the provisions of Article V of the Marrakesh Agreement, which stated that the General Council had the authority to make appropriate arrangements for consultations and cooperation with intergovernmental and non-governmental organizations, and Article IX.2 of the Marrakesh Agreement, which stated that "the Ministerial Conference and the General Council had the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Even if this issue was considered as a procedural matter, it would have been governed by Article 17.9 of the DSU which stated that "the working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General". He did not know whether the Director-General had been consulted but the Chairman of the DSB had not. Therefore, the General Council should invite the Appellate Body to withdraw the invitation for *amicus curiae* briefs in response to the wishes of the majority of the membership. The General Council should also further consider this issue of *amicus curiae* briefs at an early opportunity and take a decision which would prevent recurrence of such problems in future.

67. The representative of Norway shared the views expressed by previous speakers on the question of the systemic issues involved. The question of whether or not to accept *amicus curiae* briefs in panel cases had been discussed by Members on several occasions. During the Uruguay Round, the issue had met strong opposition from a vast majority of participants, and no conclusion had been reached. In the shrimp/turtle case, the concerns of Members had been clearly expressed. Within the framework of the DSU review, proposals to include such briefs had never received any wide support.

68. Under the provisions of Article 17.6 of the DSU, Members had granted competence to the Appellate Body with respect to "issues of law covered in a panel report and legal interpretations developed by the panel". In addition, the working procedures, drawn up in accordance with the Article 17.9 of the DSU, provided for adoption of appropriate additional procedures where procedural questions arising were not covered by the rules. Since neither the DSU nor the Working Procedures for Appellate Review provided for acceptance of *amicus curiae* briefs or the prohibition thereof, the Appellate Body found it necessary to develop additional procedures pursuant to Rule 16(1) of the Working Procedures.

69. Judging from Members' reactions over the past week and in the present meeting, the question of *amicus* briefs was, however, considered to have relevance far beyond procedural considerations. Like others, Norway also believed that this was a systemic issue which should be dealt with by Members. The present situation revealed that Members should not allow legal black holes to prevail due to their inability to agree on certain difficult issues, thus leaving panels and the Appellate Body without guidance from law-makers on how to proceed. To this effect, Members should address this systemic issue of *amicus* briefs expeditiously. Initiation of such a process would give panelists and Appellate Body members the option of refraining from actions which might prejudice the outcome of Members deliberations, without the risk of being accused of lack of integrity and impartiality. Norway supported the proposals made by Uruguay and Hong Kong, China on how to proceed from here.

70. The representative of Costa Rica also expressed concern about the Appellate Body's decision which recognized the right of persons which were neither parties nor third parties to a dispute to submit a brief within a dispute settlement process. Costa Rica did not agree with that decision and believed that the Appellate Body overstepped its competence by creating rights different from those that had been mutually agreed upon. Opinions of experts could be requested when necessary within the framework of the dispute settlement system. However to allow a person which was neither a party nor a third party to the process to submit briefs would change the balance in the DSU and the intergovernmental nature of the WTO. Such a measure represented a risk for developing countries as it would put them in a situation where they would be short of possibilities of defence. This measure would oblige parties and third parties to the case to examine all submissions and therefore would

impose an additional and unnecessary burden on them within well-known time and resource constraints. Like others, his delegation also believed that the Appellate Body had taken a decision which was Members' exclusive responsibility and which affected Members' rights and obligations. Therefore a clear message should be sent to the Appellate Body indicating Members' concerns.

71. The representative of Canada said that his delegation wished to make three comments on the systemic issues raised by the Appellate Body procedure. First, the present debate should aim at searching for a resolution of this issue. Second, one should not confuse the issues of transparency and participation in WTO dispute settlement. Canada fully supported greater external transparency in the WTO, including in dispute settlement. As stated during the General Council discussion on transparency earlier this month, Canada made its panel and Appellate Body submissions available to the public on request. Canada encouraged other Members to do likewise, and was seeking other ways to improve transparency in WTO dispute settlement proceedings.

72. The *amicus* briefs were, however, not a transparency issue. It addressed the fundamental issue of participation in WTO dispute settlement proceedings, i.e., whether this participation should be limited to WTO Member governments or would non-governmental bodies also be entitled to participate. Canada was sympathetic to the interests of non-Members in the outcome of WTO disputes and recognized that civil society, including NGOs, followed closely the issues examined in disputes. At the same time, Canada also acknowledged the need for Members to examine the impact this might have on what was a government-to-government dispute settlement process.

73. The issues surrounding *amicus* participation had important systemic and institutional implications for the WTO, and could not be characterized as exclusively procedural. Members should examine whether the participation of non-governmental actors in the WTO dispute settlement system was consistent with the principal objectives of the system. A related, and equally important issue was whether the *amicus* question should be resolved on an ad hoc basis in individual disputes, or whether it should be addressed by the Members as a whole. In his delegation's view, Members, and not the dispute settlement system, should decide on how the issue of *amicus* participation should be dealt with in the future. Members should ensure that the government-to-government nature of the dispute settlement process was not compromised by procedural initiatives of panels or the Appellate Body. Therefore, his delegation was concerned that the Division had chosen to adopt these new procedures. It was clearly time and appropriate for Members to take the responsibility to deal with this issue, and Canada would participate in any procedure that would be established to do so.

74. The representative of the United States believed that the Appellate Body had acted appropriately in adopting its additional procedure in the asbestos appeal. The Appellate Body had the authority under Rule 16(1) of its Working Procedures to adopt the additional procedure regarding the acceptance and consideration of *amicus* briefs in that case. Given that the Appellate Body had the authority to accept and consider *amicus* submissions, and given that a number of persons had either already filed, or expressed an interest in filing *amicus* submissions, the Appellate Body had adopted procedures to manage this issue in a fair, legal and orderly manner, taking into account the interests of members of civil society in having their views considered, the interests of the parties and third parties in being able to review and respond to any *amicus* submissions, and the interests of all in resolving the dispute.

75. By adopting its additional procedure in the asbestos dispute, the Appellate Body had not created a new issue related to potential *amicus* submissions. It had been managing a situation that already existed in the specific context of the asbestos dispute. The alternative approach to written procedures would have been to take an ad hoc approach in the appeal as to whether to take into account *amicus* submissions, for instance, having the interested persons send in their submissions and announcing at the end of the appeal whether or not they had been considered. This approach would be less fair to everyone, including parties, third parties, and those interested in filing *amicus*

submissions, than open and transparent procedures. Such an ad hoc approach would be especially inappropriate in cases where the Appellate Body knew that there would be persons other than parties or third parties hoping to submit views to the Body.

76. In the view of the United States, there was a value in establishing *amicus* procedures in the context of an individual case, because a concrete dispute would provide a clear context for how the procedures would work. It would also permit refinements of the *amicus* procedures based on experience in those cases. The issue was not whether there was the authority to accept *amicus* procedures, but how the acceptance of such submissions was managed. Panels and the Appellate Body had the authority under the DSU to accept and consider *amicus* submissions. In the British steel appeal the Appellate Body found that it had the legal authority under the DSU to accept and consider *amicus* briefs. Article 17.9 of the DSU made it clear that the Appellate Body had broad authority to adopt procedural rules which did not conflict with any rules and procedures of the DSU or the covered agreements, and nothing in these prohibited acceptance and consideration of *amicus* filings. Rule 16(1) of the Working Procedures for the Appellate Review established under Article 17.9 of the DSU specifically permitted an Appellate Body Division to adopt an appropriate procedure for a particular case. In the shrimp/turtle case, the Appellate Body had also found that the panel had authority to accept and consider *amicus* submissions.

77. The DSB had said many times that the text of the DSU was what was important. It was a mistake to claim that the negotiating history of the DSU showed any intent to ban *amicus* submissions. In fact, the United States had at one point sought language to clarify the DSU and make it explicit that such submissions would be permitted, but had become convinced that this was not necessary. In view of the discussion held, she believed that no additional meeting to discuss the issue was necessary and that the General Council should take note of the statements and request its Chairman to forward the minutes of this meeting to the Appellate Body so that its members would be fully aware of the views expressed.

78. The representative of Bolivia associated his delegation with the statement by Colombia and said that the issue at hand was not the whether third parties should be allowed to make submissions but the competence of the Appellate Body to take decisions without consulting Members and without their approval.

79. The representative of Turkey said that there were two ways of approaching that issue. First, as an isolated case within a well-functioning system, where an Appellate Body had exceptionally erred. Second, as a case which revealed one of the shortcomings of the dispute settlement system. In his delegation's view, this was not an isolated case, for it was not the first time that an Appellate Body had attempted to deal with the long-standing issue of *amicus* briefs. In the present case the Appellate Body had apparently based its action on precedents concerning other cases. However, it had gone further and attempted to solve this problem. He was not sure that this meeting would have taken place if the Appellate Body had limited its action to the examination of the briefs which had been sent to it. The Appellate Body had tried to develop procedures for submission of *amicus* briefs. In doing so, it had taken the decision to establish an additional procedure which was also tantamount to an invitation to NGOs to send briefs to it. This resulted in introducing non-Members in a dispute settlement system which was clearly designed for Members. One could question whether the Appellate Body was entitled to make such an invitation. Some would argue that in the absence of any rule to the contrary the Appellate Body could take such a decision. The Appellate Body was entitled to develop its own working methods, however, the issue of *amicus* briefs lay beyond its area of competence.

80. The DSU did not empower the Appellate Body to decide on such a crucial issue. The good will of the Appellate Body was not in question. However, the Appellate Body should have foreseen to a certain extent the reactions its decision would provoke. Article 13 of the DSU did not give a discretionary power to the Appellate Body. The absence of rules concerning *amicus* briefs did not

give a free hand to the Appellate Body but showed the limits of its authority as well as the limits of the system. The Appellate Body should have informed Members of the need for new rules instead of elaborating on them.

81. One of the lessons that could be drawn from this case was that when Members failed to negotiate to improve the rules, panels and the Appellate Body had the tendency of filling the gap by creating case laws and precedents. The issue of *amicus* briefs would have to be addressed in its own right. To present this legal matter as an issue of external transparency would be misleading. If Members were to engage seriously in a discussion on *amicus* briefs, they should not ignore that these were used in other international legal procedures. The question was whether the WTO membership was ready to take on board this concept. Should *amicus curiae* briefs be felt to be necessary, the modalities would have to be defined by Members which had the exclusive authority to determine them. In the meantime, *amicus curiae* briefs should not be used unless the parties to a dispute agreed thereon.

82. The representative of Hungary, also on behalf of Bulgaria, Czech Republic, Latvia, Romania, Slovak Republic and Slovenia said that given the sensitive nature of the issue his delegation would have preferred to have first an exchange of views in an informal setting. As to the issue in question, he expressed concern about the systemic implications of the communication issued by the Appellate Body in WT/DS135/9. Through that communication the Appellate Body had again considered the issue of the acceptance of *amicus curiae* as a simple procedural question which, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, might be decided by the Appellate Body on an ad hoc basis if both these procedures as well as the DSU did not address it. In his delegation's view, the question of how to treat *amicus curiae* touched upon the right of participation, which was one of the most fundamental elements of any dispute settlement mechanism. Any decision thereon affected the intergovernmental nature of the WTO dispute settlement mechanism and should be decided exclusively by Members.

83. The position taken by the Appellate Body in the case in question was a matter of particular concern in view of the opinion of the majority of the membership. Indeed, Members had stated on several occasions that the question of *amicus curiae* submissions was a question of substance and not of procedure and that the DSU in its current form did not authorize the Appellate Body to accept unsolicited *amicus curiae* briefs. Members were now facing a delicate situation. On the one hand, the fundamental question of the right of participation in the dispute settlement mechanism had become a source of conflict between the legislative and judicial arms of the WTO. On the other hand, if there was no change in the current state of affairs, Members would be running the serious risk of becoming observers rather than the main actors in the setting of fundamental rules regarding dispute settlement in the WTO. The situation called for urgent consideration of the issue of *amicus curiae* briefs by Members with a view of establishing clear rules thereon to guide panels and the Appellate Body.

84. The representative of Korea said that the Appellate Body's communication on the EC-asbestos case raised many systemic issues among which one related to the possible role of NGOs in the WTO dispute settlement system. That issue would have to be considered in the broader context of the relations between NGOs and the WTO because the DSU did not address the status of NGOs, while Article V.2 of the Marrakesh Agreement, to which the DSU was annexed, stated that the General Council had the authority to make appropriate cooperation arrangements with NGOs.

85. Another issue concerned the proper procedure to address the possible shortcomings in the DSU. In his delegation's view, it was the role of the General Council to deliberate if there were deficiencies in the DSU, and if so, to determine how to address such deficiencies. Article IX.2 of the Marrakesh Agreement provided that the General Council along with the Ministerial Conference had the exclusive right to adopt interpretations of WTO agreements, including the DSU. Article X.8 of

the Marrakesh Agreement provided that the General Council had the exclusive right to amend WTO agreements in the interval between Ministerial Conferences. The Appellate Body's decision on the acceptance of *amicus* briefs from NGOs was not a procedural decision but a substantive one which had important implications for the rights and obligations of Members. Therefore, acceptance of *amicus* briefs should be suspended pending further deliberations of the General Council on the related systemic issues.

86. The representative of New Zealand shared the views described in the Chairman's note which aimed at encouraging a constructive discussion focussed on problem-solving in relation to the important aspect of dispute settlement procedures revealed by the Appellate Body's communication in WT/DS135/9. Like others, his delegation also noted the recognition, which had been provided at the time the Appellate Body Working Procedures had been adopted in 1996, of the importance of familiarizing the Appellate Body with the climate of opinion among Members on such matters. Therefore this discussion had to be seen as providing important feedback. His comments should not be misinterpreted as indicating a general opposition from New Zealand to *amicus* briefs as such, nor to the efforts underway in the organization aimed at improving external transparency and outreach. New Zealand was open-minded about further moves to greater transparency in the WTO, including in relation to its dispute settlement procedures. It had no problems with proposals for procedural reforms in dispute settlement procedures as long as they were measured, considered, and capable of gaining the broad support of the membership. But procedural reforms that were not so were unlikely to build, or reinforce, support for the WTO and its dispute settlement system, support which was fundamental to the effective functioning of the organization.

87. In this connection, the most sensitive issue among the membership related to issues regarding access to and participation of non-Members in both the negotiation of commitments and in dispute settlement in relation to such commitments. In the US shrimp case and in the British steel case, the Appellate Body had recognized that: " ... access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental". The Appellate Body had also noted that non-Members had no legal right to make submissions, or be heard by the Appellate Body. The Appellate Body had no legal duty or right to accept or consider unsolicited *amicus curiae* briefs submitted by them. Within these parameters the Appellate Body had still been able to find, in the British steel case, that they had legal authority to accept and consider *amicus curiae* briefs in an appeal in which they had found it pertinent and useful to do so. Thus, up until the recent Appellate Body's decision, acceptance of *amicus* briefs had been considered on an ad hoc basis. In the absence of a consensus among the membership on an agreed procedure for the general receipt and consideration of *amicus* briefs, such an approach was the only viable basis on which to proceed in this very sensitive area, touching on Members' rights and obligations. However, Members had to determine whether the additional procedure, that the Appellate Body determined as being appropriate to adopt in the most recent case, was fully in keeping with the Appellate Body's earlier declaration that "…access to the dispute settlement process of the WTO is limited to Members of the WTO".

88. Another question related to how a standing invitation for expressions of interest to submit *amicus* briefs, an invitation that inevitably would tend to create the expectation of access to the WTO dispute settlement, would fit with the accepted understanding that the DSU provided for the dispute settlement mechanism to be accessed by Members; a mechanism that related to Members' reciprocal obligations undertaken under WTO agreements. In New Zealand's view, the additional procedure would tend to move away from the existing balance, which reflected the crucial distinction between the exclusive right accorded by Members to have access to, and to participate in the dispute settlement process, and the possibility that in specific cases and on an ad hoc, case-by-case basis, *amicus* briefs submitted to panels or the Appellate Body might be accepted and considered. Members would have to think constructively about the way through some of the issues in this area, not only to alert the

Appellate Body to their concerns, but also with a view to assisting that Body in dealing with future similar procedural questions. Obviously, to the extent that the membership was unable to offer its own consensus solution to a systemic procedural question raised in an appeal, one could understand the Appellate Body's concern. It would therefore be useful to consider establishing a process under which the Appellate Body could bring serious procedural issues, on which it would appreciate guidance, to the attention of the General Council and the Dispute Settlement Body. Such a process would assist in ensuring in a more systemic way that the Appellate Body would be familiarized with Members' concerns as a whole on such issues.

89. The representative of Jamaica said that the matter at hand impinged on Members' rights. In a Member-driven organization such an issue should be fully aired and appropriate decisions taken. Like others, he was concerned that with its decision the Appellate Body had expanded the access and the rights of non-Members to the dispute settlement process and, by corollary, had diminished Members' rights in this critical area of the WTO's activities. The Appellate Body had taken this decision without any legislative mandate that could reasonably be construed as a basis to do so. For a developing country such as his, this development was viewed with grave concern. The Uruguay Round Agreements were a delicate balance of rights and obligations, and the Appellate Body was a part of that balance. In carrying out its functions the Appellate Body should act with full regard for legislative authority and for the substantive and procedural rights of Members.

90. The dispute settlement system was described in the DSU as "… a central element in providing security and predictability to the multilateral trading system" (Article 3.2 of the DSU). In the present case, adoption of that additional procedure and its wide communication to non-Members had the clear effect of encouraging submission of written briefs by non-Members to the Appellate Body, a right which Members, who were not third parties during a panel's hearing of the dispute, did not have in regard to the Appellate Body's hearing of the matter. Although it was stated that that additional procedure had been adopted for the purposes of that appeal only and was not a new working procedure drawn up pursuant to Article 17.9 of the DSU, one should recall the Appellate Body's previous interpretations of Article 13 of the DSU, and other subsequent decisions and actions that had served to expand access to and the participation of non-Members in the dispute settlement process. It was unacceptable that non-Members enjoyed superior rights to Members who, to be accorded third party rights, should notify substantial interest in the case at hand and should indicate their interest at the meeting where the panel was established or within a specified time-frame. Furthermore, while allowed to participate as a third party at both panel and Appellate Body levels, they could not appear before the latter had they not joined as third parties at the panel stage of the hearing of the dispute. The participation of Members, representing legitimate interests and concerns of entire countries in trade disputes, appeared to be more rigidly circumscribed than that of non-Members. The Appellate Body, which was the final arbitrator of disputes was not only according rights to non-Members which as a consequence compromised Members' rights, but also deepening imbalances between Members.

91. With respect to the manner in which the Appellate Body's communication had been sent out and although this was not the central issue, it should be noted that very few non-Members from developing countries would have become aware of this additional procedure, communicated on 8 November, and with a deadline of 16 November for leave to apply to file a written brief.

92. Members should do whatever was necessary to exercise their legislative functions to ensure that their rights and the nature of the WTO as an intergovernmental body were preserved. A clearer understanding and respect for the distinct roles of the Appellate Body, the Secretariat and the Members should be achieved. If necessary, specific procedures should be put in place in which their respective role and responsibility would leave no room for any misunderstanding, although in his delegation's view, the existing rules in this area were quite clear. Jamaica was fully cognizant of the importance of the dispute settlement process and of the value of the Appellate Body's work and

believed that the message, which was being sent to it on this issue, was important and quite clear and if heeded, the organization as a whole would emerge healthier.

93. The representative of Argentina also believed that the issue was of a systemic and institutional nature that went beyond a particular case and also beyond a procedural question. It was not related to transparency issues. The right to accept and examine *amicus curiae* briefs was not expressly covered neither by the DSU nor by the Working Procedures for Appellate Review. Argentina did not share the Appellate Body's interpretation that that right was implicitly covered by Rule 16(1) of the Working Procedures for Appellate Review. That seemed even less justified in view of Article 17.6 of the DSU which provided competence to the Appellate Body only with respect to "issues of law covered in a panel report and legal interpretations developed by the panel". One could question what elements the possible submissions of non-parties to the dispute would contribute to the process and the clarification of litigation arising from legal interpretations stemming from WTO agreements. On the other hand, the right to accept *amicus* briefs would generate a series of doubts on the rights of Members who were neither parties nor third parties to the dispute. Would they be allowed to make spontaneous submissions to panels or the Appellate Body? If the answer was no, this would mean that Members had less rights than non-Members. If the answer was yes, could Members make submissions as such or would they have to find a way to present themselves as an NGO? Moreover, there would be a number of practical and fundamental problems. The Appellate Body would be flooded by an unmanageable number of briefs and unless there was an appropriate legal framework, to be set up by Members, there would be the risk that the DSB would be excessively influenced by NGOs or by large companies who would offer legal services. This situation would be bad for the WTO but would be even more negative for developing countries whose financial and human resources were limited and whose electronic communication means were not as developed. Therefore, the potential problems arising from the acceptance of submissions that were not required were numerous and complex. In his delegation's view, the Appellate Body had taken a decision which exceeded its competence and the Chairman should be requested to transmit to the Appellate Body in extenso the proceedings of this meeting and Members' opinions on this issue.

94. The representative of the European Communities said that this debate addressed an important and delicate systemic issue which could harm the standing of the organization and of the dispute settlement system, which was one of the most important achievements of the Uruguay Round As stated by previous speakers, no one wished to undermine the dispute settlement system nor put into question the integrity of the Appellate Body.

95. In the discussion, one should make a distinction between the ruling in the asbestos dispute and the systemic issue of who had the authority to lay down provisions enabling non-Members to participate in dispute settlement proceedings. Like others, the Community believed that it was up to the membership to legislate on such provisions. Substantive changes in a negotiated text, such as the DSU, could only be introduced through negotiations. The present discussion was the proof that such a renegotiation of the text was needed.

96. When concluding the DSU, Members did not explicitly provide for the intervention of non-Members in the proceedings. As a matter of law, only Members had the legal right to participate as parties or third parties in a dispute. Panels and the Appellate Body were only bound to consider parties and third parties submissions. It was however obvious that civil society had a clear interest in some issues relating to the work of the WTO and in particular to that of the DSB. In this regard, the Community had made a number of specific proposals to increase transparency in dispute settlement procedures within the context of the DSU review. This review exercise had clearly shown that the eventual participation of non-Members in dispute settlement proceedings raised a number of important complicated, systemic and practical questions which needed to be addressed. The Community would enter into renewed discussion on this matter with an open mind. It was only through serious and comprehensive negotiations that satisfactory results could be achieved, all

practical elements and systemic concerns adequately considered and implications evaluated. When the rules were not clear they had to be updated. The Community therefore wished to emphasize the need for rule-making now and in the future. If the legislative arm fell short in legislating, the judiciary arm had the tendency to fill the gap. The Community therefore called upon Members' willingness to engage with renewed emphasis in the DSU review process, and noted that a number of ideas and suggestions were already on the table. The Community was prepared to make a constructive contribution within this framework with the view to agreeing on rules which would avoid similar discussions in the future.

97. The representative of Cuba shared the view expressed by previous speakers which considered that the Appellate Body's decision was contradictory to the provisions of the DSU. This issue had already been rejected during the Uruguay Round. Such a procedure would be inequitable and discriminatory, and would put developing countries with little resources and, more specifically NGOs which had no access to electronic communication means, in a position of inferiority with respect to submissions to the Appellate Body. Like others, Cuba believed that the Appellate Body should be invited to reconsider its decision and refrain from applying it until the General Council reached an agreement on this issue.

98. The representative Chile said that on other occasions his delegation had already rejected the line of reasoning by the Appellate Body with regard to *amicus curiae* briefs. Unlimited access to non-governmental organizations to present their points of view in a dispute could take the WTO into uncharted waters and undermine Members' rights and obligations. With this procedure, the Appellate Body had taken a further step in the wrong direction.

99. As pointed out by previous speakers, in the United States – British steel case the Appellate Body had made it clear that neither the DSU nor the working procedures specifically provided that the Appellate Body might accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, there was no explicit prohibition therein concerning acceptance or consideration of such briefs. However, the Appellate Body had indicated that as long as it acted in conformity with the DSU and the covered agreements it had the legal authority to decide whether or not to accept and consider any information that it believed pertinent and useful in an appeal. In no circumstances, this included the power to request such briefs as mentioned in Article 13 of the DSU, since this Article clearly did not apply to the Appellate Body. The recent decision of the Division in the case in question was unwise and unsound.

100. Members should discuss the issue of the scope of Article 13 of the DSU and the participation of non-Member third parties in the WTO dispute settlement procedures. In the recent discussion on external transparency some of the proposals referred to *amicus curiae* briefs. In order to discuss the participation of non-Member third parties, several points should be clarified. To open the door to non-Member third parties could involve giving them greater rights than the Members, whose participation and rights were clearly determined under the DSU and it was not clear who were non-Member third parties and who would have the "right" to submit communications. Who was to decide if they had an interest in a specific case? If the door was opened to non-Members, how would Members decide who would enter? Were there categories of non-Members? Would any natural or legal person be allowed to express opinions, even entities openly opposed to the WTO and to the multilateral trading system, or whose objectives were incompatible with the WTO or the multilateral trading system? As pointed out, *amicus* meant sharing interests, but how would one know the interests of the NGOs or their objectives, membership or funding, even in the case of those that were on the Secretariat's e-mail subscription list? How would Members differentiate between the interests of a non-Member and the interests of one of the parties? Would there be any limit on the number of briefs? If not, how would Members expect the participants in an appeal to have a full and proper opportunity to comment on and reply to any communication? Especially in view of the fact that the time-limits for proceedings on appeal were, by their very essence, short.

101. In his delegation's view, the Appellate Body would have to take account, in its procedural decisions, of the situation within the WTO, in particular the agenda of the General Council. The General Council would therefore have to request the DSB to address a recommendation to the Appellate Body pointing out to it the inadvisability of adopting procedural decisions on matters in which there would be as yet no consensus among the WTO Members and which would still be the subject of consultations.

102. The representative of Panama agreed with previous speakers in particular with the fact that the setting up of work of panels and the Appellate Body were different and that the rules on *amicus* applicable to panels did not apply to the Appellate Body. The issue in question was not to determine if the interpretation in the shrimps/turtle case was correct or not. The Appellate Body's decision had created a right to non-Members which Members did not have. Had the Members that right, it would be contrary to the agreements. Despite the good intention of the Appellate Body in establishing procedures to deal with *amicus* briefs, the decision, instead of reaching the objectives announced by the Appellate Body, would have more negative effects than positive ones. Therefore, the General Council should urge the Appellate Body to reconsider its decision in the light of Member's concerns expressed at this meeting.

103. The representative of Australia said that his country shared the reservations of many other speakers. This was an important issue which needed careful consideration and on which Members should provide guidance. Australia recognized that there were differences of view about this issue and how Members should respond. It also recognized that the issue required early action. He noted that the statements made at the present meeting suggested that there were three key questions that needed to be addressed: (i) whether Members should provide guidance to the Appellate Body and panels concerning the treatment of *amicus* briefs; (ii) if Members were to agree that guidance should be provided, what should be the content of that guidance; and (iii) how should Members provide this guidance to the Appellate Body and Panels.

104. Australia considered that a pragmatic approach was required on this issue. The General Council had the authority to adopt guidelines providing guidance to the Appellate Body and panels on how *amicus* briefs should be handled. He noted that the General Council, in July 1996, had adopted Guidelines for Arrangements on Relations with NGOs under Article V:2 of the Marrakesh Agreement (WT/L/162), and suggested that the approach taken could also be an appropriate avenue or model for guidelines on *amicus* briefs.

105. Australia proposed that the Chairman of General Council, in cooperation with the Chairman of the DSB, consult with Members on these key questions with the aim of finding the most appropriate way forward. In light of the statements made at the present meeting, his country hoped that Members would be willing to participate fully in this process in a cooperative spirit based on the following principles: (i) the need to fully respect and preserve the rights of WTO Members; (ii) the need to preserve the special character of the WTO as an intergovernmental body with binding treaty rights and obligations; and (iii) the need to be responsive to public interest in the WTO's work. Australia considered that there was no necessary conflict between these principles and believed that Members should be able to find a reasonable compromise based on them.

106. The representative of Tanzania said that, as many delegations had stated, the purpose of the present meeting was to discuss a matter of serious systemic implications not to question the intentions of the Appellate Body or the WTO Secretariat with regard to the action that had been taken. Tanzania shared the concerns and views expressed by, *inter alia*, Brazil, Egypt, India, Mexico, Pakistan and Zimbabwe. Although Tanzania had not yet been a party to any dispute in the WTO, it did not wish to remain silent on a matter that was at the very core of the multilateral trading system. From the arguments already put on the table, the law and the facts clearly showed that the action and practice of

the Appellate Body to solicit *amicus briefs* from NGOs was improper, unwarranted, *ultra vires* and might bring an element of subjectivity into decisions of the Appellate Body on questions of law.

107. The General Council had the authority to interpret the WTO Agreements. It was clear from the discussion at the present meeting, that the will of Members should prevail and that no other body, even the Appellate Body could claim what Members had not intended to give it.

108. There was a need to preserve the intergovernmental character of the WTO and any practice that would give non-WTO Members some advantages over WTO Members should be opposed. In particular, if such a practice exacerbated the imbalance between developed and developing countries, especially LDCs whose NGOs might not have access to the available information.

109. The Appellate Body was an epitome of the rule-based system that characterized the WTO. It should be the first to uphold the law that had created the WTO and the Appellate Body itself and it should be the first to restrict the boundary between legislative and judicial bodies within the WTO. Tanzania supported the views expressed by previous speakers that the Appellate Body should withdraw its action and that the General Council should make clear and specific guidelines on this question and reassert its supremacy in interpreting the WTO Agreements so as to ensure the predictability of the rule-based multilateral trading system.

110. The representative of Japan said that two issues were involved in the matter under consideration: (i) whether it was appropriate for the Appellate Body to solicit *amicus briefs*; and (ii) whether it was appropriate for the Appellate Body to make an independent decision to request *amicus briefs* without prior consultations with Members.

111. With regard to the first issue, a number of delegations had stated that it was inappropriate for the Appellate Body to solicit *amicus briefs*. Japan had some reservations thereon. In the past, his country had expressed the view that under certain conditions it would be appropriate to allow the Appellate Body to deal with the question of *amicus briefs*. However, at the present meeting he did not wish to go into detail on this argument. He stressed that this was a very important issue which required further consultations.

112. With regard to the second issue, the action taken by the Appellate Body was not appropriate. He wondered what should be the most practical approach in this case. Japan, like the United States, believed that the most practical approach would be to convey to the Appellate Body the views expressed at the present meeting and to ask the Appellate Body to move more cautiously in making its future decisions, in particular since there were differences of view on this matter.

113. The Chairman said that he would sum-up in a few points his impression from the discussion at the present meeting. First, he welcomed the fact that that there seemed to be unanimous agreement with regard to the remark in his statement at the opening of the meeting on the importance of the dispute settlement system and the need to safeguard its integrity.

114. Second, almost all delegations had made comments on the question of whether the Appellate Body or panels should receive or solicit *amicus* briefs. There was a broad agreement that the rights and obligations under the DSU belonged to WTO Members. It had been repeatedly stated that the WTO was a Member-driven organization. Therefore, most delegations had concluded that since there was no specific provision regarding *amicus* briefs such briefs should not be accepted. Some delegations were of the view that *amicus* briefs could be used in some cases and there was at least one delegation who believed that there was both a legal and a substantive reason to use *amicus* briefs. There was no agreement on this point.

115. Third, many Members had made reference to the shrimp case[3] and the decision to interpret Article 13 of the DSU in such a way so as to accept *amicus* briefs. The majority of delegations had stated that they did not agree with that decision which served as a basis for subsequent decisions on *amicus* briefs by panels and the Appellate Body. At the same time, at least one delegation had stated that there was nothing wrong with that kind of procedure.

116. Fourth, there was the question of whether the decision of the Appellate Body in the present case, was of a procedural or a substantive nature. The majority of delegations were of the view that it was a substantive decision, while some delegations believed that this was a procedural one.

117. Fifth, many Members had also made comments on the Secretariat's action to put on the WTO website the communication from the Appellate Body to the Chairman of the DSB. It had been stated that the Secretariat's action amounted to an invitation, although he was not sure whether it had been meant to be that in the first place. The point had also been made that there was an inherent discrimination in as much as the communication from the Secretariat had gone out only to those NGOs who subscribed to the WTO system.

118. Finally, many Members had made the point that the issue under discussion was not a transparency issue, but rather a legal issue and concerned the question of who should participate in the legal system.

119. He believed that most of the points that he had just outlined had been raised by practically all delegations who had spoken at the present meeting. On this basis, he wished to draw some conclusions. First, he believed that there had been a large sentiment expressed by almost all delegations that there was a need to consider whether it would be possible to put in place clear rules for *amicus* briefs. There might not be absolute unanimity on that point, but the majority of delegations had stated that the Appellate Body and the system would benefit from clearer rules. Further consultations would be required on both the substantive content of the rules and what procedure should be used for putting them in place.

120. Second, in light of the views expressed and in the absence of clear rules, he believed that the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed.

121. He added that the press had expressed its interest in the present meeting and some delegations might also wish to make comments. He had agreed with the Secretariat that, if so required, he would meet with the press after the meeting.

122. The representative of Egypt said that her delegation could agree with most of the points put forward by the Chairman. She wished to comment on one point made by the Chairman, namely, that the majority of Members believed that there was a need to consider clearer rules with regard to the submission of *amicus* briefs. She recalled that the purpose of the Informal Group of Developing Countries in requesting the meeting was two-fold: (i) to discuss and address the serious situation as a result of the communication from the Appellate Body to the DSB Chairman; and (ii) more importantly, to request the General Council to exercise its legislative authority and, as stated by Tanzania, to reassert its supremacy and to take a decision to request the Appellate Body to reverse its decision. It was her understanding that this was the feeling of the majority of Members.

123. The Chairman said that he thought that, as he had stated at the outset of the meeting and as all delegations had stated, the objective of the discussion was not to comment on individual cases but on matters of principle. He had stated that it should be communicated to the Appellate Body that it

[3] WT/DS58.

should exercise extreme caution. On this basis, the Appellate Body would draw its conclusions. He did not think that it was appropriate to press further the point raised by Egypt as the end result would not be much different.

124. The representative of Mexico said that with regard to his earlier statement he wished to add that his country supported the statement made by Egypt on behalf of the Informal Group of Developing Countries of which Mexico was a member. His country also supported the second statement made by Egypt and wished to be dissociated from the conclusion that the majority of Members wished to consider whether to draw-up procedures for the submission of *amicus* briefs. The reason was that, on the one hand, the views had been expressed on this matter by the Informal Group of Developing Countries and, on the other hand, many statements had been made referring to possible subjects for discussion if one were to accept that such submissions could be made. These were very different matters. Before proceeding with regard to treatment of *amicus* briefs it would be necessary for the General Council to decide whether it was appropriate to accept such submissions in view of different arguments. His delegation wished to be dissociated from the fact that the majority of Members considered that there was a need to elaborate provisions in order to accept *amicus* briefs.

125. The Chairman said that he had stated that there was a need to develop rules with regard to *amicus* briefs. This might imply both that there should be no *amicus* briefs or that, under certain conditions, they should be accepted. This issue was entirely open. He believed that there was no disagreement on this matter. He was aware of what had been stated by many Members and wished to keep the outcome of the consultations open. He had put forward those ideas because some Members had stated that under certain circumstances *amicus* briefs could be accepted. Further consultations were required on this matter. The main point was that there was a need to develop some rules for the Appellate Body without prejudice to the outcome.

126. The representative of the European Communities said that the point made by Egypt should not be pressed further because this would be in contradiction with the Chairman's statement which was supported practically by all delegations. The intention was not to give injunctions to the Appellate Body, at least this was not the intention of the Community. He did not understand the point made by the representative of Mexico. One could not state that it was not up to the Appellate Body to enter into the competence of the legislative arm and, at the same time, to state that the legislative arm should not do anything. This created a situation in which there was a vacuum and the judiciary arm was forced to make interpretations. The conclusion from the discussion was clear, namely, that something should be done in the review of the DSU.

127. The representative of Colombia associated his delegation with the statement made by Egypt. Colombia recognized the systemic problems involved in this matter. He considered that in a communication to the Appellate Body it should be made clear that many delegations did not wish that the procedure under consideration be applied at this stage. Otherwise a precedent would be created. Such a precedent would be used in the future and, in this sense, it should be made sufficiently clear that the majority of delegations did not agree that the procedure at hand should be applied due to its future consequences.

128. The Chairman said that he believed that the views were very close and that the discussion was more about the language than the actual content.

129. The representative of Mexico said that the Chairman had clarified the first point referred to by his delegation. As long as Members decided to discuss this issue without prejudging the content and the outcome, his country would not have any problem. Initially he had understood that it had already been agreed that *amicus* briefs should be accepted and that one would only need to decide on how to proceed; i.e. via Internet or not. With regard to his second point, Mexico fully supported the statement made by Egypt on behalf of the Informal Group of Developing Countries, but he did not

think that the General Council had reached consensus to request the Appellate Body to reverse its decision. However, it was important that the views of the Informal Group of Developing Countries be conveyed to the Appellate Body without distortions.

130. The representative of Egypt said that, as stated by Colombia and Mexico, it was essential to ensure the clarity of the content and the language. She believed that the letter and the spirit of the present discussion would be conveyed to the Appellate Body by the Chairman. She recognized that there was no consensus on the matter at hand because one or two delegations had different views. However, there was no difficulty in drawing out some conclusions which should then be communicated to the Appellate Body. The objective was to avoid a recurrence of similar situations.

131. The Chairman thanked delegations for their cooperation and said that he would communicate to the Appellate Body the main points which had been raised at the meeting as well as the conclusions he had drawn with the above clarifications.

132. The General Council took note of the statements.

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