WORLD TRADE ORGANIZATION

WT/DS22/R
17 October 1996
(96-4287)

Original: English

BRAZIL - MEASURES AFFECTING DESICCATED COCONUT

Report of the Panel

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I. INTRODUCTION

1. On 27 November 1995, the Philippines requested consultations with Brazil under Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") concerning the countervailing duty imposed by Brazil on imports of desiccated coconut from the Philippines. (WT/DS22/1/Rev.1).

2. On 8 December 1995, Brazil replied that it was prepared to enter into consultations with the Philippines as long as it was mutually understood that those consultations would be undertaken exclusively under the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("Tokyo Round SCM Code"), under the auspices of which Brazil conducted the coconut subsidies investigations and imposed the countervailing duties.

3. On 13 December 1995, the Philippines replied that Brazil's response constituted a refusal of the request for consultations under Article XXIII:1.

4. Taking the view that Brazil had failed to enter into consultations within the period provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Philippines, on 17 January 1996, requested the establishment of a Panel with standard terms of reference, pursuant to Article XXIII:2 of GATT 1994 and Articles 4.3 and 6 of the DSU. (WT/DS22/2).

5. At Brazil's request, a copy of document SCM/193, on the issue of the countervailing duties in question, was circulated to the Dispute Settlement Body ("DSB"). In that document, Brazil stated its view that the Tokyo Round SCM Code was the only legal framework applicable to the dispute. Brazil also indicated its understanding that the DSB was not the appropriate forum for the discussion on the dispute with the Philippines, and that document SCM/193 was circulated for information purposes only and without prejudice to its rights under the Tokyo Round SCM Code and to its position on the applicable law. (WT/DS22/3, attached as Annex 1).

6. At the 31 January 1996 meeting of the DSB, the Philippines stated that, for reasons mutually agreed to, the Philippines had not objected to postponing consideration of its request for establishment of a panel, but would make a statement at the next meeting of the DSB when this request would be considered. Brazil noted that its arguments concerning the dispute were explained in document WT/DS22/3, and that it invited the Philippines for consultations on the question of the applicable law before any further steps were taken toward establishment of a panel. The DSB agreed to revert to the matter at its next meeting. (WT/DSB/M/10).

7. Continuing to take the view that Brazil had failed to enter into consultations within the period provided for in the DSU, the Philippines, on 5 February 1996, again requested the establishment of a Panel with standard terms of reference, pursuant to Article XXIII:2 of GATT 1994 and Articles 4.3 and 6 of the DSU. (WT/DS22/5, attached as Annex 2).

8. At its meeting of 21 February 1996, the DSB considered the Philippines' request for establishment of a panel. Both the Philippines and Brazil stated their views on the matter of the countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines, and the question of the law applicable to the dispute. The representatives of Indonesia, speaking on behalf of ASEAN countries, and Sri Lanka, supported the Philippines' request for establishment of a panel. Brazil considered it premature to establish a panel at that meeting, and the DSB agreed to revert to the matter at its next meeting. (WT/DSB/M/11, attached as Annex 3).

9. At its meeting of 5 March 1996, pursuant to the Philippines' request and with Brazil's acceptance, the DSB established a Panel to examine the matter. The Philippines requested that the Panel be established with standard terms of reference. Brazil requested consultations on the terms of reference.

The DSB authorized the Chairman to draw up terms of reference in consultation with the parties, in accordance with Article 7.3 of the DSU.

10. On 22 March 1996 the parties agreed that the Panel would have the following terms of reference:

> "To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements". (WT/DS22/6).

11. On 16 April 1996, the Panel was constituted with the following composition:

Chairman:	Mr. Maamoun Abdel-Fattah
Members:	Mr. Zdenek Jung
	Mr. Joseph Weiler

12. Canada, the European Community, Indonesia, Malaysia, Sri Lanka and the United States reserved their rights as third parties to the dispute. Malaysia later withdrew as a third party.

II. FACTUAL ASPECTS

13. This dispute concerns countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines. On 21 June 1994, based on a request for an investigation by the domestic industry filed on 17 January 1994, Brazil initiated an investigation regarding allegedly subsidized imports of desiccated coconut and coconut milk from the Philippines, Côte d'Ivoire, Indonesia, Malaysia, and Sri Lanka. On 23 March 1995, Brazil imposed provisional duties on imports of desiccated coconut from the Philippines, Côte d'Ivoire, Indonesia, and Sri Lanka, and on imports of coconut milk from Sri Lanka.[1] On 18 August 1995, Brazil issued Interministerial Ordinance No. 11 (the "Ordinance"), pursuant to which it imposed a countervailing duty in the amount of 121.5 per cent on imports of desiccated coconut from the Philippines.[2]

14. Brazil investigated eight Philippine programmes which allegedly conferred subsidies on coconut fruit.[3] However, Brazil considered that it was unable, based on the information obtained from the

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[1]Interministerial Decree No. 113 (23 March 1995).

[2]Interministerial Ordinance No. 11 (18 August 1995). Imports of desiccated coconut from the other countries under investigation were also found to be subsidized, as well as imports of coconut milk from Sri Lanka. Those aspects of the determination are not before the Panel.

[3]The eight programmes investigated were:
1) the Programme under Presidential Decree No. 582/74,
2) the National Coconut Productivity Programme, and its successors, the Expanded National Coconut Intercropping Programme and the Farm Assistance and Livelihood project,
3) the Small Coconut Farm Development Project,
4) the Agrarian Reform Programme,
5) the Country Economic Development Programme,
6) the Small Coconut Farmer Organizations,

(continued…)

Philippines, to determine the amount of the subsidy conferred on coconut fruit by each programme. Brazil also concluded that desiccated coconut indirectly benefitted from the subsidy provided to coconut fruit. Brazil determined the amount of the subsidy conferred on desiccated coconut by comparing the price of subsidized desiccated coconut, based on the price actually paid for coconut fruit, and a constructed unsubsidized price, based on what it considered to be the constructed unsubsidized price for coconut fruit. Brazil considered that the difference between the prices equalled the subsidy amount that affected the price of desiccated coconut.

15. Brazil further found that the subsidized imports, on a cumulated basis, caused material injury to the Brazilian industry.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

16. The Philippines requests the Panel to make the following rulings, findings, and recommendations:

"(a) That the Panel find that the Ordinance imposing a countervailing duty of 121.5 per cent on desiccated coconut from the Philippines for a period of five years from 18 August 1995 is inconsistent with Brazil's obligations under Articles I and II, and is not justified by Article VI:3 and VI:6(a) of GATT 1994.

"(b) That the Panel find that Brazil's failure to revoke the Ordinance and to reimburse any duties paid under it, notwithstanding the representations of the Philippines, was inconsistent with its obligations under Article VI:3 and 6(a) of GATT 1994.

"(c) That the Panel recommend that Brazil bring the above measure into conformity with its obligations under GATT 1994.

"(d) That Brazil's refusal to hold consultations under Article XXIII:1 of GATT 1994 on its measures affecting desiccated coconuts was inconsistent with Brazil's obligation under that Article and Article 4:1, 2 and 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

"(e) In the event the Panel were to find that the countervailing duty imposed by Brazil was consistent with Articles I and II of GATT 1994 or justified by Article VI of GATT 1994, the Philippines requests that the Panel find that the imposition of the countervailing duty and its subsequent non-revocation were inconsistent with Article 13 of the Agreement on Agriculture, and recommend that Brazil bring the measure referred to above into conformity with its obligations under the Agreement on Agriculture".

17. Brazil asks the Panel to make the following findings:

(a) That the only obligations applicable to this dispute are those in the Tokyo Round SCM Code, and that potential violations of that Code cannot be addressed by this Panel.

(b) That Brazil's injury finding, its obligations under Articles I and II of GATT 1994, its obligations under the Agreement on Agriculture, and its alleged failure to consult

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[3](…continued)
7) Income Tax Exemptions and Credits, Deductions, and other Tax Benefits, and
8) The Coconut Replanting Programme and Programme of Additional Incentives to Accelerate the Coconut Production Programme.

are not within the terms of reference of the Panel, and arguments concerning those matters should be excluded from the proceeding.

(c) That the Philippines failed to demonstrate that the requirements for the exemption it claims under the Agreement on Agriculture were met.

(d) In the event the Panel reaches the substance of Brazil's determination, that Brazil's actions were fully consistent with its obligations under Article VI of GATT 1994.

IV. MAIN ARGUMENTS OF THE PARTIES

A. Preliminary Arguments

18. Brazil requested that, as an initial matter, the Panel make a preliminary ruling on the questions of applicable law and the scope of the terms of reference. Brazil argued that both issues are procedural in nature, not substantive, and that a speedy resolution would greatly promote the efficiency of the panel process by permitting the Panel and the parties to focus on the substantive issues. Brazil asserted that there was precedent under GATT 1947 for such early rulings on procedural issues, referring, *inter alia*, to EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137 (adopted 30 October 1995) ("Cotton Yarn"), para. 4, in which the Panel issued an early ruling concerning which claims were covered by the terms of reference.[4]

19. Brazil viewed the first question as fundamental: what obligations to consider in determining whether Brazil's actions were consistent with its multilateral obligations. Brazil had maintained from the start of the consultation process that since the subsidy investigation was conducted under the auspices of the Tokyo Round SCM Code, it should be judged in relation to Brazil's obligations under that Code, by a panel established under that Code. In Brazil's view, because the answer to the question affected both which issues would be briefed and whether the Panel should consider the dispute, this issue merited immediate decision.

20. The second issue also concerned a procedural matter - whether certain claims raised by the Philippines in its first submission to the Panel were properly within the terms of reference of this Panel. Brazil alleged that the Philippines' claims concerning Brazil's injury finding, Articles I and II of GATT 1994, the WTO Agreement on Agriculture, and Brazil's alleged refusal to consult, as well as most of the requested findings and recommendations, were not within the terms of reference of this Panel and urged the Panel to issue an immediate ruling to that effect in order to avoid the necessity of arguing irrelevant points.

1. Applicable Law

21. The Philippines invoked the provisions of Articles I, II, and VI of GATT 1994 and Article 13 of the Agreement on Agriculture. The Philippines did not invoke the provisions of the Tokyo Round SCM Code or the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement").

[4]In this regard, Brazil also referred to the Panel decisions in United States - Measures Affecting Alcoholic and Malt Beverages, DS23/R (adopted 19 June 1992) BISD 39S/206, United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, DS18/R (adopted 19 June 1992) BISD 39S/129, ("Non-Rubber Footwear MFN"), and Report of Korea - Restrictions on Imports of Beef, L/6503, L/6504, L/6505 (adopted 7 November 1989) BISD 36S/268, 202, 234, respectively.

22. Brazil argued that the Philippines may not invoke any provisions of GATT 1994 or the Agreement on Agriculture in this dispute. Brazil contended that only the provisions of the Tokyo Round SCM Code are applicable to this matter, and that the Philippines is entitled only to dispute settlement under the provisions of that Code. Brazil further argued that the Tokyo Round SCM Code is not a covered agreement under Article 1.1 of the DSU, and that the Panel may therefore not apply that Code in this dispute.

(a) Principles of International Law

(i) Article 28 of the Vienna Convention

23. Brazil argued that customary rules of public international law do not permit the retroactive application of treaty obligations. Brazil pointed out that the investigation at issue in this dispute was initiated in 1994, at which time the Tokyo Round SCM Code, and Brazilian law which incorporated the requirements of that Code, were in effect. Brazil had no obligations under GATT 1994 or the WTO Agreement at that time, because those agreements did not enter into force until 1 January 1995. Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention") states that a treaty does not "bind a party in relation to any action or fact which took place or any situation which ceased to exist before the date of entry into force of that treaty with respect to that party". Brazil took the position that the relevant act at issue in this dispute was the initiation and subsequent conduct of a countervailing duty investigation, which began on 21 June 1994, before the date of entry into force of the WTO Agreement and GATT 1994 on 1 January 1995. Therefore, GATT 1994 could not bind Brazil with respect to this investigation.

24. Brazil argued that in the context of the current dispute, an act could mean the investigation which must be considered to have taken place at the time of initiation. Brazil proposed several reasons for such an interpretation. First, the right to challenge a countervailing duty investigation arises at the time of the initiation.[5] Second, the investigation must review facts that already exist. In this dispute, Brazil looked at subsidies to Philippine coconut growers in the period May 1993 through April 1994 to determine whether imports from the Philippines were subsidized. Third, in Brazil's view, the conduct of the investigation, what information was considered and the basis for the determination, were at issue in this dispute. Such procedural rules could not change during the course of the investigation. Had the Members intended to change the rules for investigations initiated prior to 1 January 1995, they would not have included Article 32:3 in the SCM Agreement.

25. The Philippines argued that Brazil's reliance on Article 28 of the Vienna Convention was misguided because the act in question in this dispute was the imposition of the countervailing measure on 18 August 1995, after the WTO Agreement was in force between the parties. It was at this point that the Philippines suffered nullification of its rights under the WTO Agreements, specifically GATT 1994. According to the Philippines, the only act that Brazil undertook and completed prior to the entry into force of the WTO Agreements was the initiation of the investigation. All other significant acts, e.g. the imposition of provisional measures, the conclusion of the investigation, the order imposing the final countervailing duty, and the levying of the final countervailing duties, occurred after the WTO Agreements came into force. Of these four acts, the Philippines was contesting only the imposition and levying of the countervailing duty. The Philippines emphasized that the countervailing duty did not merely continue after the effective date of the WTO Agreements, but was in fact imposed after that date. In the Philippines' view, relating the imposition of the duty to the date of the application for countervailing duty was a chronological fiction. The Philippines argued that Brazil, in effect, sought

[5]In this regard, Brazil referred to the decision of the Panel in United States - Measures Affecting Imports of Softwood Lumber from Canada, SCM/162 (adopted 27-28 October 1993) BISD 40S/358.

to convert the pre-WTO initiation of the investigation into a protective umbrella, similar to a grandfather clause, that would shield measures imposed after the entry into force of the WTO from the application of WTO norms. In the Philippines' view, there was a wide gap between the initiation of Brazil's investigation before the entry into force of the WTO and the imposition of the final countervailing measure. Article 28 of the Vienna Convention does not provide an umbrella to shield this kind of gap - any shield against retroactive application applied only until the entry into force of the new treaty.

26. The Philippines argued that general principles of international law, as codified in the Vienna Convention, require that even pre-existing measures must be reviewed in light of new obligations imposed by a new agreement. Therefore, in the Philippines' view, even if Brazil's investigation had been concluded and the countervailing measure had been imposed before the entry into force of the WTO Agreement, Brazil's continued implementation of such a pre-existing measure would have to be reviewed and examined in light of its obligations under GATT 1994. Because in fact Brazil's investigation ended and the countervailing duty was imposed after the entry into force of the WTO Agreement, the Philippines maintained that GATT 1994 and the Agreement on Agriculture are applicable.

27. Moreover, the Philippines noted that Brazil, in response to a question from the Philippines, had admitted that the WTO Agreements presumably apply to the actual collection of duties after 18 August 1995. In the Philippines' view, the practical effect of applying the WTO Agreements to continued collection of the duties was the application of the WTO Agreements to the imposition of the measures. In this regard, the Philippines referred to the decision of the Appellate Body in United States - Standards for Reformulated and Conventional Gasoline.[6] The Philippines considered that the Appellate Body had examined the United States' rule-making process, which took place prior to the effective date of the WTO Agreements, in assessing the validity of the United States' standards for reformulated and conventional gasoline at issue in that dispute, which standards were themselves imposed prior to the effective date of the WTO Agreements. In the Philippines' view, this demonstrated that the Panel could consider events prior to the entry into force of the WTO Agreements in evaluating the consistency of a measure with those Agreements. Moreover, the Philippines noted that, in response to a question from the Philippines, Brazil denied neither the fact nor the propriety of the Appellate Body's consideration of the rule making process in Reformulated Gasoline.

28. Brazil, on the other hand, maintained that the decision in Reformulated Gasoline did not support the Philippine position. In Brazil's view, in that case Venezuela and Brazil had challenged the continued maintenance of discriminatory standards by the United States after the entry into force of the WTO, but not the rule-making process that had led to the imposition of those standards. Thus, in terms of the current case, the analogous challenge would be to the continued imposition of duties, not the investigation and decision to impose duties. Moreover, Brazil noted that unlike the current case, there was no mechanism for a review of the United States' standards under domestic law in the Reformulated Gasoline situation, whereas in this case, the Philippines had the ability under the SCM Agreement and Brazilian law to request a review of the continued imposition of countervailing measures, under the standards of the SCM Agreement.

29. The Philippines argued that the Panel's decision in U.S. - Countervailing Duties on Non-Rubber Footwear from Brazil (adopted 13 June 1995), SCM/94, paras. 4.5 and 4.10 ("Non-Rubber Footwear"), recognized that general principles of international law required that pre-existing measures must be reviewed in light of new obligations imposed by a new agreement. The Philippines argued that in Non-Rubber Footwear the Panel concluded that the continued imposition of countervailing measures first imposed by the United States prior to the entry into force of the Tokyo Round SCM Code was

[6]WT/DS2/R (29 January 1996), WT/DS2/AB/R (22 April 1996) (both adopted 20 May 1996) ("Reformulated Gasoline").

subject to the Code's requirement of an injury test. The Philippines maintained that applying the logic of that decision to this case required that Brazil's countervailing measures be subject to the requirements of GATT 1994.

30. Brazil contended that the Panel decision in Non-Rubber Footwear did not support the Philippines' argument. Even assuming *arguendo* that the report had precedential or interpretive value, in Brazil's view, the Panel had concluded that any obligation under the Tokyo Round SCM Code would be met by conducting a review in conformity with the new obligations at the request of an interested party.[7] Non-Rubber Footwear, paras. 4.4 and 4.6. Brazil pointed out that Brazilian law and Article 21 of the SCM Agreement permit reviews upon request. Under Brazilian law, such a review would be conducted in accordance with Brazil's obligations under the SCM Agreement. Brazil noted that the Philippines had not requested such a review.[8]

31. In addition, Brazil contended that Non-Rubber Footwear states that Article 28 of the Vienna Convention prevents applying the new treaty to the pre-existing act, i.e., the actual investigation, and only permits its application to the continuing implementation.[9] Brazil distinguished between the investigation and findings made that led to imposition of final countervailing duties, and the continued collection of duties. According to Brazil, the findings made in the investigation could only be challenged under the rules then applicable - the Tokyo Round SCM Code. Moreover, Brazil noted that it did not argue that the WTO and its covered agreements do not apply to the continued collection of the duties, only that those obligations do not apply to the conduct of the investigation and the determinations made as part of that investigation. The continued collection of the duty constitutes a "situation" within the meaning of Article 28. Thus, since that situation has continued after entry into force of the WTO, the collection of duties is subject to the WTO Agreements, and the Philippines can seek a review to ensure that the continued collection is consistent with the WTO rules.

32. Brazil referred to the decision of the Permanent Court of International Justice in Phosphates in Morocco ("Phosphates") as providing guidance on the meaning of the concept of retroactive application addressed in Article 28. In that case, there is a lengthy discussion of whether the "situation" was subject to the Agreement at issue or whether it occurred prior to that Agreement. The majority opinion notes:

> "The situations and facts which form the subject of the limitation *ratione temporis* have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose. … it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within

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[7]Brazil observed that the Panel report also indicates that the obligation at issue in that case, an injury finding, was not a new obligation, but rather a pre-existing obligation under Article VI of GATT 1947. Non-Rubber Footwear, para. 4.10

[8]Brazil argued that the Panel report in Non-Rubber Footwear indicates that until a request for review is made, there can be no violation, referring to the following language:

> "If, however, the signatory subject to the pre-existing countervailing duty were to choose not to invoke its right as of that date but made its request at a later date, again there was nothing in Article VI or in its subsequent interpretation in the Code to imply that any earlier date than the date of the request would be relevant for an injury determination and possible revocation of countervailing duties".

Non-Rubber Footwear, para. 4.6.

[9]Non-Rubber Footwear, para. 4.5.

> specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real cause of the dispute".[10]

In that dispute the Italian government had raised a complaint against the French government over the "monopolization" of the phosphate trade as a result of a regime created in 1920, prior to the ratification in 1931 of the Agreement under which the complaint was brought. The Court found that the act underlying the dispute was the regime creating the cartel that led to monopolization. Therefore, even though this monopolization continued after 1931, it was because of an act initiated prior to that date, and therefore could not be brought under the Agreement. In Brazil's view, this decision established the international law principle reflected in Article 28 of the Vienna Convention. Similar to the situation in the Phosphates case, the WTO Members only intended to be subject to WTO obligations after the date of entry into force, as evidenced by the creation of a date of entry into force for the WTO Agreement, rather than having it enter into force as soon as a sufficient number of countries had ratified them.

33. The Philippines argued that the decision in Phosphates did not support Brazil's definition of retroactive application. In the Philippines' view, the Court in that case had simply held that it had no jurisdiction over disputes involving alleged international law violations that originated in definitive acts that occurred before the parties ratified the instruments through which they submitted to the Court's compulsory jurisdiction. In that case, the acts were a 1920 law and a 1925 administrative decision issued prior to ratification of the Court's compulsory jurisdiction agreement. However, the Court ruled that "situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction. … if it was with regard to them that the dispute arose". Phosphates at 18. Moreover, the date of the act underlying a dispute was determined with reference to the "definitive act" that resulted in the alleged violation. In the Philippines' view, in this case, the relevant act was the imposition of the final countervailing duty, which occurred after the WTO Agreements came into effect.

34. The Philippines, moreover, viewed the right to a review under Brazilian law as limited, and thus not an effective remedy. The Philippines noted that under Brazilian law, a review would not take place for at least one year after imposition of the measures, and even then, a change in circumstances or a new fact was required for initiation of a review. Moreover, such a review would only address the continued imposition of the measures, not the original imposition.

35. Brazil asserted that Decree No. 93,962 (22 January 1987) permitted reviews upon request beginning one year after the imposition of countervailing duties. The current law, Decree No. 1751 (19 December 1995), permits reviews upon request beginning one year after imposition of duties. In exceptional cases a review may be initiated sooner upon the request of the exporting government or on Brazil's own initiative. Brazil also noted that this was consistent with the practice of other Members, for example the United States and the European Union.

36. The Philippines asserted that, while Article 32.3 of the SCM provides a party the option to seek a review of the continuation of a measure (but not the original imposition), the initiation of such review is not mandatory, and in any event would only address the continued imposition of the measure, not its original imposition. Moreover, referring to the report of the Panel in United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway ("Salmon"), SCM/153 (adopted 24 April 1994), paras. 218-220, the Philippines argued that there was no requirement

[10] Phosphates in Morocco, Permanent Court of International Justice (14 June 1938) at 18.

in any WTO Agreement that a party first seek a review from the country imposing a measure before resorting to multilateral dispute resolution. If the Philippines were limited to seeking a review during this transitional period, instead of being able to resort immediately to the dispute settlement mechanism of the WTO, it would be subjected to delay and continued trade losses, effectively nullifying its rights of free trade under the WTO. The Philippines, in its view, was entitled to resort to WTO dispute resolution proceedings in order to invoke WTO norms against Brazil's countervailing measures.

(ii) Other provisions of the Vienna Convention

37. The Philippines also referred to Article 30:3 of the Vienna Convention, which provides that where there are successive treaties relating to the same subject-matter among the same parties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty", and argued that, between the Philippines and Brazil, the WTO Agreement and GATT 1994, as the subsequent treaty, override the Tokyo Round SCM Code.

38. Brazil argued that Article 30.3 of the Vienna Convention did not require that the applicable law in this dispute be GATT 1994. Even assuming the WTO Agreement applied in this case as the successive treaty, the portion of that treaty relating to the same subject matter as the Tokyo Round SCM Code is the SCM Agreement. Article 32.3 of the SCM Agreement provides that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications made on or after the date of entry into force for a Member of the WTO Agreement". Thus, in Brazil's view, since the investigation at issue here was initiated pursuant to an application made before the date of entry into force of the WTO Agreement, the SCM Agreement does not apply.

39. The Philippines referred to Articles 18, 26, and 31 of the Vienna Convention as indicating the fundamental principle in international law that parties to a treaty must act consistent with the treaty's objectives. Signatories bind themselves fully to all substantive obligations of the treaty and must refrain from acts which defeat the object and purpose of the treaty. In the Philippines' view, this requirement existed before the new treaty entered into force, and applied even more strongly after the new treaty entered into force. Therefore, the WTO Agreement must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their proper context and in light of its object and purpose. In the Philippines' view, it was not reasonable to infer that the negotiators of the WTO Agreements intended an interpretation of the Agreements that would suspend the rights of WTO Members for two years (while the transitional decisions regarding the Tokyo Round SCM Code were in effect), preventing them from seeking dispute settlement under the WTO Agreements, by limiting them to either dispute settlement under the Tokyo Round SCM Code or a review under the domestic law of the Member imposing the measure, of a measure imposed eight months after the WTO Agreements entered into force.

40. Brazil contested the Philippines' argument that Brazil's interpretation suspends WTO Members' rights for two years. Brazil maintained that the Philippines misstated the purpose of Article 18 of the Vienna Convention in arguing that it creates a duty to ensure that all actions prior to entry into force of the WTO Agreements were consistent with Brazil's obligations under those Agreements. In Brazil's view, Article 18 reflects an obligation to act in good faith and not to act in such a way as to make it more difficult or impossible for any party to the treaty to meet its obligations. The imposition of countervailing duties based on pre-existing obligations does not make it impossible for any party to the WTO Agreement to meet its obligations. Moreover, in Brazil's view, the interpretation of Article 18 proposed by the Philippines would conflict with the requirement of Article 28 of the Vienna Convention that a treaty not be applied retroactively unless the parties agreed to such retroactive application. For the Panel to accept the Philippine interpretation would mean that the conduct of all investigations begun prior to 1 January 1995 is subject to WTO review under Article VI of GATT 1994. Brazil considered

it unlikely that such a major step would have been contemplated by the negotiators without an express provision in the text.

41. Brazil noted that under Article 32.3 of the SCM Agreement, WTO Members have immediate rights with respect to any countervailing duty investigation or review initiated based on an application filed on or after 1 January 1995. In addition, Members have the right to challenge the conduct of a countervailing duty investigation at any time in the investigation proceeding; they do not have to wait until the investigation is completed. WTO Members also have the right to request the national authorities to review any pre-1995 investigation, which review would be subject to WTO obligations and could be challenged under the DSU. Further, the transition decisions of the Tokyo Round SCM Committee give the signatories to the Tokyo Round SCM Code, including the Philippines, the right through 31 December 1996 to challenge an investigation initiated prior to 1 January 1995, under the procedures of the Tokyo Round SCM Code.

(b) Article 32.3 of the SCM Agreement

42. Brazil argued that Article VI of GATT 1994 must be considered in conjunction with the SCM Agreement. Article II:2 of the Marrakesh Agreement Establishing the World Trade Organization (the "Marrakesh Agreement") states that the "agreements and associated legal instruments", including the SCM Agreement and GATT 1994, are integral parts of the Marrakesh Agreement. Moreover, Article 10 of the SCM Agreement states that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty … is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement … " (emphasis added). Thus, in Brazil's view, Article II:2 of the Marrakesh Agreement and Article 10 of the SCM Agreement contemplate that Article VI of GATT 1994 and the SCM Agreement must be considered together. Brazil asserted that, considered together, Article 32.3 states explicitly that they do not apply to investigations begun before 1 January 1995. In Brazil's view, this was a necessary corollary of the integrated nature of the WTO. Otherwise, a Panel could interpret an article of GATT 1994 in a manner different than the detailed WTO Agreement on the same subject matter.

43. The Philippines disputed Brazil's position that Article VI of GATT 1994 and the SCM Agreement must be invoked together. The Philippines noted that language virtually identical to Article 10 of the SCM Agreement was found in the Tokyo Round SCM Code. Yet, this had not precluded signatories to that Code from invoking only Article VI of GATT 1947 in dispute resolution. In this regard, the Philippines also noted that, in the Reformulated Gasoline dispute, both the Panel and the Appellate Body resolved the dispute with reference only to GATT 1994, and did not address the requirements of the Agreement on Technical Barriers to Trade, which had also been invoked by the complaining parties as applicable to the disputed U.S. measures.

44. The Philippines contended that Brazil's position regarding Article 32.3 misrepresented the scope and functions of that provision. The Philippines took the position that Article 32.3 clearly applies only to procedural obligations under the SCM Agreement - not GATT 1994 or the Agreement on Agriculture - and only to the obligations relating to investigations. In the Philippines' view, Article 32.3 could not be used to bar a claim premised on a substantive right clearly provided for in Article VI of GATT 1994. The purpose of this provision was to prevent WTO Members from having to redo investigations which were started before they were bound by the SCM Agreement in order to apply the new and more detailed procedural requirements governing the conduct of investigations set out in that Agreement. In addition, Article 32.3 was needed to clarify at which stage in ongoing investigations the switch to the new procedural requirements of the SCM Agreement would have to take place. In the Philippines' view, these rationales underlying Article 32.3 did not apply to the requirements of Article VI of GATT 1994 because the standards under that provision are not textually

different from those of Article VI of GATT 1947, which already existed for WTO Members who were also Contracting Parties of GATT 1947 at the time of the entry into force of the WTO Agreement.

45. Brazil agreed with the Philippines that the purpose of Article 32.3 was to prevent WTO Members from having to redo investigations which were started before they were bound by the SCM Agreement. Brazil maintained that this was precisely the situation at issue here. The Philippines was attempting to use the WTO to object to an investigation begun before Brazil was bound by the WTO Agreements. Brazil did not believe it should have to redo an investigation to conform to obligations that did not exist when the investigation was started.

46. The Philippines also maintained that Brazil's interpretation of Article 32.3 obscured the rights and obligations of WTO Members who were not signatories to the Tokyo Round SCM Code. In the Philippines' view, if Article VI of GATT 1994 were deemed inapplicable to investigations conducted prior to the entry into force of the WTO Agreement, such Members would be denied any remedy against countervailing measures imposed on them after the entry into force of the WTO Agreement. The Philippines maintained that this result could not have been contemplated by the WTO Agreement.

47. The Philippines argued that Article 32.3 of the SCM Agreement does not automatically preclude the application of the SCM Agreement to measures imposed after the date of entry into force of the WTO Agreement pursuant to investigations initiated prior to the entry into force of the WTO Agreement. Indeed, Article 32.3 provides that a review of an existing measure, i.e. one in existence on the date of entry into force of the WTO Agreement, initiated pursuant to an application filed after the entry into force of the WTO Agreement, is subject to the requirements of the SCM Agreement. Obviously, the investigation that preceded such an existing measure would have been initiated prior to the entry into force of the WTO Agreement. Thus, in the Philippines' view the fact that an investigation was initiated prior to the effective date of the WTO does not, as such, preclude application of the SCM Agreement if that investigation leads to a measure imposed after the effective date of the WTO which then becomes the subject of review under the WTO. Moreover, the Philippines noted that the measure in question here was not imposed prior to the effective date of the WTO Agreement, and thus was not an existing measure as of that date. Thus, in the Philippines' view, Article 32.3 did not resolve the question of what law was applicable to the measure.

48. The Philippines argued that Brazil could not be surprised at the substance of the standards under GATT 1994, and thus there was no inequity in subjecting the measures imposed after the effective date of that agreement to its requirements. The provisions of Articles I, II and VI of GATT 1994 were identical to those of Articles I, II and VI of GATT 1947, which applied to both Brazil and the Philippines. The text of the provisions of GATT 1947 applied when the investigation was initiated, and the provisions of GATT 1994 were in effect in 1995 when Brazil imposed the countervailing duties. The Philippines therefore was not asking the Panel to apply to the measures rules whose content did not already exist when the procedures that led to their imposition were initiated, and when the countervailing duties were imposed.

49. In Brazil's view, the fact that the language of Article VI of GATT 1994 is the same as the language of Article VI of GATT 1947 did not permit retroactive application of the provisions of GATT 1994 to the measures in question. Brazil noted that, according to Article II:4 of the Marrakesh Agreement, GATT 1994 and GATT 1947 are legally distinct documents. Thus, the obligations of GATT 1947 are not legally binding once it terminated on 31 December 1995, and because of their legally distinct status, application of GATT 1994 would be retroactive application which is contrary to customary rules of public international law.

50. The Philippines asserted that the legal distinction between GATT 1947 and GATT 1994 was not intended to preclude WTO Members from invoking GATT 1994 as against identical provisions in GATT 1947, but rather to avoid the "free-rider" problem posed by the prospect of GATT 1947 Contracting Parties demanding and obtaining WTO benefits on the basis of the most-favoured-nation clause in GATT 1947. Thus, in the Philippines' view, the legal distinction between GATT 1947 and GATT 1994 did not support Brazil's position on retroactivity. The Philippines also referred to the decision of the Appellate Body in Reformulated Gasoline, which noted that the relevant provisions in that case had not changed as a result of the Uruguay Round negotiations. The Philippines argued that the legal distinction between GATT 1947 and GATT 1994 did not bar the interpretation of the latter in light of the former.

(c) Transition Decisions of the Tokyo Round SCM Committee

51. The Philippines argued that the Tokyo Round SCM Committee's Decision on Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization ("Decision on Transitional Co-Existence")[11] accorded a temporary and limited right to look to the Tokyo Round SCM Code even after its termination, but was not intended to curtail the right of a WTO Member to resort to the dispute settlement procedures of the WTO. The Philippines noted that the Decision on Transitional Co-Existence provided that the Tokyo Round SCM Code would "continue to apply with respect to any countervailing duty investigation or review which is not subject to application of the WTO [Subsidies] Agreement pursuant to the terms of Article 32.3 of that Agreement". The Philippines referred to sub-paragraph (d) of the Decision on Transitional Co-Existence, which provides in pertinent part that:

> "With respect to such disputes for which consultations are requested after the date of this Decision, signatories and panels will be guided by Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement".

In turn, Article 19 of the DSU (as well as Article 3.2 to which it refers) cautions that a WTO Panel "cannot add to or diminish the rights and obligations provided in the [WTO] covered agreements". Thus, in the Philippines' view, the Decision on Transitional Co-Existence is not in derogation of a WTO Member's right to invoke the WTO Agreement.

52. In the Philippines' view, the Decision on Transitional Co-Existence recognized that invocation of the WTO Agreement was not constrained by any Tokyo Round SCM Code obligations. Indeed, the Decision indicates that a Member's invocation of the WTO Agreement precluded another Member from objecting based on any purported inconsistency with the Tokyo Round SCM Code.

53. Brazil took a different view of the effect of the transition decisions of the Tokyo Round SCM Committee. Brazil argued that the Decision on Transitional Co-Existence and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("Decision on Consequences of Termination")[12] reflected the intent that there would be no retroactive application of the new Agreements. In Brazil's view, the Decision on Transitional Co-Existence, by permitting, but not requiring, the adoption during the transition period of any measure consistent with the SCM

[11]SCM/186 (adopted 8 December 1994).

[12]SCM/187 (adopted 8 December 1994).

Agreement, regardless of whether it was consistent with Tokyo Round SCM Code obligations, gives some guidance on the applicable law. Because it does not require parties to adopt immediately measures consistent with the WTO, it contemplates the continuing application of Tokyo Round SCM Code obligations, at least to the measures initiated under the Tokyo Round SCM Code. Paragraph 2(a), referred to by the Philippines in its requests for dispute settlement proceedings, permits disputes to be brought in accordance with the DSU but does not address what law is applicable in considering the dispute. Finally, the Decision on Transitional Co-Existence provides that for its purposes the Tokyo Round SCM Code terminated one year after entry into force of the WTO, i.e. on 31 December 1995. Thus, in accordance with this Decision, the Tokyo Round SCM Code is terminated and was terminated before this Panel was requested. Therefore, the Philippines' reliance on this Decision as a basis for this Panel was unfounded.

54. Brazil also argued that the Decision on Consequences of Termination addresses disputes arising once the Tokyo Round SCM Code was terminated, as is the case here. It provides, *inter alia*, that for dispute settlement purposes, the Tokyo Round SCM Committee shall continue in force for two years after the entry into force of the WTO, i.e. through 31 December 1996. Thus, in Brazil's view, during 1996 the Decision on Consequences of Termination controls disputes originating out of a countervailing duty investigation begun before 1 January 1995, as is the case here. Paragraph (a) provides that the Tokyo Round SCM Code shall continue to apply with respect to any investigation or review begun prior to the entry into force of the WTO. Brazil maintained that this was consistent with Article 32.3 of the SCM Agreement, allowing for coverage of all subsidies disputes. Brazil contended that, in accordance with the Decision on Consequences of Termination, the applicable law for the current dispute is the Tokyo Round SCM Code. The Decision on Consequences of Termination also provides, in paragraph (d), for disputes to be raised in accordance with "rules and procedures for the settlement of disputes arising under the Agreement applicable immediately prior to the date of entry into force of the WTO Agreement" for any disputes arising out of an investigation or review begun prior to entry into force of the WTO.

55. In Brazil's view, the Philippines' reliance on one provision of paragraph (d) of the Decision on Consequences of Termination in support of its claim that GATT 1994 applies reads that provision out of context. Paragraph (d) states that the dispute rules in effect immediately prior to entry into force of the WTO apply, but that if consultations are requested after entry into force of the WTO Agreement, Article 19 of the DSU shall guide panels. Article 19 of the DSU says only that, where a violation is found, the Panel shall recommend that the violating Member bring its measure into conformity with the violated agreement and may suggest ways the recommendations could be implemented. This does not, in Brazil's view, mean either that the complaint can be brought under the DSU or that GATT 1994 or its covered agreements constitute the applicable law. Brazil noted that the Decision on Consequences of Termination will remain in effect through 31 December 1996, and therefore, the Philippines has had and will continue to have recourse to dispute settlement under the Tokyo Round SCM Code until 1 January 1997.[13]

[13]In this regard, Brazil noted that, in the anti-dumping area, where there are similar transition agreements, Canada had recently requested conciliation under the 1979 Tokyo Round Anti-Dumping Code against Mexico, (ADP/142), the United States had recently held consultations (under the auspices of the 1979 Tokyo Round Anti-Dumping Code) with Brazil on the Brazilian imposition of anti-dumping duties on blood collection tubes from the United States, and the United States had been considering requesting consultations on the EU anti-dumping duties on soda ash from the United States. These proceedings indicated that, under facts similar to those at issue here, Canada and the United States continued to have recourse to, and Canada, Mexico, and the United States consider the appropriate rules and forum for resolving disputes involving an investigation initiated under a Tokyo Round Code, to be the Tokyo Round Code, not Article VI of GATT 1994. Brazil argued that subsequent practice of the parties to a treaty is one of the primary sources for interpretation of that treaty, referring to Article 31.3(b) of the Vienna Convention.

56. The Philippines argued that whatever the effect of the Tokyo Round SCM Committee's transition decisions, a decision of the signatories to the Tokyo Round SCM Code did not bind the Members of the WTO, the majority of which were not signatories to that Code. While the signatories to the Tokyo Round SCM Code may have decided to adjust their rights and obligations under that Code to take into account the existence of the WTO Agreement, the WTO adopted no corresponding decision on the coexistence of the Tokyo Round SCM Code and the WTO Agreement. Nor did WTO Members adopt any other decision that could be interpreted as an understanding that Members' rights under the WTO Agreement are in any way diminished by the existence or continued application of the Tokyo Round SCM Code. Hence, the Philippines argued that as a WTO Member, it was free to enforce its rights under the WTO Agreement.

(d) Right to choose legal basis for claims

57. The Philippines considered it well established that where a party has alternative legal grounds upon which to base its claim, the party has the right to choose the legal basis for its claim, and suggested that to question that right would be to deny the complaining party its rights under any agreements that the other party argues should not be applied. In this regard, the Philippines referred to the Panel decisions in United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada (adopted 11 July 1991), BISD 38S/30 ("Pork") and EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (adopted 25 January 1990), BISD 37S/116, para. 110 ("Oilseeds"). In those cases, the decision of GATT Contracting Parties who were also signatories to the Tokyo Round SCM Code to proceed under provisions of the GATT 1947, rather than the Tokyo Round SCM Code, was not questioned by the respective Panels.

58. In the Philippines' view, there were important legal and policy or institutional reasons why panels have consistently respected the right of the participants to choose the legal basis of their claims. This right permits the participants in the multilateral trading system to choose the instrument that contains the most favourable substantive provisions and that is most effectively enforced. It thereby strengthens the multilateral trading order.

59. The Philippines noted in particular that in Pork, Canada chose to invoke its rights under GATT 1947 rather than the Tokyo Round SCM Code apparently because the dispute settlement procedures of the Tokyo Round Agreements had broken down. The fact that Canada had the choice of invoking its GATT rights furthered the objectives of the system, which might otherwise have been wholly frustrated. Similarly, the Philippines in this case considered the dispute settlement procedures and covered agreements of the WTO to be more effective than those of the now-terminated Tokyo Round SCM Code. The Philippines believed that, by choosing to exercise its rights under the WTO Agreement, it furthered its trade interests as well as the interests of all participants in the multilateral trading system by invoking the most effective instrument currently available governing the application of countervailing duties.

60. Brazil argued that the Philippines' position that it could resort to dispute settlement under the WTO, invoking GATT 1994, because WTO dispute settlement was more effective did not affect the central issue of determining what set of obligations were in force during the investigation in order to determine the appropriate procedures for dispute settlement. In Brazil's view, there was no support for the choice of dispute settlement procedures on the basis of what is considered "most effective" independent of the alleged violation. There are specific dispute settlement procedures for each case and GATT 1994 obligations cannot be invoked for past acts merely because one Member considers its dispute settlement procedures "more effective" than those of the applicable law. Brazil argued that there should be a clear separation between the dispute settlement procedures a Member may invoke and the obligations concerning the investigation process. Under the Philippines's view, Brazil argued, it would be possible to invoke GATT 1994 dispute settlement procedures at any time and, as a

consequence, it would be possible to invoke the WTO DSU with regard to obligations under any prior agreement whatsoever.

61. The Philippines clarified that it had identified the greater effectiveness of dispute settlement under the DSU as one of its reasons for exercising the right to proceed under the WTO and not the Tokyo Round SCM Code, not as the basis of that right. In the Philippines's view, that right existed independently of the complaining party's reasons for invoking it. For example, the Philippines argued that the Panels in Pork and Oilseeds had not conditioned the exercise of parties' rights to choose dispute settlement under GATT 1947 rather than under the applicable Tokyo Round SCM Code on the reasons, motives or purposes of the complaining party for exercising that right. The Philippines stated that its principal reason for considering the WTO dispute settlement mechanism more effective was that, under the WTO system, Brazil would not have the ability to block the report of this Panel on the merits that it would have had under the old GATT system. The Philippines asserted that Brazil had, in the past, blocked adoption of a panel report, referring to Non-Rubber Footwear (report issued 4 October 1989, adopted 13 June 1995).

62. Brazil took issue with the suggestion that it would block a panel report under the Tokyo Round SCM Code, thus rendering dispute settlement ineffective. Brazil asserted that every panel report in a dispute involving Brazil had been adopted.

(e) Interpretation of Article VI of GATT 1994

63. Brazil also argued that if the Panel decided that Article VI of GATT 1994 applies to this dispute, it must be interpreted without reference to the substantive provisions of the Tokyo Round SCM Code or the SCM Agreement. The Tokyo Round SCM Code interpreted Articles VI, XVI and XXIII of GATT 1947, not GATT 1994. Article II:4 of the Marrakesh Agreement specifically states that the two GATTs are legally distinct. Moreover, except for the extension of dispute resolution under the Decision on Consequences of Termination, the Tokyo Round SCM Code terminated on 31 December 1995 by agreement of the signatories to the Code. Therefore, it cannot be applied to interpret Article VI of GATT 1994. Moreover, Brazil argued that to apply the rights and obligations contained in the Tokyo Round SCM Code would either add to or diminish the rights and obligations provided for in Article VI of GATT 1994 - an action prohibited by Articles 3:2 and 19:2 of the DSU.

64. Brazil argued that, if the Panel decided that Article VI of GATT 1994 could be applied to this dispute despite the fact that the SCM Agreement did not apply, the Panel should nonetheless reject all arguments raised by the Philippines that rely on concepts, rights, and obligations found in the Tokyo Round SCM Code or the SCM Agreement, but not found within the plain language of Article VI of GATT 1994. In this regard, Brazil noted certain arguments raised by the Philippines that, in Brazil's view, arose from concepts set forth in and requirements of the Tokyo Round SCM Code or the SCM Agreement that were not found in Article VI of GATT 1994. Brazil referred specifically to the argument that the Agrarian Land Reform programme is not a subsidy because it is of general application to all poor Philippine farmers, the argument that Brazil was required to consider whether there was a significant increase in imports, a price effect from the imports, and price depression or suppression in making an injury determination, and the argument that Brazil did not adequately examine other factors that adversely affected production of desiccated coconut. Brazil maintained that Article VI of GATT 1994 did not contain a requirement for a finding of specificity in determining the existence of a subsidy, and did not contain any requirements on the analysis of injury.

65. The Philippines noted out that Article XVI:1 of the Marrakesh Agreement permits WTO dispute settlement panels to seek guidance from "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". The Philippines also observed that in Reformulated Gasoline, both the Panel and the Appellate

Body sought guidance from old GATT decisions. In addition, the Philippines asserted that the Panel in Non-Rubber Footwear had acknowledged that certain interpretations of Article VI of GATT 1947 antedated, and were merely reflected by, the Tokyo Round SCM Code.[14]

(f) Application of the Agreement on Agriculture

66. Brazil also argued that application of the Agreement on Agriculture to this dispute would constitute retroactive application and that there was no agreement among the parties to such retroactive application. In addition, Brazil maintained that Article 13 of the Agreement on Agriculture cannot apply if the SCM Agreement does not apply. Since the SCM Agreement - by the terms of Article 32.3 - does not apply to this dispute, Article 13 of the Agreement on Agriculture also cannot apply.

67. Brazil noted that the chapeau of Article 13 is based specifically on the provisions of GATT 1994 and the SCM Agreement. Article 13 acts as a constraint upon actions taken under the combined auspices of GATT 1994 and the SCM Agreement. Because this dispute is not under the auspices of the SCM Agreement, because of the wording of Article 32.3 of that Agreement, Article 13 cannot apply to this dispute. In addition, Article 13 constrains countervailing duties as defined in footnote 4 to Article 13. That footnote states that the countervailing duties so constrained "are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures". Therefore, for Article 13 to be applicable, the duties at issue must be covered by Part V of the SCM Agreement as well as by Article VI of GATT 1994. Because the SCM Agreement does not apply to this investigation or the resulting duties, by reason of Article 32.3, the countervailing duties at issue in this dispute cannot be subject to Article 13 of the Agreement on Agriculture.

68. The Philippines argued that Brazil's reading of Article 13 of the Agreement on Agriculture was strained and stilted. In the Philippines' view, the word "and" in Article 13 of the Agriculture Agreement must be understood in the disjunctive sense and thus did not limit the applicability of the Agreement on Agriculture only to situations where both Article VI of GATT 1994 and the SCM Agreement must be invoked. Rather, that provision means that the Agreement on Agriculture applies to situations covered by either Article VI of GATT 1994 or the SCM Agreement, or both.

2. Terms of Reference

69. Brazil argued that, in its first submission to the Panel, the Philippines had sought to broaden the scope of the terms of reference beyond the matters set forth in its request for establishment of a panel, which request defines the substantive mandate of the Panel. Brazil identified the following as being beyond the proper scope of the Panel's terms of reference:

(a) Articles I and II of GATT 1994.

(b) Brazil's failure to revoke the Ordinance and reimburse duties collected based on representations by the Philippines as a violation of Article VI of GATT 1994.

(c) Brazil's refusal to consult under GATT 1994 as inconsistent with its obligations.

(d) Article 13 of the Agreement on Agriculture.

(e) Brazil's injury determination.

[14]Non-Rubber Footwear, para. 4.10.

70. Brazil referred to Article 6.2 of the DSU, which provides in part that "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Brazil asserted that Article 6.2 of the DSU reflects substantial past panel practice that each claim in a dispute must be specified with some particularity within the documents included in the terms of reference. In this regard, Brazil referred to the report of the Panel in Cotton Yarn, where the Panel stated that "the fundamental purpose" of the terms of reference is to give advance notice to the defendant and third parties of the claim at issue and therefore, the claim had to be "expressly referred to" in the request for establishment of a panel in order to be within the terms of reference.[15] Brazil also referred to the report of the Panel in Salmon, which noted that the term "matter" identified in the terms of reference "consisted of the specific claims stated by Norway in these documents [the Panel Request and addendum] with respect to the imposition of these duties by the United States".[16] The Panel further addressed the importance of the notice function of the terms of reference:

> "The notice function of terms of reference was particularly important in providing the basis for each Party to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party. The Panel observed that terms of reference often were standard terms of reference, as in the present dispute, in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining Party. In the light of these considerations, the Panel concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter was within the scope of, and had been identified in, the written statement or statements referred to or contained in the terms of reference".[17]

Brazil also noted that in Non-Rubber Footwear MFN,[18] the Panel had found that the terms of reference were limited to matters raised by Brazil in its request for establishment of a panel. Thus, Brazil argued that the requirement that the claims be stated with some particularity in the request for establishment of a panel (or other documents included within the terms of reference) is a long-standing practice that was explicitly recognized by Article 6.2 of the DSU.

71. The Philippines asserted that its requests for relief did not broaden the terms of reference. The Philippines contended that Article 6.2 of the DSU requires only that the statement of a claim be specific enough "to present the problem clearly", which it contended was the case here. The Philippines also noted that the standard terms of reference under the old GATT system ("examine in the light of the relevant GATT provisions") differed from the standard terms of reference under Articles 7.1 and 7.2 of the DSU ("address the relevant provisions in any covered agreement cited by the parties"). In the Philippines' view, the latter more sharply defines the Panel's mandate to address the "relevant" provisions in the cited agreements, not only "cited" provisions. Moreover, the Philippines asserted that, unlike Part F(a) of the Montreal Improvements to the GATT Dispute Settlement Rules and Procedures, L/6489 (13 April 1989), Article 6.2 of the DSU omits any reference to a complaint's

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[15]Cotton Yarn, para. 463.

[16]Salmon, para. 212.

[17]Salmon, para. 208. Brazil noted that this point was reiterated in the companion anti-dumping Panel report. United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/187 (adopted 24 April 1994) ("Salmon ADP"), para. 336.

[18]Non-Rubber Footwear MFN, para. 6.2.

"factual" basis and simply requires a summary of the complaint's "legal" basis. The Philippines argued that some of Brazil's criticisms confused the notion of "claims" with the concepts of "relevant provisions" and the relief requested.

(a) Articles I and II of GATT 1994

72. Brazil argued that Articles I and II of GATT 1994 were not even mentioned in any of the documents referred to in the terms of reference. Thus, any claims under those Articles were beyond the scope of the Panel's mandate. Brazil further maintained that the Philippines' claim that Brazil had violated Article VI of GATT 1994 was not a sufficient basis from which to infer a claim of violation of Articles I and II of GATT 1994. A claim under Articles I and II must be specifically identified. In this regard, Brazil referred to the Panel decision in Non-Rubber Footwear MFN.[19] In that case, the Panel disallowed claims under Articles X and XXIII:1(b) and (c) of GATT 1947 because it found that although the question of discrimination had been raised, it had not been raised in such a way in the request for establishment of a panel as to implicate Article X. With respect to Article XXIII:1(b) and (c), the Panel found that Brazil had argued the United States had acted inconsistently with its obligations but had not claimed that benefits accruing to it under the General Agreement were nullified or impaired. Therefore, the Panel found that matters raised by Brazil with respect to Article XXIII:1(b) and (c) were not within the terms of reference of the Panel.[20] Brazil maintained that this case was similar, in that the Philippine request for establishment of a panel argued that Brazil's actions were inconsistent with Article VI of GATT 1994, but did not claim that they were inconsistent with its obligations under Articles I and II of GATT 1994.

73. The Philippines argued that Articles I and II of GATT 1994 are covered by the terms of reference because they are relevant provisions of the agreement, GATT 1994, cited by the Philippines. The Philippines asserted that Articles I and II lay down the general rule of non-discrimination, to which Article VI is an exception, citing the Pork Panel, para. 4.4. In the Philippines' view, Articles 7:1 and 2 of the DSU indicate that, while a panel's mandate is limited to the agreement cited by the parties in the terms of reference, a panel is authorized to examine and base its ruling on all relevant provisions of the cited agreement, in this case, GATT 1994. The Philippines considered Articles I and II relevant because they lay down the most-favoured-nation principle and the commitment to tariff bindings to which Article VI allows a limited exception for the imposition of countervailing duties.

(b) Failure to revoke and reimburse

74. Brazil noted that the request for establishment of a panel sought a finding that the imposition of the duties was a violation of Article VI of GATT 1994, and a recommendation that the duties be revoked and reimbursed. However, in Brazil's view, this did not constitute a claim that a failure to revoke the measure and reimburse duties prior to the completion of the dispute settlement process was itself a violation of GATT 1994. Brazil argued that it was incomprehensible how a failure to revoke the measure and reimburse duties could possibly constitute a violation of GATT 1994 in the absence of a finding that the imposition of the measure was inconsistent with its obligations.

75. The Philippines argued that its request for relief concerning Brazil's failure to revoke the measure and reimburse the collected duties simply addressed Brazil's continued implementation of its countervailing measure despite Philippine representations on the impropriety of that measure. The Philippines clarified that it was simply requesting the Panel to include reimbursement of duties paid

[19] Non-Rubber Footwear MFN, para. 6.2.

[20] Non-Rubber Footwear MFN.

under the disputed measure among the reliefs to be granted to the Philippines, referring to WT/DS22/5, page 2, penultimate paragraph, sub-paragraph 2.

(c) Failure to consult

76. Brazil recognized that the request for establishment of a panel described the Philippines' view of the consultation history, but denied that this in itself stated a claim before the Panel. Brazil noted that the consultation history is usually included in a request for establishment of a panel, but argued that it does not constitute the basis of a claim in its own right unless a specific claim was identified in the request for establishment of a panel, which Brazil maintained was not the case here.

77. The Philippines contended that Brazil's argument that the description of the consultation history cannot form the basis of a claim merely begs the question whether a refusal to consult, which would of course be part of the consultation history, could be the subject matter of a claim. The Philippines maintained that its request for establishment of a panel accused Brazil of refusing a request for consultations under Article XXIII:1 and alleged a failure to enter into consultations with the Philippines in accordance with XXIII:1 of GATT 1994, thereby violating its obligations under Article XXIII:1 of GATT 1994 and Article 4 of the DSU.

(d) Injury and the Agreement on Agriculture

78. Brazil argued that the Philippines' claims regarding injury and the Agreement on Agriculture did not meet the requirement of Article 6.2 of the DSU that a request for establishment of a panel "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In Brazil's view, none of the points set forth in the Philippines' request for establishment of a panel stated the legal basis of any claim with respect to injury or the Agreement on Agriculture. Brazil noted that document WT/DS22/3 and statements made by Brazil and the Philippines at the DSB meeting where the request for establishment of a panel was first discussed addressed only the question of applicable law. Thus, in Brazil's view, the only basis for raising claims concerning the injury determination or the Agreement on Agriculture would be the request for establishment of a panel itself. Brazil recognized that WT/DS22/5 contained a citation to paragraph 6(a) of Article VI of GATT 1994, implicitly referencing injury, and a citation to Article 13 of the WTO Agreement on Agriculture. However, Brazil noted that the term injury was not even used in the request for establishment of a panel, although it did refer to like product. That reference was in the context of the subsidy calculation, not injury. Thus, in Brazil's view, no claim was raised with respect to like product in the context of Brazil's determination of injury. Moreover, Brazil contended that there was no explanation of how the Philippines considered Brazil to have violated either the injury requirement of Article VI, or Article 13 of the Agreement on Agriculture. Thus, in Brazil's view, the request for establishment of a panel did not state a claim with respect to either provision.

79. In this regard, Brazil cited the Panel report in Cotton Yarn as providing a description of what constitutes a claim. According to that report, "a claim [is] the specification of the particular legal and factual basis upon which it was alleged that a provision of this Agreement had been breached".[21] The Panel also noted that since there may be more than one legal basis for alleging the breach of the same provision of the Agreement a claim for one would not constitute a claim for the other.[22] Finally, the Panel indicated that the legal basis for the claim must be described in the documents within the terms

[21]Cotton Yarn, para. 444.

[22]Cotton Yarn, para. 444.

of reference.[23] Since, in Brazil's view, none of the documents within the terms of reference of this Panel provided any description of the legal or factual basis for the Philippines' claims regarding injury and the Agreement on Agriculture, such claims were not within the terms of reference of this Panel.

80. The Philippines maintained that its request for establishment of a panel adequately set forth a claim pertaining to Brazil's injury determination, and that Brazil had had notice that the Philippines considered that determination deficient. The Philippines noted that Brazil recognized that the request for establishment of a panel implicitly referred to the issue of injury by citing Article VI:6(a) of GATT 1994. Moreover, the Philippines' request also discussed like product in the context of criticizing Brazil's calculation of the countervailing duty, in addition to the calculation of the subsidy. In this connection, the Philippines' request noted that Brazil was a producer of coconuts and desiccated coconut, both of which are available in the domestic market of Brazil. Thus, in the Philippines' view, Brazil was duly apprised that the Philippines was contesting Brazil's injury findings.

81. The Philippines referred to the report of the Panel in Cotton Yarn as having recognized that a general criticism of an anti-dumping methodology can encompass more specific aspects of that methodology. Cotton Yarn, para. 463. The Philippines' criticism of Brazil's injury and causation findings simply related to the basic requirement of Article VI:6(a) of GATT 1994 that such determinations be based on adequate facts and reasons. The thrust of that criticism was that Brazil had relied on indeterminate and inconsistent facts, some of which undercut Brazil's own conclusions, and advanced reasons that could not be supported by such indeterminate facts. In the Philippines' view, these asserted deficiencies were sufficiently encompassed by the basic criticism that the injury findings were inconsistent with Article VI:6(a) of GATT 1994. Moreover, the Philippines pointed out that following an informal meeting between the parties on 27 October 1995 the Philippines had sent Brazil a letter requesting additional information about Brazil's injury determination, which showed that Brazil was fully aware of the Philippines' questions about Brazil's injury determination.

82. Finally, the Philippines asserted that its request for a ruling on the measure's inconsistency with the Agreement on Agriculture was a sufficient statement of a claim of violation of that Agreement. The Philippines' request for establishment of a panel clearly alleged that the disputed measure was inconsistent with Article 13 of the Agreement on Agriculture, and asserted that the investigated programmes, as implemented by a developing country like the Philippines, should not have been considered as subsidies *per se*. In the Philippine's view, Brazil was put sufficiently on notice concerning the Philippines' claims under the Agreement on Agriculture.

83. In Brazil's view, the Philippines' argument invited the Panel to ignore the requirement set forth in Article 6:2 of the DSU that the request for establishment of a panel must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Brazil asserted that, in arguing that Brazil was on notice concerning the Philippines' claims regarding injury, despite the fact that the request for establishment of a panel does not even mention the term "injury," merely because Brazil had received questions from the Philippines raising concerns about the injury finding during the course of the informal bilateral consultations, the Philippines failed to recognize the importance of the notice function of the panel request. Brazil further noted that the questions referred to by the Philippines concerned Brazil's injury determination in light of Brazil's obligations under the Tokyo Round SCM Code. Thus, in Brazil's view, these questions did not provide any notice of concern under GATT 1994.

84. Brazil argued that whether issues are raised in the process leading up to a request for establishment of a panel is a separate question from whether they are properly within the terms of

[23]Cotton Yarn, para. 456.

reference of the Panel by being set forth in the documents cited in the terms of reference. Brazil argued that previous Panels have recognized the importance of the notice function, not just for the party against whom the complaint is made, but, equally importantly, for third parties in order to enable them to determine whether their interests are affected by the dispute. In this regard, Brazil referred to the Panel decision in Salmon, where the Panel stated:

> "The Panel considered that the terms of reference served two purposes: definition of the scope of a panel proceeding, and provision of notice to the defending signatory and other signatories that could be affected by the panel decision and the outcome of the dispute. The notice function in the terms of reference was particularly important in providing the basis for each signatory to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party".[24]

More recently the Cotton Yarn Panel stated:

> "The Panel considered that it was not sufficient that a contention simply "can reasonably be interpreted" as amounting to a claim, as that implied there could be indeterminacy or ambiguity regarding the ambit of the claim. This would in the view of the Panel, run counter to the fundamental purpose of the terms of reference, which was to give advance notice to the defendant and to third parties of the claim at issue".[25]

Thus, in Brazil's view, the fact that the Philippines may have indicated concerns at prior stages of this dispute was an insufficient basis for the conclusion that they constituted claims within the terms of reference of the Panel, unless they were specifically stated in the request for establishment of a panel. Indeed, Brazil noted that issues could well have been discussed in the consultation process and then not raised before the Panel, as the clarification and resolution of issues if possible was one function of the consultations.

3. Burden of Proof

85. The Philippines took the position that the allowance of countervailing duties under Article VI:3 of GATT 1947 is an exception to the basic free trade principles of Article I:1 of GATT 1947. Accordingly, in the Philippines' view, Article VI:3 has been interpreted narrowly, and any party invoking it has the burden of proving compliance with its requirements.[26] These principles also apply to the identical provisions of GATT 1994. Thus, the Philippines argued that Brazil bore the burden of identifying positive evidence that its imposition of a countervailing measure against Philippine desiccated coconut met all requirements for the application of a countervailing measure under the exception provided for in Article VI. The Philippines asserted that, consistent with GATT 1947 precedents and practice, Article VI of GATT 1994 prohibits the imposition of a countervailing duty unless the following three elements are established: (a) a subsidy of the relevant product by the government of the exporting country; (b) material injury to the domestic industry producing the same or a like product in the importing country; and, (c) a causal relationship between the allegedly subsidized imports and the alleged injury to the pertinent domestic industry. The Philippines asserted that Brazil had failed to prove any of the necessary elements for the imposition of a countervailing duty.

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[24]Salmon, para. 208.

[25]Cotton Yarn, para. 456.

[26]In support of this position, the Philippines referred to the Panel reports in Pork, para. 4.4, and New Zealand - Imports of Electrical Transformers from Finland, (adopted 18 July 1985), BISD 32S/55, para. 4:4.

86. Brazil took the position that longstanding panel practice required that the party that invokes the dispute settlement provisions substantiate its claims[27], and that this burden was not shifted for disputes under Article VI. Brazil referred to several disputes in which, it asserted, Panels had chosen not to rule on the question of whether Article VI constituted an exception and had proceeded to accord the burden to the complaining party, just as with other GATT dispute settlements.[28] Thus, in Brazil's view, the burden in this case was on the Philippines to establish that Brazil's actions were inconsistent with its obligations.

87. The Philippines argued that Brazil's reliance on the report of the Panel in Uruguayan Recourse to Article XXIII was mistaken and misleading. The Philippines argued that the Panel had concluded in that case that the complaining party has the burden of proof only in a non-violation complaint under Article XXIII:1(b).[29] However, in the Philippines' view, the Panel had recognized that in a violation complaint, the offending "action would *prima facie*, constitute a case of nullification or impairment".[30] As the Philippines' request for establishment of a panel made clear, this dispute involved a violation complaint under Article XXIII:1(a), in which the burden of proof was on Brazil as the party that imposed the countervailing duty. The Philippines also argued that Brazil's reliance on Alcoholic Drinks was misplaced and misleading. In the Philippines's view, the issue in that case involved whether the complaining party was required to prove the existence of the practices complained against where there was a factual dispute between the parties as to the existence of some of those practices.[31] The Panel concluded that it was necessary for the complaining party to prove the existence of the practices complained against before the Panel could evaluate those practices in light of GATT obligations. In this case, by contrast, there was no question that Brazil had imposed the countervailing measure at issue. Thus, the Philippines considered that it had satisfied the preliminary need to identify the existence of the disputed measure, which Brazil then had the burden of justifying.

88. Brazil took the position that although it agreed with the Philippines' contention that in the case of a *prima facie* nullification or impairment of benefits, there was a presumption of adverse impact on the complaining party and the responding party bore the burden of rebutting that presumption, that was not the situation before this Panel. A case of *prima facie* nullification and impairment can be found only if an infringement of obligations is first found. In Brazil's view, the question before this Panel was whether there had been an infringement of Brazil's obligations in the first place. In that situation, Brazil considered that past practice indicated that the burden of proof was on the complaining party.

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[27]In this regard, Brazil cited the Panel reports in Uruguayan Recourse to Article XXIII, L/1923 (adopted 16 November 1962), BISD 11S/95, paras. 15-16 and Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, DS17/R (adopted 18 February 1992) ("Alcoholic Drinks"), BISD 39S/27, para. 5.3.

[28]Cotton Yarn, para. 516, EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136 (unadopted, 28 April 1995) ("Audiocassettes") paras. 358-359, Salmon ADP, para. 483.

[29]The Philippines also considered that Article 26:1(a) of the DSU recognizes that it is only with respect to non-violation complaints under Article XXIII:1(b) that the complainant bears the burden of "present[ing] a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement".

[30]Uruguayan Recourse to Article XXIII, para. 15.

[31]Alcoholic Drinks, para. 5.3.

4. Scope of the Panel's Examination of Brazil's Decision

89. The Philippines asserted that, in examining whether Brazil's findings satisfied the prerequisites of Article VI of GATT 1994 for imposition of a countervailing measure, the Panel must examine the factual and legal reasons set forth in the Ordinance containing Brazil's final determination, but must disregard any alleged evidence and reasons not covered in the Ordinance itself, because to take into account considerations beyond the Ordinance would be tantamount to allowing a party to modify and rationalize its determination *ex post facto*.[32] In the Philippines' view, the Ordinance fell short of the requirements for the imposition of countervailing duties, in that Brazil did not identify adequate evidence and reasons to support its findings, and ignored evidence that favoured the Philippines.

90. Brazil asserted that the Panel should examine not only the factual and legal reasoning set forth in the final Ordinance but also that set forth in DTIC Opinion 006/95. Brazil stated that, under Brazilian law, the Ordinance, published in the Diario Official, is a summary of the reasons and bases for its decision, which are reflected more fully in DTIC Opinion 006/95. Brazil noted that, in its first submission, the Philippines had repeatedly referred to another document, DTIC Opinion 004/95. Brazil asserted that the Philippines erred in referring to DTIC Opinion 004/95, because the final determination was based on DTIC Opinion 006/95.[33]

91. Brazil stated that, while not published in the Diario Official, DTIC Opinion 006/95, which was signed by the individuals responsible for the investigation and preceded the published final Ordinance, was available to all interested parties upon request. Brazil maintained that consideration of DTIC Opinion 006/95 would not constitute an *ex post facto* modification or rationalization of Brazil's decision. Rather, Brazil contended, consideration of DTIC Opinion 006/95 would be consistent with prior panel practice, referring to the Panel reports in Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, ADP/92 (adopted 27 April 1993) ("Polyacetal Resins"), BISD 40S/205, para. 211, and Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179 (adopted 28 April 1994) ("Milk Powder"), para. 291. Brazil asserted that, unlike the transcript of deliberations the Panel declined to consider in Polyacetal Resins, DTIC Opinion 006/95 is a formal statement of the issues of fact and law considered material and the reasons and bases therefore, signed by the investigating authorities responsible, and made publicly available to the interested parties. Moreover, following the Panel report in Milk Powder, where the Panel looked only at the explanation provided in the published notice of Brazil's determination, stating that "it could not have regard to factual reasons presented by Brazil to the Panel but not stated in the public notice of the findings or otherwise contained in a public statement of reasons issued by the Brazilian authorities at the time of that finding," the Brazilian authorities had revised their procedures. Consequently, in this investigation, DTIC Opinion 006/95 was issued by the Brazilian authorities at the time of the final finding and was publicly available to the interested parties upon request. Brazil noted that DTIC Opinion 006/95 was, in fact, requested and provided to one Philippine exporter. The co-petitioners had also requested and received a copy. Brazil maintained that the Philippine government was offered the opportunity to review the record and

[32]However, the Philippines argued that the administrative record can be considered in connection with any relevant evidence that the Ordinance improperly ignored.

[33]In this regard, Brazil noted that the Ordinance itself indicates that DTIC Opinion 004/95 is not the basis of the final determination. In its discussion of the case history, the Ordinance notes that after the 21 July 1995 meeting with the Conselho Tecnico Consultivo (Technical Consultative Counsel) at which DTIC Opinion 004/95 was considered, that opinion was discussed and the investigation was continued until additional information had been gathered.

receive a copy of DTIC Opinion 006/95 but did not avail itself of the opportunity.[34] Thus, in Brazil's view, DTIC Opinion 006/95 is part of the public statement of reasons accompanying the final determination, along with the Ordinance published in the Diario Official, and must be considered in the Panel's review of Brazil's determination.

92. The Philippines challenged Brazil's reliance on DTIC Opinion 006/95. The Philippines noted that this opinion was not mentioned in the Ordinance, although DTIC Opinion 004/95, dated 18 July 1995, was. Moreover, the Philippines asserted that it was unaware of the existence of DTIC Opinion 006/95 until it received Brazil's first submission, despite having requested that Brazil provide it with a copy of any internal memorandum relied upon in the determination. In the Philippines' view, DTIC Opinion 006/95 was at most a portion of the administrative record that could not be considered as a basis for the Ordinance's findings unless duly identified in the Ordinance itself. In this regard, the Philippines referred to the Panel report in Milk Powder, paras. 286-87, 291, 312:

> "The administrative record of an investigation did not constitute a statement of reasons but was simply a collection of documents containing facts and arguments. … It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding. … [T]o take into account … considerations [beyond the Order imposing measures] would be tantamount to allowing a Party to modify and rationalize its determination *ex post facto*".

93. The Philippines also referred to the report of the Panel in Polyacetal Resins, paras. 251-54 and 284, where the Panel did not consider data in a "staff report" because it was not mentioned or discussed in, and thus was deemed not relied on by, the public statement of reasons for the determination. In the Philippines' view, DTIC Opinion 006/95 merely contained recommendations, and was not mentioned or discussed in the Ordinance, which should identify and explain any adopted recommendations.

94. The Philippines considered Brazil's argument that DTIC Opinion 006/95 was part of the public statement of reasons, because it was a formal statement that was available to the interested parties, to be without merit. In this regard, the Philippines referred to the report of the Panel in Milk Powder, which stated "That [the investigated country] might have had access to the record containing the facts considered by the Brazilian authorities was irrelevant in … respect" to the "lack of explanation of the reasons" for Brazil's findings. Milk Powder, para. 294. Moreover, the Philippines alleged that Brazil had precluded the Philippines' access to DTIC Opinion 006/95 by not mentioning it in the Ordinance, and had failed to provide the Philippines with a copy despite the fact that the Philippines had requested a copy of any internal memorandum that formed the basis of the determination in the Ordinance. The Philippines acknowledged that its request was made before the issuance of the Ordinance, but considered that this did not justify Brazil's failure to provide it with a copy after the Ordinance had been issued. The Philippines noted that the request from the Philippine exporter who did receive a copy of DTIC Opinion 006/95 was also received by Brazil before the issuance of the Ordinance. Moreover, the Philippines had continued to seek clarification from Brazil concerning the Ordinance, including a letter dated 27 October 1995, more than two months after issuance of the Ordinance, containing questions concerning Brazil's determination. However, Brazil had not taken that opportunity to provide the Philippines with a copy of DTIC Opinion 006/95, and had not even responded to the Philippines' questions. Thus, in the Philippines' view, Brazil itself had obstructed both the publicity and the

[34]Brazil acknowledged that the Philippine government did request any memorandum that formed the basis of the final determination in a letter submitted a few days before the final decision was made. Under Brazilian practice DTIC Opinions are not final and part of the record until the final determination is made, so Brazil did not supply it at that time.

accessibility of DTIC Opinion 006/95, and therefore could not rely on it in support of its determination as set forth in the Ordinance.

95. Brazil responded that the cited previous panels' analyses regarding what documents to consider were based on procedural requirements of the Tokyo Round Codes, not of Article VI. Article VI of GATT 1994 did not require any public notice of the reasons or bases for the decision. In the view of Brazil, therefore, it was irrelevant under Article VI whether the documents were publicly available. As long as those documents were official, contemporaneous statements of the reason and bases of the decision, they should be considered by this Panel.

5. Translation of DTIC Opinion 006/95

96. On 12 June 1996, the second day of the Panel's first meeting with the parties, Brazil provided the Panel with a two-page document setting forth corrections to its translations of Interministerial Ordinance No. 11 and DTIC Opinion 006/95. Brazil indicated that the initial translation did not properly reflect the original Portuguese-language determinations.

97. The Philippines objected to the consideration by the Panel of the corrected translations of the two texts. The Philippines considered that there were substantive differences between the initial and corrected translations. The Philippines argued that it lacked the resources to check the corrected translation, that to do so would delay the dispute settlement process, and that to accept the corrected translations at this late date would be unfair to the Philippines.

98. At the meeting, the Panel took note of the corrected translations submitted by Brazil. It informed the Philippines that if it believed the corrected translation inaccurately reflected the original determination it should so inform the Panel, and the Panel would make any such ruling as might be required. The Panel indicated that if the Philippines considered that it needed more time as a result of the submission of the corrected translations, the Panel would grant such additional time.

99. The Philippines subsequently submitted a letter objecting to the "acceptance" by the Panel of the corrected translations. The Philippines objected to Brazil's failure to provide advance warning of the pending corrections, and inferred that the corrections were submitted in response to arguments made during the oral presentation of the Philippines and third parties and/or to address some of the concerns expressed by the Panel in its questions to Brazil. The Philippines indicated that it lacked the resources to engage a professional translator, but pointed out three instances in which it considered that Brazil had gone beyond translation corrections to change the substance of the documents in question.

B. Failure to Consult

100. The Philippines observed that the duty to accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representations made by another Member concerning measures affecting the operation of any of the WTO Agreements was one of the most important procedural obligations of the Members of the WTO, citing Article 4:1 of the DSU.

101. The Philippines maintained that the reasons cited by Brazil for its refusal to consult, that the Philippines did not invoke the applicable law, and should invoke its rights under the Tokyo Round SCM Code instead, were arguments which Brazil could have advanced in the consultations, but did not justify a refusal to consult. The obligation to consult would be meaningless if WTO Members could refuse to consult when they did not consider the legal claims of the WTO Member requesting consultations to be justified. Moreover, agreeing to consult under the GATT 1994 would in no way have prejudged Brazil's position on the applicable law in the present Panel proceedings since Article 4:6 of the DSU makes explicit that "consultations shall be … without prejudice to the rights of any Member

in any further proceeding". The Philippines asserted that, under international law and in GATT practice, it is recognized that a legal finding may be sought for the purpose of obtaining satisfaction or a guarantee of non-repetition. Therefore the Philippines submitted that a finding on this issue was necessary to strengthen the consultative process in general and, in particular, to reduce the likelihood of Brazil's resort to similar arguments to avoid consultations in the future.

102. Brazil disputed the Philippines' contention that it "refused" to consult. Brazil noted that it had offered to consult under the Tokyo Round SCM Code three times. In addition, Brazil submitted a list of the informal consultations that were held, noting that these consultations were considered "informal" at the request of the Philippines.

C. Subsidy Issues

1. Reliance on Best Information Available

103. Brazil argued that the Philippines consistently failed to meet its obligation to supply necessary information within the applicable time periods, despite numerous extensions, and Brazil therefore properly based its subsidy decision on the best information available. Moreover, Brazil asserted that in making its determination it in fact relied mainly on information the Philippines did submit. Brazil maintained that Article VI of GATT 1994 does not contain any administrative provision specifically addressing information gathering. Logically, however, it must contemplate an investigation into the existence and nature of the subsidies prior to imposition of a countervailing duty, since it requires a finding of subsidization and injury. Any such investigation presumes the cooperation of the party being investigated in providing the necessary information to enable the investigating authorities to make those determinations. Brazil argued that this interpretation is supported by past practice with respect to Article VI of GATT 1947, which contained identical language. Brazil referred to the Second Report of the Group of Experts, which addressed this issue:

> "Paragraph 3 of Article VI stipulated that no countervailing duty could be collected beyond the 'estimated' amount of the bounty or of the subsidy granted. In order to arrive at this estimate, the majority of the Group considered it normal, and at least desirable, that the country which became aware of the existence of a subsidy and which ascertained the injury which the subsidy caused, should enter into direct contact with the government of the exporting country. It was also desirable that the latter country should give information requested without delay. This would after all be in its own interest in that it would avoid the imposition of a countervailing duty on its exports at a rate which, failing this information might be fixed at too high a level".[35]

In Brazil's view, the last sentence of this section contemplates the use of the best information available. Brazil also noted that Article 2:9 of the Tokyo Round SCM Code specifically permits the use of best information available:

> "In cases in which any interested party or signatory refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available".

[35]L/1141 (adopted 27 May 1960), BISD 9S/194, para. 35. Brazil did not concede that any precedent from GATT 1947 was binding on the WTO. Nor, in Brazil's view, does such precedent fall within the scope of any source of material for treaty interpretation recognized by the Vienna Convention. Nevertheless, Brazil argued that in facing a new issue, past practice or interpretation of similar language might help guide considerations.

Brazil noted that it discussed the Tokyo Round SCM Code because the obligations of that Code were the obligations in force on Brazil during the investigation.

104. Brazil argued that the Philippines failed to submit requested information that would have enabled Brazil to determine, on a programme-specific basis, the per unit level of subsidization. Among the information not provided was information as to the annual disbursements of the programmes (including how many growers benefitted), the actual costs of administering the programmes, any specific eligibility criteria, and other requested information.

105. The Philippines asserted that it was the only country that fully cooperated with Brazil during the investigation, making good faith efforts to submit extensive information in meetings and documentation. The Philippines observed that, because it had always believed there were no subsidies on Philippine coconut fruit, it had simply responded to Brazil's questions without unduly trying to discern Brazil's possible purposes for asking those questions or to facilitate purported subsidy calculations.

106. The Philippines considered that Brazil's reliance on best information available in fact reflected that Brazil had not fully considered the Philippines' responses, and had only selectively relied on those responses. In this regard, the Philippines noted that Brazil had relied on the "Cost Worksheet" provided by the Philippines to construct the per hectare production cost of hybrid coconut trees, but ignored the per hectare fruit yield reflected in that same worksheet in calculating the per fruit production cost. In the Philippines' view, there were several clear instances when Brazil simply disregarded relevant Philippine responses. The Philippines also argued that Brazil had improperly treated some of the information provided by the Philippines as unsupported assertions. For example, Brazil considered as evidence of levy allocations a list that showed how records of the Marcos regime accounted for the levy funds, but deemed unsupported assertions the contents of the book written by a knowledgeable coconut industry official discussing the unreliability of that list.[36] Indeed, the Philippines asserted that Brazil neither mentioned nor evaluated the book, 20 Million Farmers are Victims of Levy Racket, and did not even acknowledge that the Philippines submitted material assailing the reliability of the list. In the Philippines' view, this represented an improper one-sided treatment of the Philippines' submissions.

107. Moreover, the Philippines argued, referring to the report of the Panel in Salmon, that, before an investigating country can resort to the use of best information available, "the first question to be asked [is] whether the information requested … was of the type that would make it possible to calculate the amount of a subsidy … if this information had been requested, and had not been provided, then subsidy findings could be made 'on the basis of the facts available'".[37] In the Philippines view, Brazil never asked the types of questions required for, *inter alia*, the downstream subsidy analysis called for by the Panel report in Pork. The questionnaire issued by Brazil sought information pertaining to programmes for the upstream product, coconut fruit. Thus, in the Philippines' view, Brazil had no basis for using best information available in regard to the consideration of subsidies to the downstream product, desiccated coconut.

108. Brazil noted that, with respect to the various programmes investigated, the following information was requested and not provided: the official reports of the officials responsible for administering the programme, "administrative norms and regulations, duly-updated, documents that prove the actual

[36]In this regard, the Philippines noted Brazil's current legislation, Decree No. 1751 (19 December 1995), which, although not in effect during the investigation, recognizes the admissibility of secondary evidence, which is subject to Brazil's verification but can be disregarded only if found to be false or misleading.

[37]Salmon, para. 250.

coverage of the programmes covered by legislation, commercial conditions of the benefits conceded, and businesses in questions and our cultivators of coconuts benefitted in the period of investigation," supporting documentation to confirm the information provided in response to the first questionnaire, the actual expenditures for the programme during the period of investigation, detailed information requested about each component of the programme, for example the number of farmers benefitted by the "intercropping," the number of hectares occupied by nurseries, and the actual costs of the nurseries. In response to a question from the Panel, Brazil specified that it had requested copies of official reports relative to each of the programmes; the source for any data provided; the official annual reports of the government entities in charge of the programmes cited; for each identified programme, the commercial conditions of the benefits conceded, businesses covered by the programmes, and cultivators of coconuts that benefitted in the period of investigation; information needed to quantify subsidies received during the period of investigation, for example, with respect to the Presidential Decree No. 582/74 programme, the amount received by each farmer, how many farmers benefitted from loans under the programme, the interest rates at which the loans were granted, percentages of borrowers for each interest rate, loan amortization conditions, whether the farmers get (or could get) private loans in the absence of the programme, and if so, at what interest rate and amortization conditions. Brazil recognized that the Philippines provided information during the investigation, but maintained that the Philippines did not provide sufficient information to enable Brazil to make its determination without reliance on best information available. Brazil reiterated that it had relied where possible on the information provided by the Philippines.

2. Existence of Subsidies

109. The Philippines maintained that, of the seven Philippine programmes Brazil assertedly concluded involved subsidies, five involve the redistribution to the coconut farmers of a levy previously collected from them, one comprised a land reform programme that generally applied to landless Philippine citizens; and the last consisted of investment incentives for which traditional coconut products were not eligible, but which the Ordinance speculated might be available to such products in the future. In the Philippines' view, these programmes cannot be characterized as subsidies.

110. The Philippines took the position that industry programmes funded by direct collections from their beneficiaries are not subsidies, referring to the Interpretative Notes to Article XVI:3 of both GATT 1947 and GATT 1994, which state in part that price stabilization schemes can be characterized as subsidies only if "wholly or partly financed out of government funds in addition to funds collected from producers in respect of the product concerned". Accordingly, the five groups of replanting and livelihood programmes involving redistribution to farmers of a levy collected from them from 1973 to 1982 were not subsidies. The Philippines argued that Brazil did not deny that levy-funded programmes are not subsidies, but instead had surmised that programmes after 1984 must have been funded by the Philippine Government because a list of allocations of those funds purported to show that the funds had already been completely redistributed as of 1984. However, the Philippines maintained that Brazil had ignored evidence showing that only a small portion of the levy funds were actually redistributed to the farmers.[38] Moreover, the Philippines argued that the prior misuse of the levy funds had both factual and legal implications for purposes of determining whether the Philippine replanting and livelihood programmes were levy-funded. As a factual matter, any levy funds that were diverted from the coconut industry cannot, in the Philippines' view, be deemed to have subsidized those programmes. As a legal matter, the Philippines was of the view that any coconut industry programmes after February 1986, the departure of former Philippine President Ferdinand E. Marcos, could be pursued in conjunction

[38]The Philippines argued that Brazil neither mentioned nor addressed the book submitted by the Philippines entitled, 20 Million Farmers are Victims of Levy Racket (1992), by retired Brigadier General Virgilio M. David, who was Philippine Deputy Military Supervisor of the Coconut Industry from 1974-77, and is currently the Administrator of the Philippine agency, the Philippine Coconut Authority, that principally oversees the industry.

with the Philippine Government's efforts to recover the levy funds and to rectify their prior misuse.[39] In particular, the Philippines believed it was proper for the Government to finance post-February 1986 programmes with levy funds that the Government had so far traced, such as those in the United Coconut Planters Bank, or recovered, with some limited advances, especially for rehabilitation programmes that alleviate the plight of farmers after natural calamities. Thus, in the Philippines' view, there was no factual and legal basis for characterizing the levy redistribution programmes as subsidies.

111. The Philippines also maintained that the Agrarian Reform Programme, which was of general application to all poor Philippine farmers, and was not specific to coconut lands, which were not even included in the programme until 1988, was not a subsidy. In response to a question from the Panel whether the Philippines considered that a subsidy must be specific in order to be countervailable under Article VI of GATT 1994, the Philippines responded in the affirmative, that it had been the practice in countervailing cases by some GATT Contracting Parties even before Article VI of GATT 1994, but such a specificity requirement was now expressly articulated only in Article 2 of the SCM Agreement.

112. The Philippines further contended that Brazil had not found that the programme's compensation scheme was concessionary to the farmers. The Philippine position was that the Agrarian Reform Programme could not be considered a subsidy since all the farmers had to pay for the lands distributed. The Philippines noted in this regard that the Ordinance stated no basis for determining the existence of a subsidy, and instead focused on the purported lack of information about the land area covered by the programme for purposes of calculating the amount of the alleged subsidy. Brazil had acknowledged that the Philippines had provided information about land valuation and payment forms, but had made no explicit determination that the land reform programme's compensation scheme had the features of a subsidy. Consequently, in the Philippines' view, Brazil had not had any basis for addressing the total land area covered by the programme. The Philippines asserted that if the compensation scheme was not found unduly concessionary, it could not be deemed a subsidy, and it did not matter how much coconut land was included in the programme. The Philippines also challenged Brazil's characterization of data on the total land area covered by the programme as "non-official," and therefore insufficient to enable calculation of the amount of the subsidy. The Philippines noted that the source of the data was the Philippine Coconut Authority, the government agency principally in charge of the coconut industry. The Philippines argued that Brazil should have accepted this information, and if it had, it would have found the programme's effects on coconut lands too insubstantial even if there had been a determination that the programme's compensation scheme was unduly concessionary.

113. Finally, the Philippines asserted that Brazil erred in treating as an actual subsidy the potential grant of future investment incentives under the Omnibus Investment Code of the Philippines, despite recognizing that coconut products were not eligible for such benefits. Article VI:6(a) allows countervailing duties to offset only subsidies that have actually been "bestowed", while grants under the Omnibus Investment Code were only potential. Moreover, the investment incentives were in fact available only to products that were "new" in the sense of being qualitatively different from the non-eligible traditional coconut products, which included desiccated coconut.

114. Brazil maintained that the information submitted by the Philippines was insufficient to demonstrate that the investigated programmes were not countervailable subsidies. Brazil argued that, even assuming

[39]In this regard the Philippines requested the understanding of the Panel in regard to the Philippines' restrained discussion of factual and legal issues about the involvement of the family and close associates of the late President Marcos in the improper diversion of the levy funds. These issues were currently under litigation in Philippine courts, which are the appropriate fora for resolving those issues. Consequently, in this dispute the Philippines limited itself to pointing out Brazil's failure to give these matters due consideration; the Philippines did not seek the Panel's definitive resolution of issues pending before Philippine courts.

arguendo that programmes aimed at increasing coconut production funded by a levy on the coconut producers themselves did not constitute subsides, documents submitted by the Philippine government in the countervailing duty proceeding contradicted the claim that the programmes were levy-funded. According to the documentation provided by the Philippines concerning the collection and disbursement of the coconut levy, which terminated in August 1982, the amount collected was fully disbursed between August 1973 and June 1984. With the exception of Presidential Decree 582, all the programmes under investigation were initiated after June 1984. Brazil asserted that the Philippines never explained how this levy could have financed any programme during the period of investigation (1993-1994), much less programmes initiated after 1984, when it was fully disbursed by June 1984. In addition, Brazil argued that other information provided by the Philippines also contradicted the statements that all programmes were financed by the levy. For example, the information provided by the Philippines indicated that, for the Farm Assistance and Livelihood Project, P 88.7 million of the total P 113.6 million was funded by government sources other than the levy. Given these contradictions that were never explained, Brazil considered that it was fully justified in its finding that the programmes at issue were not financed by the levy, especially in light of the fact that the levy collections had been fully disbursed by June 1984.

115. Brazil considered extraordinary the Philippines' argument that Brazil should not have relied on the submitted document showing that the levy funds were fully disbursed by June 1984 because the accounting in it was false and used to hide the misappropriation of these funds by the Marcos government. In Brazil's view, this argument suggested that Brazil had violated its obligations because it relied on information submitted by the government of the exporting country. Moreover, Brazil asserted that this was the only document submitted that provided any evidence, beyond unsupported assertions, on how the funds were allocated. Finally, even assuming the Philippines was correct that the Marcos regime had misappropriated the funds and did not pass them on to the coconut growers, Brazil maintained that this did not explain how, under the current government, levy funds that had already been misappropriated by 1984 could be disbursed to the growers in the 1990's. In Brazil's view, the Philippines' line of reasoning supported Brazil's finding that the programmes were not funded by the coconut levy.

116. With respect to the Agrarian Reform Programme, Brazil asserted that it had considered this programme to confer a subsidy because the information provided by the Philippines in response to Brazil's questions was inadequate to determine whether or not a subsidy existed. Brazil had noted that the Philippines had provided data as to the assessment and forms of payment, but asserted that the Philippines had not submitted official or substantiated information on the acreage covered and on the expenses and objectives reached. Brazil maintained that a respondent which did not supply that information could not have expected a no subsidy determination. Brazil noted that the record indicated that persons buying land under the programme could obtain government loans to pay for the purchase at 6 per cent interest, and that therefore those loans were not at commercial interest rates. Moreover, Brazil maintained that the Philippines had not presented any official information on the costs of the programmes, on the total amount loaned out, or on the acreage covered. Therefore, Brazil had been unable to determine from the information provided that the administrators of the programme were covering their costs for administering the programme. Brazil stated that all this information had been requested, and that therefore, on the basis of best information available Brazil had found that this programme provided a subsidy but was unable to determine on a programme-specific basis the effect or amount of the subsidy.

117. In response to a question by the Panel, Brazil stated that it did not consider that the Omnibus Investment Code provided a subsidy to either the coconut growers or the producers/exporters of desiccated coconut.

118. The Philippines asserted that Brazil's statement cast serious doubt on the fairness and reliability of the Ordinance as a public statement of Brazil's subsidy determinations. In the Philippines' view, the Ordinance clearly states that Brazil had identified a set of Philippine programmes that were not subject to action, and considered the other programmes, including the Omnibus Investment Code, to have granted subsidies. The Philippines maintained that, if as Brazil now asserted, no subsidy finding could be inferred from the Ordinance's discussion of the Omnibus Investment Code, then the Ordinance should have explicitly identified the Omnibus Investment Code with the other programmes not subject to action. Instead, the Omnibus Investment Code was listed together with the other programmes Brazil had found granted subsidies and thus actionable.

3. Downstream subsidy analysis

(a) The Pork Panel

119. The Philippines contended that, even if the Philippine programmes were deemed to constitute subsidies on the production of coconut fruit, Brazil had no legal and factual basis for imputing those subsidies to the production of desiccated coconut. To justify a countervailing duty on desiccated coconut, Brazil was required to determine the existence and extent of a subsidy on desiccated coconut, and could not simply impute the subsidies for coconut fruit to desiccated coconut. Article VI:3 of GATT 1994 prohibits the amount of a countervailing duty from exceeding the amount of the corresponding subsidy allegedly bestowed directly or indirectly on the production of the product that is the object of the countervailing investigation. The Pork Panel had considered the imposition by the United States of a countervailing duty on imports of pork based on the subsidies provided to producers of live swine. The Panel, in considering the United States' analysis of the amount of the subsidy on pork, found the United States' decision, which imputed the subsidy on live swine to pork, based on the close inter-relationship between the two products, to be inconsistent with Article VI of GATT 1947, since Article VI:3 mandated that a countervailing duty be based on a subsidy to the specific product under investigation.[40] The Panel ruled that a subsidy determination must be predicated on an examination of all relevant facts[41], and where the alleged subsidies are provided to a separate industry producing the upstream product, operating at arm's length from the industry producing the downstream product subject to the investigation, the investigating authorities must at a minimum perform an analysis of the price effect of factors relating to the price paid for the upstream product by producers of the downstream product.[42] Based on the Panel decision in Pork, the Philippines argued that any subsidies on coconut fruit production could not simply be imputed to the production of desiccated coconut, because these are two different products that belong to two different industries. The Philippines maintained that Brazil failed to do any analysis of the specific effects of the programmes at issue on desiccated coconut.

120. The Philippines asserted that Brazil acknowledged that coconut fruit is an upstream product, whereas desiccated coconut is a downstream product, and that the two products were produced by separate industries operating at arms' length. In the Philippines' view, Brazil's countervailing duty on desiccated coconut was thus subject to the requirements established by the Panel in Pork. The Philippines read Pork to require, in this situation, that the investigating authorities conduct a "price effect" analysis that examines, at a minimum, whether the alleged subsidies to the raw material led

[40]Pork, paras. 4.6 and 4.8.

[41]Pork, para. 4.8. The Panel noted that such "practices" were "reflected in Part I of the [Tokyo Round] SCM Code". Id. Thus, the Philippines argued that the pertinent principles articulated by Pork would apply to the instant matter even if it were considered under that Code.

[42]Pork, paras. 4.9 and 4.10.

to a decrease in the level of prices for that raw material paid by the processed product's producers below the level they would have had to pay for the raw material from other commercially available sources of supply. The Philippines also considered that Pork required two further relevant factors to be considered: (a) whether the raw material was internationally traded, since it is less likely that subsidies will cause the domestic price of such material to decline by the full amount of the subsidies if the producers of the raw material can export at international prices; and (b) the per unit cost of producing the additional output of the raw material that the subsidies may have caused, since the extent to which such additional output affects the price for the raw material will depend in part on the cost of producing the output.

121. The Philippines maintained that Brazil did not conduct an examination of any of the factors set forth in Pork, nor of any other factors showing a price effect of the alleged subsidies on desiccated coconut. In this regard, the Philippines noted that other relevant considerations could affect the international market. For instance, international market conditions could depress the price of the downstream product so as to in turn depress the price of the upstream product even in the absence of subsidies. The Philippines argued that an investigation of subsidies on downstream products would have to consider such factors in order to avoid attributing such price depression to subsidies on the upstream product in a case where international market conditions appeared to act in conjunction with the subsidies to affect the price of the upstream product in the exporting country.

122. The Philippines argued that, because it was improper for Brazil to have directly imputed subsidies on coconut fruit to desiccated coconut production, Brazil had no basis for resorting to a "constructed value" methodology to calculate the amount of the coconut fruit subsidy. The Philippines argued that, in accordance with Article VI:1(b)(ii) of GATT 1994, a constructed value methodology can sometimes be allowed in an anti-dumping context where a country "has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State".[43] However, the Philippines maintained that this approach was wholly inapplicable in the investigation at hand. First, the methodology was envisioned for an anti-dumping investigation and made little sense in a countervailing duty investigation. Second, Brazil made no effort to establish the predicate for the method's application; Brazil did not examine, and made no findings on, whether the Philippines had a complete or substantially complete monopoly of the trade in desiccated coconut or whether all domestic prices are fixed by the State. In fact, the Philippines noted that the evidence was to the contrary, as the Philippine domestic price for desiccated coconut is governed by the international price for the product, and there was no government intervention in market pricing. Thus, the Philippines contended that Brazil's constructed value methodology had no legal basis in GATT 1994 and was invalid as a basis for imposing countervailing duties under Article VI of GATT 1994.

123. The Philippines also argued that the constructed value approach violated Article VI:3 of GATT 1994 because it lacked any mechanism for adjusting the purported subsidy amount to ensure its proportionality to the number and extent of the alleged upstream subsidies. Such a constructed value calculation would yield the same subsidy amount no matter how many of the programmes were considered to be subsidies, and regardless of the funding levels of such programmes. Ostensibly, the subsidy amount would remain unchanged even if only one out of the seven programme categories were deemed to be a subsidy, and even if the funding levels of all the programmes were much lower. In the Philippines' view, this methodological inflexibility rendered the constructed value approach inconsistent with Article VI:3 of GATT 1994, under which the amount of a subsidy must be determined rationally, not indiscriminately.

[43]Note 2 to Article VI:1(b)(ii) of GATT 1994. The Philippines noted that same limitation applied under the corresponding provision in GATT 1947, and Article 15:1 and Article 15:2(b) of the Tokyo Round SCM Code.

124. Brazil took the position that its calculation of the level of subsidization on desiccated coconut was fully consistent with its obligations under either Article VI:3 of GATT 1994 or the Tokyo Round SCM Code. Brazil noted that neither Article VI nor the Tokyo Round SCM Code contained any guidance on the method of calculation of the amount of the subsidy. Brazil contended that, as long as its approach reasonably calculated the subsidy bestowed on the exported product, it was consistent with Article VI:3. Brazil agreed with the report of the Pork Panel that a "price effects" test was a reasonable method of determining whether a subsidy to an upstream product was bestowed on the exported downstream product, observing in addition that there may be other reasonable methods but it was unnecessary to consider them in this case.

125. Brazil agreed that the situation in this case was similar to the situation in the Pork case. Brazil had determined that coconut fruit and desiccated coconut are separate products and that the coconut fruit is the raw material for the desiccated coconut. The Philippines had submitted information that showed that coconut fruit production and desiccated coconut production are two separate industries that operate at arm's length. Thus, the situation in this case comported with the requirements set out in Pork that where separate industries are operating at arm's length the downstream industry cannot be considered subsidized unless the subsidy bestowed on the coconut fruit (the upstream product) has had a price effect on the desiccated coconut (the downstream product). Brazil maintained that in this case, a price effects test was a reasonable method available for Brazil to measure the subsidies that were indirectly bestowed on desiccated coconut, since the Philippines did not provide much of the information Brazil had requested. Had the Philippines provided the information requested, Brazil asserted that it could have determined the programme-specific subsidies provided to coconuts and then conducted a more detailed analysis, based on respondent's information, to determine how much of the programme-specific subsidies on coconuts flowed downstream to the production of desiccated coconut.

126. Brazil asserted that its analysis was consistent with the approach advocated by the Pork Panel. Brazil asserted that in order to determine the price effect, it had used a constructed unsubsidized price for coconut fruit and calculated an unsubsidized price for desiccated coconut. Brazil then compared this price for unsubsidized desiccated coconut to a subsidized price for desiccated coconut, calculated using the price in the Philippines of the subsidized fruit. The difference between the subsidized and unsubsidized prices for desiccated coconut determined the price effect of the subsidies and measured the subsidies indirectly bestowed on desiccated coconut. Only after finding that there were subsidies to the upstream product, coconut fruit, that were passed through to the downstream producers in the form of reduced input prices, did Brazil look at whether these indirect subsidies benefitted desiccated coconut production. Brazil determined that they did and that the subsidy was bestowed on the imported product in the form of reduced prices. Brazil asserted that it had considered all relevant facts, within the constraints of an analysis based on the best information available.

127. Brazil argued that its construction of an unsubsidized price was reasonable and logical. Brazil asserted that the Philippines arguments concerning the use of "constructed value" in the dumping context were completely irrelevant to this dispute. Brazil maintained that it had not conducted a "constructed value" analysis, but rather had attempted to measure the price effect of the subsidies using the best information available in light of the Philippines' failure to provide necessary information.

(b) Commercial availability issue

128. The Philippines asserted that the Pork Panel treated consideration of other commercially available sources of supply as a means of determining whether factors other than the alleged upstream subsidies may have affected the price at which upstream producers sold the raw material to downstream producers. In the Philippines' view, unless such other factors were considered, there could be no reliable finding that the price of the raw material was determined solely or principally by the alleged upstream subsidies. The Philippines noted other relevant considerations pertaining to the conditions of international market

demand and competition that, while not enumerated in Pork, could be considered. For example, international conditions could depress the price of the downstream product in a way that in turn also depressed the raw material's price in the exporting country even if there were no subsidies.

129. In this regard, the Philippines referred to the Panel decision in Canada - Countervailing duties on Grain Corn from the United States, SCM/140 (adopted 26 March 1992) ("Grain Corn"), BISD 39S/411, para. 5.2.7. The Philippines argued that, although Grain Corn involved prices in the importing country, it illustrated the possible effects of international conditions on domestic prices:

> "Clearly, if there is a general and dramatic decline in world market prices for grain corn, this will affect Canadian producers. It will affect Canadian producers even if Canada does not import any grain corn from the United States, even if it imports grain corn from third countries, even if it is completely self-sufficient in grain corn or, indeed, even if it is a net exporter of grain corn, as it was in some crop years. … In each case, the Canadian price for corn would still be directly impacted -- in a material way -- by the world price decline…".

Grain Corn, para. 5.2.9. Just as it could affect domestic prices in an importing country, the Philippines argued that an international price decline could also depress domestic prices in an exporting country.

130. The Philippines also argued that, where alleged subsidies and international conditions appeared to be concurrent causes of low domestic prices in an exporting country, the investigating country bore the further burden of carefully analysing the international conditions so as to avoid attributing to alleged upstream subsidies any price depression, or degrees of any such price depression, actually caused by international conditions. The Philippines maintained that if the international conditions would, by themselves, have been sufficient to depress raw material prices, e.g., by depressing the prices of the downstream product derived therefrom, even in the absence of upstream subsidies, then the depression of the raw material price cannot be deemed a benefit "bestowed" by the upstream subsidies.

131. The Philippines maintained that Brazil's price effect analysis entailed an a priori disregard of all factors other than the alleged upstream subsidies. In other words, Brazil's comparison between the subsidized fruit price and the constructed unsubsidized fruit price yielded a price differential that Brazil simply treated as the price effect, uninfluenced by any other factors. Thus, in the Philippines' view, Brazil had ruled out by definition the relevance of other factors in its price effect analysis, contrary to the guidance of Pork.

132. Brazil asserted that the Pork Panel's use of the phrase "other commercially available sources of supply" indicated one possible means to assess what the price of the subsidized upstream product, in this case, the fruit, would have been in the absence of the subsidies, but that this was not necessarily the only means available. Brazil maintained that it had considered international trading in the product. However, because the five largest world suppliers of coconuts were under investigation for subsidies, Brazil did not consider the international price to reflect an unsubsidized price. Thus, that Philippine coconut producers could sell in the international market did not mean they would be able to sell at a higher, unsubsidized price. Moreover, Brazil argued that the Philippines had provided no information on coconut prices in countries that did not subsidize coconut fruit production, and that even if an international price existed, there might not be commercially viable access to the upstream product by the producer of the downstream product. Thus, Brazil had considered the constructed price as the most reliable unsubsidized coconut price for comparison purposes.

133. In Brazil's view, the phrase "other commercially available sources of supply" in the Pork Panel report was intended to allow flexibility to determine the appropriate analysis on a case-by-case basis. Brazil asserted that such flexibility was imperative in cases, such as this one, where there was no

unsubsidized commercially available source for the upstream product. Brazil noted that there were a number of reasons not to consider international prices in this case. First, Brazil determined in its investigation that the five largest producers of coconuts were subsidizing their coconut production.[44] The Philippines provided no information about coconut fruit prices in countries not found to subsidize coconut fruit production. Thus, if the major suppliers of coconut fruit received subsidies, the international price would show the effects of those subsidies. Brazil asserted that subsidies to a product in one country can affect the world market price for a product in at least three different possible ways. If subsidies are bestowed on a product by Country X are substantial and Country X is an exporter of that product, the subsidized prices can, and would be expected to, lower the world market price for that product. If subsidies are bestowed on a product by Country X, which accounts for a significant portion of the world production of that product, the subsidized prices can lower the world market price for that product. If subsidies are bestowed on a product by a number of countries whose production of the product accounts for a significant portion of the world production, the subsidized prices can lower the world market price for that product. Brazil argued that the third possibility was the case during the Brazilian investigation of desiccated coconut from the Philippines. Brazil also noted that an international price must be adjusted to include import duties and other expenses.[45] Finally, although an international price may exist, there may not be commercially viable access to the international product because of import restrictions, unreliable suppliers, shipment delays, quality differences, or other reasons. Thus, in this case, Brazil had determined to rely, for comparison purposes, on a constructed price for the Philippines, based on cost information provided by the Philippines, as the most reliable unsubsidized coconut price.

134. Brazil also argued that, to determine the competitive benefit or price effect that the subsidization of the input product (coconut fruit) has on the price of the downstream product (desiccated coconut) the price of the subsidized input must be compared to the price of an unsubsidized input. In other words, the investigating country must determine what it would have cost a producer to purchase the input product in the absence of subsidies. Without such a benchmark, no determination of a price effect or competitive benefit can be made. The issue of subsidies was relevant to the issue of the use of an international price benchmark. A respondent would always argue that a lower subsidized benchmark price should be used for comparison purposes because that would lower any subsidy rate determined by the investigating country. On the other hand, the investigating country's producers would be hurt by the use of a lower subsidized benchmark price especially if the lower benchmark price erroneously resulted in a finding of no pass-through of the subsidies. Moreover, once the subsidies were eliminated, the international prices would rise to the unsubsidized price and this unsubsidized international price could once again be used as an unsubsidized benchmark.

135. The Philippines considered as *ex post facto* Brazil's assertion that it considered international trading, but did not consider the international price to reflect an unsubsidized price because the five largest world suppliers of coconuts were under investigation. The Philippines noted that Brazil did not cite to either the Ordinance or to DTIC Opinion 006/95 in proffering this explanation, and urged the Panel to disregard it. The Philippines also observed that, in theory, subsidies to a product in one country could conceivably affect the world market for that product, and the international price thereof. However, a subsidy determination could not be based on such a mere theoretical possibility. Rather, the investigating authorities must establish the existence of all factors that could possibly affect the

[44]Brazil stated that it was the practice of other countries conducting an upstream subsidy analysis to refuse to use potentially subsidized prices as a benchmark against which to compare the price in question to determine whether the subsidy was passed-through. See, e.g., Final Affirmative Countervailing Duty Determination on Steel Wheels From Brazil, 54 Federal Register 15523 (U.S. Department of Commerce 18 April 1989).

[45]Brazil argued that the fact that Brazilian coconut prices were above the price paid by the Philippine processors was one indication that the prices available to those processors were affected by subsidies.

world market for the product under investigation. The Philippines asserted that the Ordinance did not contain an assessment, let alone a determination, regarding the existence of such factors. Thus, Brazil's subsidy determination was flawed by its disregard of international pricing factors, and Brazil's belated rationalizations for such disregard must be rejected as both *ex post facto* and without merit.

136. Moreover, the Philippines contended that Brazil's explanation was without merit. The Philippines contended that the mere involvement of several of the largest suppliers of coconut products in the investigation did not have any automatic effect, either upward or downward, on the international price at which coconut producers could sell their product. In the Philippines' view, Brazil should have investigated and analyzed the actual price effects of other international trading factors, rather than *a priori* ruling out the possibility of any price effects.[46] In addition, the Philippines argued that Brazil did not even assert that it considered the other relevant factor identified in Pork, the per unit cost of producing the additional output of raw material that the subsidies may have caused.

137. Brazil also maintained that, in a comparison of the actual price of coconuts to the constructed unsubsidized price of coconuts, the difference necessarily reflected the price effect of the subsidies on the raw material. Brazil argued that it did not presume a full pass-through of the subsidies on coconuts to desiccated coconut. The extent of the pass-through calculated consisted only of the difference between the subsidized and the constructed unsubsidized price of coconut fruit. To the extent that the actual subsidized price did not reflect the full amount of the subsidies bestowed on coconut production, those subsidies were not considered to be passed through to the coconut processors.[47]

138. The Philippines asserted that Brazil's determination was undercut by evidence presented by the Philippines showing that Philippine coconut farmers sell coconut fruit to producers of products other than desiccated coconut, such as coconut oil, copra, fatty chemicals and foodnuts, and that desiccated coconut represents only a small percentage of Philippine exports of coconut products, as coconut exports are dominated by coconut oil. The Philippines considered that the Pork Panel had rejected an imputed subsidy analysis even when the downstream product (pork) "constitute[d] the primary product" of the upstream product (swine)[48], and asserted that there was even less legal or factual support for the use of such an analysis in this case, because desiccated coconut is not even the "primary product" of coconut fruit in the Philippines.

139. Likewise, the Philippines asserted that Brazil's determination was undermined by evidence showing that the export price of Philippine coconut products other than coconut oil, including desiccated coconut, and the Philippine domestic price of coconut fruit "husked nuts", the raw material for desiccated coconut, closely tracked the international price of coconut oil, which in turn followed the price trends in the worldwide market for oils and fats, where Philippine coconut oil has only a 5 per cent share. The Philippines argued that Brazil had wrongly ignored information on the dependence of coconut prices on world supply and demand for coconut oil. The Philippines maintained that this evidence, the "Coconut Industry Kit-Series of 1993", prepared by a coconut industry association before the initiation of Brazil's investigation, and the document prepared by the Philippines' National Economic Development Authority, a formal paper for the 1994 Proceedings of the World Conference on Lauric Oils, had been submitted during the investigation, and was not generated specifically in response to Brazil's

[46]In this regard, the Philippines argued that, since Brazil's questionnaires did not request information concerning relevant facts about international trading, Brazil had no basis for relying on best information available.

[47]As an example, Brazil asserted that if the actual subsidized price of coconuts were 25 pesos, the calculated "unsubsidized price" were 40 pesos, and the subsidies equalled 20 pesos, Brazil would have considered only 15 pesos of the subsidy to be passed through to the Philippine coconut processors.

[48]Pork, paras. 2.8.a, 4.9, and 4.10.

questionnaires. Thus, Brazil had no basis for completely ignoring these documents. Moreover, the Philippines noted that these documents were not addressed by Brazil in either the Ordinance or DTIC Opinion 006/95, and thus Brazil's explanation for disregarding them was an *ex post facto* rationalization that the Panel should not consider.

140. The Philippines also argued that Brazil improperly disregarded the formal testimony of a high ranking Philippine government official during the 13 June 1995 meeting, at which he explained the relationship between the price of husked nuts and the international price of soybean oil. In the Philippines's view, even oral evidence, as long as subsequently reduced into writing, is admissible in countervailing investigations.

141. Brazil contended that the Philippines' claim that the subsidies could have no price effect because the price of coconuts is dependent on the price of coconut oil was not supported by evidence submitted in the course of the investigation. Therefore, Brazil had no basis to conclude that coconut prices were unaffected by the subsidies. In this regard, Brazil objected to the Philippines' submission to the Panel of information on the relationship between soybean and coconut oil prices[49] that had not been submitted during the investigation.

142. The Philippines maintained that Brazil had set artificially high evidentiary hurdles on the international trade issue in an attempt to obscure the fact that it had failed to address that issue at all in its determination. In this regard, the Philippines asserted that the graphs and tables it submitted to the Panel were intended only to further exemplify the type of information that Brazil should have sought and examined as part of the "other factors" analysis required by Pork.

143. Brazil argued that it did consider the information provided by the Philippines about the price relationship between the various oils and desiccated coconut, but concluded that the information did not support the Philippines' claim. For example, Brazil asserted that the data in the "Coconut Industry Kit" referred to by the Philippines did not demonstrate a correlation in prices of coconut fruit and oil. Moreover, Brazil argued that some of the information was uncorroborated statements by the Philippine government, which Brazil was not obliged to rely upon. Brazil also maintained that it was not clear that information on the relationship between the price of coconuts and the price of coconut oil was relevant. Brazil posited that, if subsidies were necessary to keep the coconut producers in operation given the low price of coconut oil, this still meant that the coconut producers benefitted from the subsidies and that downstream purchasers benefitted from the lower prices that could be charged because of the subsidies, asserting that, if prices drop below a profitable level in the absence of subsidies, the supply of coconut will decline and the users of coconuts will have to pay increasingly higher prices for coconuts in the fact of dwindling supply. Moreover, Brazil considered the relevance of the fact that there are many competing uses for coconuts unclear. Brazil posited that it could mean that desiccated coconut processors did not have the market power to force a pass-through of the subsidy or some portion thereof to themselves alone. It did not mean that the interplay of all supply and demand factors did not result in at least some portion of the subsidy being passed through to all consumers of coconuts, including the desiccated coconut processors.

144. In the Philippines's view, Brazil had adopted the type of imputation analysis that was rejected by the Panel in Pork. In Pork, the issue was the propriety of the United States' imputation of upstream subsidies (whose actual value was unchallenged) to the downstream product using a conversion factor based on the ratio of the hog carcass to the weight of the live hog. In this case, the Philippines argued that Brazil constructed the value of the upstream subsidies, and then improperly imputed those subsidies to desiccated coconut using a conversion factor of 7.5 coconuts per kilogram of desiccated coconut.

[49]Attachments 1 and 2 to the first submission of the Philippines.

Although Brazil sought to distinguish its methodology from an imputation approach, claiming that by constructing the "unsubsidized" cost and price of coconut fruit it had measured the price effect of the subsidies on coconuts and limited the extent of the pass-through to the difference between the subsidized and the unsubsidized price of the coconuts, in the Philippines' view, this methodology still constituted the sort of upstream-downstream imputation rejected by the Panel in Pork, because Brazil failed to consider other factors, aside from the effect of upstream subsidies on the raw material's price, to complete the downstream price effect analysis.

145. Brazil considered that the Philippines appeared to allege that the "improper imputation methodology" in Pork was the use of a conversion factor. In Brazil's view, the conversion factor was not the problem in the Pork calculation, the problem was that the United States merely applied a subsidy to swine directly to pork production without determining whether that subsidy passed through. Brazil asserted that it was obvious that, if the subsidy is passed through to a downstream product, a conversion factor will have to be used to convert the upstream product into the downstream product. Brazil noted that presumably the Philippines intended to argue that the methodology found improper in Pork was the one step pass-through without analysis, which in Pork was done by taking the subsidy to swine and multiplying by the conversion factor to arrive at the subsidy for pork. However, Brazil maintained that it did not conduct such a one step pass-through without analysis. Brazil first considered the price difference between subsidized and unsubsidized coconuts to determine whether there was a price effect from the subsidies. Then, finding that there was a price effect, Brazil compared the costs/prices of desiccated coconut based on subsidized coconut costs with the costs/prices of desiccated coconut based on unsubsidized coconut costs to determine the effect of the subsidy on the exported product. To determine the cost of producing one kilogram of desiccated coconut, it was necessary to determine how much coconut goes into one kilogram of desiccated coconut, requiring a conversion factor.

4. Calculation issues

146. The Philippines asserted that even if Brazil's "constructed value" approach were deemed appropriate, the Panel should rule that Brazil's calculation was erroneous and lacked adequate explanation. The Philippines described the steps followed by Brazil in its constructed value calculations as follows: (1) based on a 1993 Philippine "Cost Worksheet" for hybrid coconut fruit, Brazil calculated the annual per hectare production cost by assuming that each tree would be productive in the 8th year after planting, that annual costs would be fully amortized within 15 years from the 8th year at a 12 per cent annual rate, and that the same 12 per cent rate could be used to discount the annual cost, to arrive at a present value of US$ 821.41 per hectare; (2) while recognizing that the prevailing variety of coconut tree in the Philippines was tall trees, Brazil treated the per hectare production costs of hybrid and tall trees as equal, citing a Brazilian study showing a difference of less than three percent. Brazil divided the per hectare production cost of new hybrid coconut trees (US$ 821.41 per hectare) by the per hectare annual fruit yield of old tall coconut trees (3,910 per year), added an 8 per cent profit margin and US$ 0.015 for freight cost, to arrive at a constructed unsubsidized price of US$ 0.242 per fruit. (3) Brazil then applied a conversion ratio of 7.5 nuts per kilogram of desiccated coconut, and added an 8 per cent profit margin, to arrive at a constructed unsubsidized price for desiccated coconut of US$ 2.348 per kilogram. (4) Based on the "coconut fruit price effectively paid" by a Philippine exporter, US$ 0.051, and presumably also using at least the 7.5 nuts per kilogram conversion ratio, Brazil arrived at a subsidized price for desiccated coconut of US$ 0.800 per kilogram. (5) Brazil then deducted the subsidized price of desiccated coconut (US$ 0.800 per kilogram) from the unsubsidized price of desiccated coconut (US$ 2.348 per kilogram) to arrive at a subsidy amount of US$ 1.548 per kilogram. (6) Finally, Brazil divided the subsidy amount for desiccated coconut (US$ 1.548 per kilogram) by the "average weighted CIF export price" of desiccated coconut exported to Brazil (US$ 1.274 per kilogram), thereby deriving a 121.5 per cent countervailing duty.

147. Brazil asserted that there were several problems with the Philippines' description of Brazil's calculation. Brazil objected to the Philippines' insinuations that it had overstated the constructed fruit price. Brazil noted that the Ordinance described how Brazil calculated the price, and that DTIC Opinion 006/95 provided the exact figures and a more detailed description which showed the exact numbers involved to result in the US$ 2.348 figure. The processing cost that the Philippines questioned was provided by a Philippine exporter. Moreover, Brazil noted that in questioning the calculations of the price for the subsidized desiccated coconut, the Philippines failed to account for the processing costs used by Brazil.

(a) Constructed price

148. In the Philippines' view, Brazil's calculation was defective in several respects. First, it was inherently inconsistent to use the actual production cost of allegedly subsidized hybrid coconut trees to derive an unsubsidized price. To the extent that the Brazilian countervailing duty purported to have been imposed on existing Philippine subsidies, and subsidies typically reduce production cost, then the actual production cost of hybrid coconut trees must have presumably been reduced by the alleged Philippine subsidies. By using the actual production cost to construct a price that is higher than an actual price paid by a Philippine exporter, the decision suggested some variant of a dumping charge - that is, that the Philippines exported desiccated coconut at a price that was lower than it would otherwise have been had the actual production cost of coconut fruit been passed on in the price to desiccated coconut producers, and exports of desiccated coconut.

149. The Philippines contended that Brazil had either (a) considered the actual production cost of hybrid trees unaffected by the alleged subsidies, in which event the countervailing investigation should have ended without finding any subsidy; or (b) considered the production cost reduced by the alleged subsidies, in which case it was, in the Philippines' view, incomprehensible how a subsidy-reduced production cost could be the basis for constructing an unsubsidized fruit price that was lower than the actual fruit price. The Philippines maintained that Brazil had resorted to an inappropriate anti-dumping methodology in this countervailing duty investigation, resulting in figures that were meaningless and could not support the imposition of countervailing duties.

150. Brazil asserted that it relied on the cost information submitted by the Philippines, which contained estimated costs. Brazil assumed those costs were estimated rather than actual because they reflected production costs absent the subsidies. Brazil noted that it could have chosen to rely on Brazilian prices, rather than seeking to construct a Philippine price, which would have resulted in a much higher rate of subsidy being found, since Brazilian coconut prices were higher than the cost information submitted by the Philippines.

151. The Philippines asserted that Brazil had presented no credible reason for considering that the Philippines' estimate of the cost for hybrid trees, relied on in the construction of the per hectare production cost of coconut fruit, represented unsubsidized costs. The Philippines had been asked for, and had provided, estimates about the actual cost and price of coconut fruit. Brazil's assertion that it could have relied on Brazilian coconut prices in constructing the cost of production of Philippine coconut fruit was unjustified, in the Philippines view, and was an *ex post facto* rationalization that was not mentioned in Brazil's determination. In any event, the Philippines argued that Brazil conceded that its production costs were unusually high by international standards, and those costs would therefore not have been an appropriate basis for calculating Philippine production costs.

(b) Costs and yields of hybrid and tall trees

152. The Philippines argued that Brazil did not have an adequate basis for treating the per hectare production costs of hybrid and tall Philippine coconut trees as "equal". Moreover, even if the per hectare production cost of hybrid and tall trees were deemed to be equal, Brazil had no basis for treating the per fruit production cost as equal by disregarding the contrast in production costs of new and old trees, and the actual difference in the average annual fruit yields of the two types of trees. The Philippines contended that Brazil's calculation was distorted by the use of the per hectare production cost of new hybrid trees, while using the per hectare fruit yield of old or senile tall trees which had much lower fruit yields, involved practically no maintenance costs, and comprised the overwhelming majority of coconut trees in the Philippines. The Philippines further asserted that Brazil ignored the difference in fruit yields when it divided the per hectare production cost of hybrid trees by the lower per hectare fruit yield of tall trees (3,910), instead of dividing that per hectare cost by the higher per hectare fruit yield of hybrid trees (15,000), despite the fact that the latter yield was mentioned in the "Cost Worksheet" from which Brazil derived the actual production cost of hybrid trees. In the Philippines' view, this mixing of figures for new hybrid and old tall trees reflected an unfair manipulation of data. Thus, the calculation must be deemed inconsistent with Article VI:3 of GATT 1994, which requires a rational and reliable determination of the amount of an alleged subsidy.

153. Brazil responded to the Philippines' objections to the information and assumptions underlying the calculation by noting that, with respect to "Step 1" of the calculation, Brazil did, in fact, rely on information supplied by the Philippines, the "Cost Worksheet - Coconut Production; Cost of Planting and Maintenance per Hectare of Coconut" that described the stages, timing, and costs of producing coconuts. The assumption that the trees would be productive in their 8th year and would be productive over 15 years (for amortization purposes) was derived from information supplied by the petitioners and used as best information. Regarding the consideration of costs for hybrid trees when the bulk of the Philippine trees were tall trees, Brazil noted that the cost information provided by the Philippines contained estimated costs for one farm producing hybrid trees on one acre of land. Thus, the only information the Philippines supplied on costs was for hybrid, not tall, trees. Nevertheless, Brazil attempted to check whether such information reasonably reflected costs throughout the Philippines, by considering a comparison of costs done by the Brazilian Institute for Agricultural Research comparing the costs of the two types of trees. Based on that comparison, Brazil calculated a less than 3 per cent difference in costs between the two tree types. Regarding the consideration of production cost of new trees when most of the Philippine trees were old, Brazil asserted that it had again based its calculation on information supplied by the Philippines. Brazil calculated the average yield in the Philippines by dividing the total number of trees by total production as supplied by the Philippines in response to the supplemental questionnaire. Brazil noted that the Philippine government had not submitted any information on profit that could be used in the calculation, but one Philippine exporter had submitted information that indicated a profit significantly higher than 8 per cent. Therefore, in Brazil's view, the use of an 8 per cent profit figure was more favourable to the Philippines than other record evidence would have been.

154. The Philippines argued that Brazil had not identified any factor which would indicate that the Philippine and Brazilian crops were comparable, so as to justify treatment of the production costs of Philippine hybrid and tall trees as the same based on an alleged 3 per cent difference between the production costs of two Brazilian crops, which the Philippines asserted were in any event unspecified. Likewise, Brazil had failed to explain why its subsidy calculation divided the per hectare production cost of hybrid trees by the per hectare fruit yield of tall trees (i.e., 3,910) despite the fact that the substantially higher per hectare fruit yield of hybrid trees (i.e., 15,000) was stated in the very cost worksheet Brazil used to calculate per hectare production cost. This glaring error, by itself, in the Philippines' view rendered Brazil's subsidy calculation fundamentally indeterminate and thus unreliable.

155. Brazil maintained that it had used the average yield of all trees in the Philippines, not only the yield for tall trees, and moreover, that the yield figure was based on the information supplied by the Philippines. Brazil also noted that the Philippines never supplied any production cost information for tall trees.

156. The Philippines argued that it was misleading for Brazil to state that the Philippines supplied information only on costs for hybrid, not tall, trees. Brazil's questionnaires had inquired about production costs that included original planting expenses. Because only hybrid trees were being freshly planted in the Philippines, and all the replanting programmes examined by Brazil involved hybrid trees, the Philippines, in response to Brazil's questions, provided the production cost of hybrid trees. However, the Philippines explained that those types of costs were neither currently nor recently incurred by the tall trees, which were 40 years old or older. Thus, it was improper for Brazil to impute to extremely old tall trees the original replanting and other costs of new hybrid trees. Indeed, during the investigation the Philippines had stressed that tall trees should not be deemed benefited by replanting programmes that only involved hybrid trees. Moreover, because hybrid trees constituted only a tiny minority of Philippine coconut trees, it would be manifestly unreasonable to assume that Philippine exporters of desiccated coconut obtained their raw material solely or mostly from hybrid trees. The Philippines suggested that Brazil should have limited its subsidy calculation to the portion of the Philippine coconut tree population affected by alleged upstream subsidies -- hybrid trees. Since the only data Brazil had concerning a Philippine exporter showed that the exporter purchased only the output of tall coconut trees, Brazil had no basis for concluding that Philippine exports were the product of coconut fruit from subsidized hybrid trees.

D. Injury Issues

1. Like Product

157. The Philippines contended that, in order to impose a countervailing duty under Article VI of GATT 1994, Brazil must show through positive evidence that the alleged subsidization caused material injury to the relevant "domestic industry", which is in turn determined by the definition of the "like product". However, in the Philippines' view, the definition of the "like product" in Brazil's determination was ambiguous and contradictory. The Philippines asserted that the Ordinance variously defined the domestic "like product" to include: (1) all desiccated coconut, whether destined for the industrial market (where it is processed as a raw material) or for the retail market (where it is consumed as a finished product); (2) only desiccated coconut destined for industrial use; (3) only desiccated coconut destined for industrial use, and coconut fruit; and (4) all desiccated coconut destined for the industrial and retail markets, and coconut fruit. As a consequence of this failure to define the like product clearly and consistently, the Philippines argued that the scope of the relevant domestic industry varied throughout the Ordinance, specifically in the sections analysing apparent consumption, capacity and employment, industrial demand, and unit cost/price. By alternately narrowing and broadening the range of data to be considered, the shifting definition of the domestic industry made the evaluation of the alleged injury unclear.

158. In support of this contention, the Philippines noted that the Ordinance at one point referred to alleged injury suffered by coconut fruit producers who were supposedly unable to participate in a 19 per cent increase in industrial demand for desiccated coconut, and elsewhere stated that the coconut fruit producers themselves cut down the supply of fruit to desiccated coconut producers because an alternative market offered higher prices for the fruit. Thus, the Philippines questioned whether Brazil had considered coconut fruit production part of the domestic industry. In addition, the Philippines contended that the unclear definitions of the like product and the domestic industry undermined the reliability of the data and analysis regarding material injury and causation set forth in the Ordinance.

159. Brazil took issue with the Philippines' position that it had failed to make a clear determination of like product.[50] Brazil asserted that it had clearly determined that the like product was domestically produced desiccated coconut, and that the like product was not subdivided based on the market in which desiccated coconut was sold. Brazil also maintained that it had clearly determined that the domestic industry consisted of the domestic producers of the like product, desiccated coconut, with the exclusion of one domestic producer, found to be a significant importer of the subject product. Brazil had included all other domestic producers in the definition of domestic industry, two of whom (the co-petitioners) accounted for on average 49 per cent of the national production (and 52 per cent of the production of the domestic industry) during the period of the injury investigation. Brazil noted that, in its consideration of injury, it used information from the co-petitioners, the only producers to respond to its questionnaires, where information for the entire domestic industry was not available.

160. Brazil asserted that Article VI does not refer to the concept of like product in the context of countervailing duties or injury, or specifically address the definition of domestic industry. Nevertheless, Brazil agreed that Article VI requires a determination of like product in order to define the domestic industry. Brazil suggested that guidance as to the meaning of the term like product in relation to Article VI of GATT 1947 can be found in the First Report of the Group of Experts:

> "the Group agreed that this term should be interpreted as a product which is identical in physical characteristics subject, however, to such variations in presentations which are due to the need to adapt the product to special conditions in the market of the importing country".[51]

In addition, Brazil referred to the Tokyo Round SCM Code, which defines the term "like product" to mean "a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration". Under both Article VI and the Tokyo Round SCM Code, therefore, Brazil argued that like product is defined on the basis of physical characteristics. In Brazil's view, the Philippines misread the Ordinance in claiming that Brazil had defined like product four different ways. The portion of the Ordinance cited by the Philippines to support this claim, Brazil argued, was the analysis of physical characteristics and the conditions of competition Brazil had relied upon in order to define the like product.

161. In examining the issue of like product, Brazil asserted that it had found that the domestic product was not alike in all respects to the imported product. There were differences in the amounts of sugar and fat contained in the products and in the size and dryness of the flakes between the two. Nevertheless, both were similar in that they were dried, grated coconut with physical characteristics that permitted overlapping uses. Therefore, Brazil determined that the product most "like" the imported product in terms of physical characteristics was the domestic desiccated coconut, but also concluded that competition between imported desiccated coconut and Brazilian coconut was a significant condition of the Brazilian market that had to be considered in the injury determination. Brazil noted that in its discussion of the like product in the Ordinance, item B, para. 4 was the only place in which it stated what product was "similar" or "like" the imported product. In Brazil's view, this confirmed its position that Item B discussed the analysis of like product in four paragraphs but only provided one definition of like product, and that definition of like product was based on physical characteristics as required by Article VI -- to the extent that Article VI could be interpreted as establishing a "like product" requirement.

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[50]Brazil reiterated its position that the injury arguments, including the like product arguments raised by the Philippines, were beyond the scope of the Panel's terms of reference.

[51]L/978 (adopted 13 May 1959), BISD 8S/145, para. 12.

162. The Philippines argued that the ambivalence of Brazil's like product determination was demonstrated by what it termed Brazil's apparent confusion about the effect of considering only desiccated coconut for retail sale in evaluating apparent consumption data that included non-competing desiccated coconut for retail sale. In the Philippines' view, the Ordinance states that this would make the share of imports more accentuated, while Brazil argued in its first submission that the share of imports was understated by this comparison. The Philippines argued that Brazil had also argued in its first submission that the like product included desiccated coconut for both the retail and non-retail markets, but continued to describe the data on apparent consumption as overstated due to the inclusion of desiccated coconut for retail sale. In the Philippines' view the inclusion of desiccated coconut for retail sale in the apparent consumption data would simply make the data fit the definition of like product if the like product included desiccated coconut for both retail and non-retail sale.

2. Material Injury

163. The Philippines referred to several factors, acknowledged in the Ordinance, which in its view undermined the finding of material injury. The Philippines noted that, after an 8 per cent decrease in 1991, the domestic price of Brazilian desiccated coconut increased by 23 per cent in 1992-93, and by 5 per cent in 1993-94. In addition, the operating profits of the Brazilian co-petitioners averaged 25 per cent for the 1991 to 1994 period. One co-petitioner's gross margin was constant from 1990 to 1993, indicating that its sales were not affected by price pressures and its operating margins were also reasonably stable. The other co-petitioner's operating margins were also stable. The production of the co-petitioners increased by 30 per cent from 1991-94, and one co-petitioner expanded its production capacity.

164. In the Philippines' view, such increases in production, stability in profits and operating margins, and substantial price increases belied the existence of any material injury, and instead indicated that the co-petitioners themselves had been thriving. Moreover, given that the co-petitioners were actually able to increase their production significantly from 1991-94, the Philippines considered it obvious that imports of desiccated coconut from the Philippines did not cause the co-petitioners to reduce their prior level of production. Rather, the Philippines considered that the co-petitioners were apparently complaining that the lower-priced imports allegedly limited their ability to increase their production at projected rates. However, the Ordinance did not identify any data supporting such projected increases, and did not even provide figures for the anticipated increase in production rates. As a result, there was nothing on record to show that the co-petitioners' growth and profit projections were reasonable and realistic, rather than merely speculative. The Philippines asserted that these growth projections seemed to be based on information unreliable on its face. The co-petitioners' data on installed capacity were aggregated for desiccated coconut and other products (such as coconut fruit and coconut milk). Consequently, it was possible that any allegedly unsatisfactory growth in production was attributable to those other products, not to desiccated coconut.

165. Brazil maintained that it looked at relevant factors that indicated that the domestic industry was injured. Brazil found that national production (including production by the importing company) fell by 45 per cent in the period 1989 to 1994, while production of the domestic industry (excluding production by the importing company) declined by 31 per cent during the period 1991 to 1994. There was a decrease in capacity utilization throughout the period. The level of employment in the industry declined 13 per cent between 1991 and 1994. Finally, the domestic industry's share of apparent consumption dropped from 63.9 per cent in 1991 to 37.7 per cent in 1994. Brazil also argued that the fact that the production of the two co-petitioners increased during that period did not indicate no injury to the domestic industry. Injury was to the industry as a whole not to individual producers. Therefore, the fact that one of the co-petitioners obtained a greater share of a declining national production did not indicate a lack of injury to the domestic industry as a whole.

166. Thus, Brazil argued, there was substantial evidence that the domestic industry was injured. Brazil noted that the requirement of an objective examination of positive evidence was found in Article 6:1 of the Tokyo Round SCM Code but not in Article VI of GATT 1994. Brazil argued that it nonetheless considered all relevant economic factors, some of which indicated injury, such as declining production, employment, and capacity utilization, others of which, such as operating results, did not. That not all indicators were negative did not detract from its finding. Brazil argued that previous Panel decisions recognized that a finding of injury may be based on an objective examination of positive evidence even where not all factors are negative.[52] In Brazil's view, the Philippines' arguments sought to have the Panel substitute its judgement for that of the investigating authorities as to which factors were more important indicators of injury in this case, which Brazil asserted was beyond the authority of the Panel.

167. The Philippines argued that it was misleading for Brazil to rely on the employment trends and capacity utilization data of the two co-petitioners alone as being those of the industry. More importantly, in the Philippines' view, Brazil did not explain how such data could be a reliable basis for drawing any conclusions about the desiccated coconut industry, when Brazil conceded in the Ordinance that the data could not be disaggregated by product. In the Philippines' view, the data were indeterminate, and therefore could not support conclusions about capacity utilization and employment levels in the desiccated coconut industry.

3. Causation

168. The Philippines considered that, even if the domestic industry were deemed to have suffered some material injury, Brazil had failed to show that such injury was caused by the alleged subsidies on desiccated coconut imports from the Philippines. The Philippines asserted that, pursuant to Article VI:6(a) of GATT 1994, an alleged injury must be "the effect of the … subsid[y]" in order to justify any countervailing action, and Brazil was therefore required to analyze the allegedly subsidized imports' volume, price effect and impact on the domestic market. The Philippines argued that Brazil relied on data referring to different time periods for different aspects of its analysis, inconsistent data, and random presentation of prices, quantities and ratios, which left its analysis unclear and unsupported.

169. Brazil argued that the consideration of the volume, price effect, and impact on the domestic market, was a requirement of the Tokyo Round SCM Code, not Article VI, which did not contain any guidance on the elements of an injury determination. Nonetheless, Brazil asserted that it had properly considered those factors in making its determination.

170. Brazil also maintained that it did not rely on data for different periods in its evaluation of injury, as argued by the Philippines. Brazil acknowledged that data regarding longer periods, from 1989 through 1994, were also considered where available, but asserted that data for the period of investigation, 1991 through 1994, were considered in all cases. The only exception was where Brazil looked at the imports authorized in the first months of 1995, which Brazil asserted was a reasonable examination aimed at using the most up to date data possible.

(a) Volume

171. The Philippines argued that Brazil's evaluation of the volume of imports was unclear. For instance, the Philippines noted that the Ordinance referred to an 89.93 per cent increase in imports of all "coconut products" from 1991-94, but did not indicate what part of that increase was desiccated

[52]In this regard, Brazil referred to the reports of the Panels in Cotton Yarn, para. 524, Audiocassettes, para. 422, and Salmon, para. 305.

coconut (as distinguished from other types of coconut products), and did not break down desiccated coconut imports by country, by month, or by year. In the Philippines' view, it was impossible to determine from this data the proportion of the total increase in imports accounted for by desiccated coconut, and the proportion accounted for by imports of desiccated coconut from the investigated countries, as distinguished from those not under investigation. While the Ordinance stated that the investigated countries accounted for 80 per cent of imports from 1989-94, in the Philippines' view, this percentage was meaningless because the Ordinance failed to establish the share of the total increase in coconut product imports accounted for by desiccated coconut imports. Moreover, the Philippines asserted that it was improper to use a 1989-94 time frame in calculating the investigated countries' share in desiccated coconut imports, and a 1991-94 time frame in calculating the increase of total coconut imports, because the difference in time periods precluded any accurate comparison.

172. Similarly, the Philippines contended, the Ordinance failed to distinguish desiccated coconut from other coconut products in the analysis of apparent consumption. The Philippines asserted that Brazil had determined that the like product was limited to desiccated coconut destined for the industrial market, excluding desiccated coconut for retail sale, but the Ordinance acknowledged that data on apparent consumption were overstated by the inclusion of desiccated coconut for retail sale, noting that it was not possible to obtain production data by market destination. In the Philippines' view, it was thus impossible to determine whether the like product, desiccated coconut for industrial sale, had an increasing or decreasing share in apparent consumption. As a result, even if import share in domestic consumption increased in absolute terms, it was not possible to determine whether import share also increased relative to the domestic like product. This indeterminate information on apparent consumption thus obscured any causal relationship between the share of imports and the share of the domestic like product in apparent consumption. Moreover, the Philippines noted that, if the like product excluded desiccated coconut for retail sale, then imports for retail sale should have been excluded from the import volume data. However, the Ordinance did not identify the proportion of total imports accounted for by imports for retail sale. On the other hand, if the like product included all desiccated coconut, regardless of the market in which it was sold, then the apparent consumption data were not overstated.

173. Brazil asserted that, in determining the effects of imports, it had cumulated the imports from the five countries under investigation, and found that imports of the subject product increased substantially during the period of investigation. Brazil asserted that DTIC Opinion 006/95 made clear that the only products considered in the analysis were desiccated coconut and coconut milk, the products subject to the investigation. Moreover, Table 10 in DTIC Opinion 006/95 showed both that cumulated imports of desiccated coconut, and the imports from the Philippines alone, increased significantly. The Ordinance also indicated, based on import licenses granted for the period January through May 1995, that imports were likely to increase. Thus, Brazil argued that the data showed both an increase during the period of investigation and in the imminent future of imports in absolute terms. Brazil asserted that it had found that the countries accounting for most of the increase in imports of desiccated coconut were the Philippines, the Ivory Coast, Sri Lanka, and Indonesia (all subject to investigation) which together accounted for 81.2 per cent of the total imports from 1989 to 1995. Brazil also argued that the information showed that imports increased significantly in relative terms. Brazil had found that apparent consumption overall increased 17 per cent in the period 1991 through 1994, while imports represented 35.8 per cent of the consumption in 1991 and 53.8 per cent in 1994. Thus, Brazil argued that the information supported its determination that the increase in subject imports in both absolute and relative terms was significant.

(b) Price

174. The Philippines argued that Brazil's consideration of price data was fundamentally flawed by its failure to examine actual import and domestic prices. Instead of considering actual import prices over a defined time period, the Philippines asserted that Brazil had relied on a single average price

for imports from each country, calculated from CIF import prices, without reference to any time period. Referring to DTIC Opinion 004/95, the Philippines argued that there was no breakdown of prices by month and by year, that the only time frame mentioned was the period from May 1993 to April 1994, and that, with the exception of the data for Sri Lanka, the CIF prices cited in the Ordinance differed from those reported in DTIC Opinion 004/95.

175. The Philippines observed that Brazil had constructed domestic desiccated coconut prices based on the average coconut fruit price, a conversion ratio of fruit to processed product, a markup for additional processing costs, and a 15 per cent profit rate, virtually twice as much as the 8 per cent rate used to construct the unsubsidized Philippine price in the subsidy analysis, resulting in domestic prices that in the Philippines' view were artificially higher than import prices. The Philippines argued that there was no justification for the use of a constructed domestic price in lieu of actual prices. Because a countervailing duty could be validly imposed only if the investigated imports directly competed with the domestic product, the imposition of a duty implies that there was in fact such competition, in which case the actual selling prices of both the imports and the domestic product in the Brazilian market should have been available. Yet, such prices were not obtained, and the failure to do so was not explained. In the Philippines' view, it was not possible to determine any price trends or price comparisons between imported and domestic prices in the absence of actual prices.

176. The Philippines also asserted that the price and import volume data available actually indicated that there was no depression of domestic prices. In the Philippines' view, if lower priced imports had been affecting domestic prices, there would have been an inverse relationship between domestic price levels and import volume, as domestic producers would have had to cut prices to prevent their market share from being eroded by cheaper imports. However, on the contrary, the Philippines asserted that domestic prices and import quantities moved in the same general direction - both domestic prices and import volume decreased in 1991, and in each of the next two years. Thus, according to the Philippines, the data indicated that desiccated coconut imports did not depress domestic desiccated coconut prices.

177. Brazil argued that the information supported its conclusion that there had been price undercutting by the cumulated imports, varying from 70 per cent for the Philippines to 104 per cent for Indonesia. In order to determine the price undercutting, Brazil had relied on a constructed domestic price in making the comparison. Brazil argued that it had constructed the domestic prices because there were no domestic prices unaffected by the subsidized imports, because the volume of subsidized imports was such that the domestic price could not remain unaffected, and because the imported product was at a different stage of production from the Brazilian desiccated coconut. Brazil asserted that if the purpose of analysing the prices was to determine the effect the subsidies had on the domestic prices, it was reasonable to attempt to determine what the price would be absent those subsidies. Constructing a price based on the cost of production plus the normal profit, was, in Brazil's view, a reasonable approach to measuring that effect.

178. Therefore, Brazilian prices were not comparable without adjustment. Brazil argued that the Philippines' complaint that the margin of profit used to construct Brazilian prices was 15 per cent while an 8 per cent profit margin was used to construct Philippine prices was a false complaint. Brazil asserted that the 15 percent margin reflected commercial reality in Brazil. Moreover, since Brazil never compared the unsubsidized Philippine price calculated for the subsidy analysis with the constructed domestic price, the Philippine price that Brazil constructed for purposes of determining the level of subsidization had no effect on the injury determination. Brazil asserted that the Brazilian domestic price was then compared to the actual CIF prices of the imports, adjusted to reflect the same level of trade as the Brazilian prices. Brazil asserted that it calculated the import price by adjusting CIF prices from import documents for freight and other expenses associated with bringing the product to the Brazilian market. This resulted, in Brazil's view, in an appropriate comparison at the same level of trade.

179. Brazil asserted that it had also found that average domestic prices had decreased in the first two years of the period of the injury investigation, then increased in the later part of the period of the injury investigation. However, Brazil asserted that it determined that such increases were accounted for by the initiation of the investigation and the implementation of the Plan Real, a currency stabilization plan that led to significant price increases. Therefore, Brazil concluded that these increases did not indicate a lack of price effect by the imports. In addition, Brazil asserted that the price information had been accorded less significance in its determination than other factors.

180. Brazil asserted that, as indicated in the Ordinance, it had placed the most importance on the volume of imports, the decline in production, and the increasing share of apparent consumption accounted for by the imports, in reaching its determination that the subsidized imports caused injury. In Brazil's view, this analysis was consistent with the requirements of both Article VI of GATT 1994 and the Tokyo Round SCM Code. Brazil again noted that Article VI provided no guidance as to what factors to consider in determining injury, and asserted that therefore, a consideration of reasonable factors was sufficient to meet the requirements of Article VI. Brazil argued that its analysis considered all relevant economic factors in making the determination.

181. The Philippines asserted that Brazil's proffered explanations underlying its consideration of constructed prices in evaluating price effects should be disregarded by the Panel because they were *ex post facto* rationalizations. In addition, the Philippines asserted that Brazil's explanations were in any event flawed. First, by assuming that there were no Brazilian prices unaffected by the subsidized imports, Brazil began its price effect analysis having already assumed such a price effect. Second, Brazil's proffered explanation that prices had to be constructed because the domestic and imported products were at different stages of production, and were thus not comparable without adjustment, was without merit, given that Brazil's formula for constructing the domestic price contained no adjustment for differing stages of production. In addition, the Philippines argued that Brazil had failed to explain or justify its calculation of a single average import price per country. The Philippines had pointed out the difference between virtually all the CIF prices referred to in the Ordinance and those referred to in DTIC Opinion 004/95. Brazil's argument that DTIC Opinion 006/95 was the appropriate reference did not address this concern, since DTIC Opinion 006/95 referred to the same set of import documents as DTIC Opinion 004/95. However, in DTIC Opinion 006/95, different CIF prices were derived from those documents, without any explanation. Thus, in the Philippines' view, Brazil's calculation of import prices was highly suspect, and therefore the evaluation of price effects was not based on positive evidence.

182. Brazil noted that the data contained in DTIC Opinion 004/95 was not necessarily final information used as a basis for the determination in the investigation and differed from the data contained in DTIC Opinion 006/95. Brazil noted that, as stated in the final Ordinance, after the meeting with the Technical Consultative Counsel at which DTIC Opinion 004/95 was discussed, it was decided to collect additional injury information.

183. The Philippines also argued that even DTIC Opinion 006/95 does not state any determination concerning the cause of price increases, but merely notes that price increases "may have" been occasioned by the two factors referred to by Brazil. In the Philippines' view, this was insufficient to constitute a finding on the question. Moreover, Brazil's argument failed to explain how price increases in 1993-94 could be accounted for by the countervailing investigation initiated on 21 June 1994.

(c) Impact of Imports and Other Factors

184. In the view of the Philippines, the finding of causation ultimately hinged on the mere juxtaposition of the following two factors: the decrease of the market share of the domestic producers of desiccated coconut, which in turn supposedly decreased domestic production due to the lesser demand, and the

increase in import volume and in import participation in domestic consumption. However, the Philippines argued that there was no reliable evidence that desiccated coconut imports caused the difficulties allegedly experienced by the Brazilian desiccated coconut producers. Instead, the Philippines argued that the evidence on record indicated that the problems of the domestic producers were caused by other factors wholly peculiar to Brazil's coconut industry.

185. The Philippines argued that, contrary to the requirements of Article VI of GATT 1994, Brazil had ignored those other factors, and had merely listed them without assessing their impact or making any findings to ensure that their adverse effects on the domestic industry were not blamed on the allegedly subsidized imports. Among the factors Brazil assertedly disregarded were Brazil's unusually high domestic raw material and production costs. In this regard, the Philippines cited DTIC Opinion 004/95, referring to Brazil's unusually high production cost. The Philippines maintained that the co-petitioners had admitted that high costs and social benefits made Brazil's production cost higher than that of imported products. The Philippines asserted that, in light of the admissions of the co-petitioners regarding the significance of high domestic production costs, the failure to evaluate the extent to which those costs caused the alleged injury was improper. Moreover, the Philippines argued the cost of coconut fruit became prohibitive for producers of desiccated coconut when an alternative market, the "in natura" market, offered coconut fruit prices higher than desiccated coconut producers. Yet, the Philippines asserted that Brazil had failed to assess how these prohibitive raw material costs affected domestic prices during the period under investigation.

186. The Philippines asserted that the Ordinance listed several other non-import factors that adversely affected the production of coconut fruit, and as a result, the production of desiccated coconut. However, Brazil had not explained why any one or combination of those other factors could not have caused the alleged decrease in the production of coconut fruit and desiccated coconut. Among the other factors the Philippines asserted Brazil had admitted affected the coconut industry were: (1) a considerable number of farmers had opted to change from giant or hybrid trees to dwarf trees; (2) many farmers had converted their farms to non-coconut crops such as sugarcane, especially in Brazil's Northeastern region, where Brazil's coconut fruit production was most heavily concentrated; (3) all coconut farmers chose not to replant senile trees, whose percentage of all of Brazil's coconut trees was not identified; (4) farmers sold coconut lands to non-coconut industries that were widely expanding in Brazil's Northeastern region; (5) the high prices offered by the "in natura" market to fruit producers caused a decrease in the offer of fruit to the processors of desiccated coconut; and (6) a drought lasted for years during the period under review. In the Philippines' view, the drought alone could account for much of the decrease in desiccated coconut production due to the resulting fruit shortage, which in turn caused, rather than was caused by, a corresponding increase in imports to remedy that shortage.

187. Brazil argued that Article VI does not require an examination of other factors in determining whether there is a causal connection between the injury and the subsidized imports. Under Article VI, it was sufficient that the subsidized imports were found to cause injury. However, Article 6:4 of the Tokyo Round SCM Code does require the consideration of other factors, and Brazil asserted that it had examined other factors that might be causing injury but found that the imported product was nevertheless causing material injury to the domestic industry. Referring to the Panel report in Salmon, Brazil argued that past panel practice indicated that the consideration of other factors need not be extensive. Brazil found that, as stated during the investigation, given the importance of the raw material in the total cost of fabrication of the desiccated coconut and the effect of the subsidies on the imported desiccated coconut, the subsidized imports were by themselves the cause of the injury to the domestic industry.

188. The Philippines argued that Brazil erred in taking the position that Article VI does not require an examination of other factors in determining whether there is a causal connection between the injury and the subsidized imports. The Philippines questioned how investigating authorities could be sure

that the injury was caused by subsidized imports, rather than by other factors, other than by considering the latter. Referring to the Panel report in Grain Corn, the Philippines argued that it was not enough for an investigating country to have "acknowledged the existence of factors other than subsidized imports having an effect" on the domestic industry, if that country "made no effort to ensure that the injuries caused by other factors were not attributed to the subsidized imports".[53] The Philippines also took issue with Brazil's statement that the analysis of other factors need not be extensive, arguing that while the public summary of that analysis could be brief, the analysis itself should be extensive. Moreover, the Philippines asserted, the explanation of the analysis should be more extensive if the investigation showed that there were significant other factors present that could have caused injury to the domestic industry. A mere listing of the "other factors" was insufficient, in light of the Panel report in Grain Corn. For example, the Philippines asserted that the drought and the availability of an alternative market for coconut fruit, the "in natura" market, could very well account for all three elements which Brazil claimed supported its determination, the volume of imports, declines in domestic production, and the increasing share of apparent consumption accounted for by the imports. Indeed, information on the record indicated a correlation between import volume and drought-induced fruit shortages.

E. Agreement on Agriculture

189. Even assuming that the investigated programmes constituted subsidies on the production of coconut fruit, the Philippines asserted that they were not countervailable because they fully complied with the developing country and *de minimis* exemptions under Article 6 of the Agreement on Agriculture.

190. The Philippines referred to Article 6.2 of the Agreement on Agriculture as recognizing that "government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries …", and that

> "investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments … ".

The Philippines maintained that, as evidenced in the information furnished to Brazil, the Philippine programmes, which in the Philippines' view involve investment subsidies, e.g, replanting, and input subsidies, e.g, fertilizers and affordable interest rates, complied with Article 6. These forms of assistance were generally available, to the extent funds permitted, to the agricultural sector, including the most disadvantaged sectors such as coconut farming. The Philippines argued that in recognition of the special needs of developing countries, these programmes are exempt from any reduction commitments in the Agreement on Agriculture.

191. The Philippines also asserted that the *de minimis* provision of Article 6.4 of the Agreement on Agriculture further exempts from reduction commitments even Philippine support measures which do not meet the criteria in Article 6.2. Article 6.4 of the Agreement on Agriculture provides:

> "(a) A member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
>
> (i) product-specific domestic support which would otherwise be required to be included in a Member's calculations … where

[53] Grain Corn, para. 5.2.8.

> such support does not exceed 5 per cent of … total value of production of a basic agricultural product during the relevant year; and
>
> (ii) non-product-specific domestic support … where such support does not exceed 5 per cent of the value of that Member's total agricultural production.
>
> (b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent".

The Philippines argued that Brazil failed to estimate the amount of the alleged subsidy and to show that the Philippines provided domestic support up to, or near, the corresponding *de minimis* amount.

192. Thus, the Philippines argued, since the Philippine programmes complied with Article 6 of the Agreement on Agriculture, Brazil could not impose countervailing measures on imports of Philippine desiccated coconut without demonstrating that such imports caused material injury to the relevant Brazilian industry. However, the Philippines maintained that Brazil had failed to demonstrate that the domestic industry suffered material injury, or that any injury that allegedly occurred could be attributed to Philippine desiccated coconut imports, and not to other causes. Thus, Brazil's countervailing duty on Philippine imports of desiccated coconuts was inconsistent with Brazil's obligations under the Agreement on Agriculture.

193. Brazil asserted that the limitations on actionability provided for in Article 13 of the Agreement on Agriculture did not apply in this case. First, the countervailing duties imposed by Brazil were not subject to the limitations of Article 13, which applies to countervailing duties covered both by Article VI of GATT 1994 and by Part V of the Agreement on Subsidies and Countervailing Measures. Brazil asserted that the Philippines had conceded that the SCM Agreement did not apply to this dispute by virtue of Article 32.3. Therefore, Brazil argued that the Agreement on Agriculture similarly did not apply, and the countervailing duties in this case were not subject to any of the limitations on actionability provided in Article 13.

194. Brazil also maintained that the Philippines' arguments that its subsidy programmes were not countervailable because they complied with developing country and *de minimis* exemptions under Article 6 of the Agreement on Agriculture were superfluous. Brazil asserted that the Philippines had recognized that the Agreement on Agriculture merely required that Brazil make a finding of material injury to the relevant Brazilian industry before imposing countervailing duties on these products. Brazil read the Philippines' argument to claim that its programmes were covered by Article 13(b)(i), which requires Brazil to make an injury finding.[54] Thus even if the Philippines were correct in arguing that the Agreement on Agriculture is applicable, and that the Philippine programmes complied with that Agreement, Brazil had made the requisite injury finding, consistent with the requirements of the Agreement on Agriculture.

195. Brazil also contended that, even assuming, *arguendo*, that Article 13(b)(i) were applicable in this case, the Philippines had failed to demonstrate that its programmes met the requirements of that provision. Because Article 13 of the Agreement on Agriculture is an exception to the SCM Agreement, in Brazil's view the Philippines bore the burden of demonstrating that its programmes qualified for

[54]In Brazil's view, the Philippines was not arguing that the Philippine programmes were non-actionable under Article 13(a) Agreement on Agriculture, as meeting the requirements of Annex II of the Agreement on Agriculture, the so-called "green box".

that exception. Brazil considered that the Philippines' argument, that its programmes fell within Article 13(b) because they provide domestic support within *de minimis* levels and in conformity with Article 6, was insufficient. In Brazil's view, the Philippines provided no specific evidence that its programmes complied with the requirements of Article 6.2.[55] Brazil asserted that, lacking any specific factual support, the conclusory statements of the Philippines failed to meet the Philippines' burden of demonstrating compliance with Article 6.2. Moreover, the conclusory statements themselves failed to state the required conclusions: the Philippines did not state that the subsidies were generally available to "low-income or resource-poor producers," but that they were generally available to the agricultural sector, "including the most disadvantaged sectors such as coconut farming".[56] In Brazil's view this made clear that the programmes were not limited to "low-income or resource-poor producers". Moreover, Brazil argued that the Philippines' statement that the programmes were generally available, whether to the agricultural sector or to low-income or resource-poor producers, was inaccurate. Most of the investigated programmes were available only to those growing coconuts, and others (e.g., the Agrarian Reform Programme) were available only for a limited number of products. Other low-income and resource-poor producers did not receive the subsidies in question. Thus, Brazil asserted that the subsidies did not fully conform to the requirements of Article 6.2.

196. Brazil also argued that the Philippines had failed to demonstrate that its subsidies were *de minimis*. Instead, the Philippines had simply asserted that Brazil had failed to show that the Philippine programmes exceeded *de minimis* levels. Brazil considered that the Philippines mistakenly assumed that the burden was on Brazil to demonstrate that the Philippines did not qualify for the exception. In Brazil's view, the Philippine argument highlighted the fundamental flaw of the position that the terms of the Agriculture Agreement applied to Brazilian activity that pre-dated the Agreement, by requiring Brazil to have applied the terms of an agreement that was not even in force at the time that Brazil initiated the investigation that resulted in the imposition of duties.

V. ARGUMENTS PRESENTED BY THIRD PARTIES

A. Canada

197. Canada argued that, notwithstanding Article 32.3 of the SCM Agreement, Articles I, II, and VI of GATT 1994 were applicable to existing countervailing measures, even if those measures were first enacted or imposed before the entry into force of the WTO. In Canada's view, there was nothing retroactive in requiring WTO Members to continue to maintain only those tariff and non-tariff measures that were consistent with their GATT 1994 obligations. Moreover, the inapplicability of the SCM Agreement to an investigation did not prevent the application of Article VI of GATT 1994 to existing countervailing measures imposed as a result of such investigations. In Canada's view, the possible applicability of the Tokyo Round SCM Code, and the potential inapplicability of the SCM Agreement, were not germane to the question of whether the Brazilian measure in question could be justified as a countervailing duty under Article VI.

198. Canada argued that the obligations of Articles I and II of GATT 1994 applied to all measures of a WTO Member, including measures that were initiated or imposed before the entry into force of the WTO for that Member. Accordingly, the exceptions to those Articles, in particular Article VI

[55]Brazil asserted that the Philippines had not provided this information during the investigation, either.

[56]Brazil noted that this argument contradicted the Philippines' claim that the subsidies to the coconut growers were funded by the coconut levy. If the programmes were generally available to the agricultural sector, there would be no possibility that a levy on the coconut producers entirely funded the programmes.

of GATT 1994, were equally available to a Member complained against to justify a measure, provided that it met the criteria set out in Article VI.

199. Canada noted that under the GATT 1947, Contracting Parties enjoyed the protection of Articles VI and XVI of GATT 1947, and the benefits of GATT 1947 dispute settlement, while the signatories to the Tokyo Round SCM Code had additional rights and obligations that they could enforce under the dispute settlement mechanism of that Code. Contracting Parties which were also signatories to the Tokyo Round SCM Code had the choice of proceeding under the Code or the GATT, and the choice of forum depended on the nature of the asserted inconsistency, the nature of applicable obligations, and the remedies available.

200. With the entry into force of the WTO Agreements, the various Agreements that have superseded the Tokyo Round Codes are integral to the WTO and apply to all Members, with the DSB as the single forum for enforcement of rights and obligations under any of the Agreements. However, the fact that a WTO Agreement, in this case the SCM Agreement, may not be applicable to the specific circumstances of a case did not preclude the application of GATT 1994, in this case Article VI, to the same circumstances. In Canada's view, the text of Article 32.2 of the SCM Agreement expressly limited the application of that Agreement only, and not the application of Article VI of GATT 1994. Moreover, there was nothing in GATT 1994 itself that limited its application to measures or practices imposed or enacted after the entry into force of the WTO for the Members concerned. Canada maintained that nothing in the SCM Agreement or GATT 1994 prevented the application of GATT 1994 obligations to existing measures. In Canada's view, the Panel has jurisdiction to examine all existing measures for consistency with obligations that have not been expressly excluded from its jurisdiction. The inapplicability of the SCM Agreement or the applicability of the Tokyo Round SCM Code should not preclude a panel from reviewing the existing measures of a Member for consistency with that Member's on-going GATT 1994 obligations. The fact that enactment or imposition of a measure antedated the entry into force of the WTO should not preclude review of the measure as currently applied in accordance with WTO norms due to concerns over retroactivity or the legal distinctiveness of GATT 1994 and GATT 1947.

201. Canada also argued that the existence of potential recourse to the Tokyo Round SCM Committee for dispute settlement under the Tokyo Round SCM Code was not dispositive of the issue - the availability of one forum and legal instrument did not foreclose the availability of other fora or instruments to WTO Members, and in particular did not foreclose reliance on basic GATT obligations by WTO Members. Similarly, the possibility of domestic review proceedings in Brazil was not dispositive of the issue. Nothing in the Tokyo Round SCM Code, the SCM Agreement, or GATT 1994 required the Philippines to challenge existing measures through domestic review mechanisms to the exclusion of the WTO dispute settlement process.

202. Canada also agreed that Brazil's failure to consult with the Philippines constituted a violation of Brazil's obligations under Article 4.3 of the DSU. In Canada's view, whatever Brazil's view of the appropriate terms of consultations, the refusal to consult without first establishing those terms constituted a refusal to consult in violation of Brazil's obligations. Entering into consultations where a request is made was a basic procedural obligation of every WTO Member. Brazil should have presented its substantive or procedural objections to the Philippines during consultations, and at the meetings of the DSB, and ultimately to a panel, rather than frustrating the consultative process.

B. European Communities

203. On the question of the law applicable to this dispute, the EC took the position that the Philippines had brought its complaint to the wrong forum under the wrong law. The EC argued that the principle of non-retroactivity of treaty obligations, embodied in Article 28 of the Vienna Convention, precluded

the application of Article VI of GATT 1994 to the Brazilian countervailing measures in question. This interpretation was, in the EC's view, consistent with the transitional provisions of Article 32.3 of the SCM Agreement, as well as the Tokyo Round SCM Committee's Decision on Consequences of Termination. In the EC's view, the principle of non-retroactivity required that the determination made by Brazil be challenged only under the provisions of the law in force between the parties at the time the application was filed, i.e., GATT 1947 and the Tokyo Round SCM Code. The EC noted that the Philippines continued to have recourse to dispute settlement under the Tokyo Round SCM Code, and in addition, if it considered the collection of countervailing duties after 1 January 1995 inconsistent with GATT 1994, it could seek a review under Brazilian law, which review would be conducted in accordance with the SCM Agreement and GATT 1994. Finally, the EC argued that Article 13 of the Agriculture Agreement applies only with respect to investigations covered by both Article VI of GATT 1994 and the SCM Agreement. Pursuant to Article 32.3 of the SCM Agreement, that Agreement did not apply to the Brazilian countervailing duty. Consequently, regardless of the Panel's decision whether Article VI applied to this dispute, Article 13 of the Agreement on Agriculture did not apply, and the Philippines' claim relating to that provision should be deemed inadmissible. The EC also supported the Brazilian request for a preliminary ruling on the question of the admissibility of the Philippines' claims, particularly since Brazil's objections covered all the claims raised by the Philippines.

204. The EC rejected the Philippines' argument that Article 30.3 of the Vienna Convention required the application of GATT 1994 to this dispute. The EC argued that there was no conflict between the Tokyo Round SCM Code and GATT 1994 with respect to the Brazilian investigation, since Article VI of GATT 1994 did not apply to that investigation. Consequently, there was no need to resort to Article 30.3 to determine the applicable law, as there was no conflict between successive treaties dealing with the same subject matter.

205. The EC supported Brazil's view that Article 28 of the Vienna Convention precluded the application of Article VI of GATT 1994 to this dispute, since the investigation was initiated pursuant to an application made prior to the entry into force of the WTO Agreements, including the SCM Agreement. In the EC's view, the operative act in this case was the application for countervailing duty, filed in 1994. The investigation, and the resulting duties, all flowed from that act, and must all be judged in light of the law in effect at the time of that act. The EC noted that the WTO Agreement did not contain any express provision requiring the retroactive application of Article VI of GATT 1994, nor was there any other basis on which such an intention could be established. To the contrary, the terms of the SCM Agreement, and the decisions of the Tokyo Round SCM Committee supported the conclusion that no retroactive application was intended.

206. The EC also noted that, unlike the Tokyo Round SCM Code and GATT 1947, which were distinct agreements with their own dispute settlement procedures and differing membership, Article VI of GATT 1994 and the SCM Agreement are part of the same agreement, the WTO Agreement, bind all Members, and are covered by the same dispute settlement arrangements. The EC asserted that the title and wording of Article 10 of the SCM Agreement evidence the intention of the parties that Article VI of GATT 1994 should apply only in conjunction with the more detailed rules contained in the SCM Agreement. Moreover, the EC asserted that this same intention is reflected in Article 32.1 of the SCM Agreement, and was further confirmed by the language of Article 13 of the Agreement on Agriculture. Article 13 of the Agreement on Agriculture exempted from the imposition of countervailing duties those countervailing duties covered by Article VI of GATT and Part V of the SCM Agreement. The EC argued that this indicated that the drafters of the WTO Agreement did not envisage the autonomous application of Article VI of GATT 1994. The EC maintained that, had such an eventuality been contemplated, it would have been anomalous not to extend the exemption to the imposition of countervailing duties which are covered only by Article VI of GATT 1994.

207. The EC distinguished between the application, investigation, and imposition of duties, and the continued collection of duties. The EC argued that the collection of countervailing duties on individual shipments could be characterized as a situation arising out of a previous act. As such, the law applicable to continuing collection of duties was that in effect at the time duties were actually collected. Thus, for duties collected after the entry into force of the WTO, Article VI of GATT 1994 would apply. In the EC's view, however, in that case, the only obligation of the importing country would be to open, upon request, a review of the measures, in light of the new requirements of Article VI of GATT 1994, which review would be conducted under the SCM Agreement. The EC cited the decision of the Panel in Non-Rubber Footwear in support of its view, arguing that the situation in that case involved a similar issue, and the Panel in that case concluded that although the determinations underlying the duties could not be invalidated, the collection of duties pursuant to those determinations was subject to the new requirements of the Tokyo Round SCM Code. However, the Panel had further concluded that the importing country's obligations in this regard were satisfied if a right to request a review of the determination was afforded.

208. Regarding the issue of the scope of the terms of reference, in response to a question from the Panel, the EC argued that a precise statement of claims in the request for establishment of a panel was essential to safeguard the defense rights of the respondent as well as the right of third parties to intervene in the dispute. Moreover, a precise definition of claims was necessary to ensure that the parties had been given an opportunity to reach a satisfactory solution of the matter during the consultation stage. The EC considered that the Panel reports referred to by Brazil on this matter provided a correct view of what constitutes a claim, and of the degree of specificity required for a claim to be considered by a panel. The EC also argued that the principles developed by these Panels had been confirmed by Article 6.2 of the DSU. The EC considered that, in accordance with the terms of Article 6.2 of the DSU and the principles derived from previous Panel reports, the request for establishment of a panel should include, with respect to each particular claim, at least the following elements: (a) the infringing measure, (b) the obligation under the WTO Agreement which the complainant considered to have been violated, and (c) a brief explanation of the way in which the measure infringed the legal obligations. With respect to element (b), the EC maintained that a simple reference to one of the WTO Agreements without further specification was clearly insufficient, and a reference to a particular Article might be insufficient if the Article laid down more than one obligation. With respect to element (c), the EC stated that the explanation was to be distinguished from the arguments, i.e. the legal or factual reasoning advanced to support, clarify, or explain the claim. The EC noted in this regard that a claim might be supported by one or more arguments, and the same argument might support one or more claims. Furthermore, the EC maintained that the claims should be specifically identified as such in the request for establishment of a panel. The EC asserted that practice under the DSU, while still very limited, confirmed these principles, referring in this regard to the report of the Panel in Reformulated Gasoline, para. 6.19, and the interim report issued to the parties in Japan - Taxes on alcoholic beverages, WT/DS8, 10, 11, para. 6.

C. Indonesia

209. Indonesia supported the Philippines' position that the countervailing duty imposed by Brazil was inconsistent with Articles VI:3 and 6(a) of GATT 1994 and the Agreement on Agriculture. In Indonesia's view, the Philippine programmes, although they could be categorised as subsidies, were not countervailable, as they were fully in compliance with developing countries' rights and the *de minimis* exception of Article 6 of the Agriculture Agreement. Indonesia argued that since Brazil's determination was made in August 1995, the Agreement on Agriculture was applicable. Indonesia also argued that Brazil erred in relying on the best information available, and failed to take account of relevant information submitted by the Philippines.

D. Sri Lanka

210. Sri Lanka took the view that the countervailing duty in question, as applied both to imports of desiccated coconut from the Philippines, and to imports of desiccated coconut and coconut milk powder from Sri Lanka, was inconsistent with the provisions of GATT 1994 and the Agreement on Agriculture. Sri Lanka asserted that, in imposing that duty, Brazil had violated Articles I and II of GATT 1994. In Sri Lanka's view, the countervailing duty could not be justified under Article VI of GATT 1994. Sri Lanka asserted that the Sri Lankan programmes investigated by Brazil were not subsidies, since they were paid for by a mandatory levy on exports of coconut products. In addition, the Philippine domestic support measures found by Brazil to constitute subsidies, like the Sri Lankan domestic support measures also found by Brazil to constitute subsidies, fell into the "green box" category of non-actionable subsidies under Article 13 of the Agreement on Agriculture.

E. United States

211. The United States took the position that the Philippines was entitled to invoke Article VI of GATT 1994. In the United States' view, Brazil improperly relied on the fact that it commenced its countervailing duty investigation on imports of desiccated coconuts before 1 January 1995 to argue that GATT 1994 does not apply to that investigation. However, when Brazil became a WTO Member, it assumed the obligation not to levy countervailing duties after that date in a manner inconsistent with Article VI of GATT 1994. Brazil accepted this obligation notwithstanding its already-initiated countervailing duty investigation on desiccated coconut. The United States asserted that, should Brazil fail to respect its obligation to levy countervailing duties in a manner consistent with Article VI of GATT 1994, and levy duties in a manner inconsistent with its schedule of tariff concessions, it would impair its tariff bindings in violation of Article II of GATT 1994, which it also accepted when it became a WTO Member. In the United States' view, for purposes of determining Brazil's obligations under Article VI of GATT 1994, it was irrelevant when Brazil had commenced its countervailing duty investigation. The United States argued that while the SCM Agreement did not apply to this dispute, that situation did not affect the application of Article VI of GATT 1994. The United States, in response to a question from the Panel, indicated that the provisions of Article 10 of the SCM Agreement did not affect its analysis of the issue of applicable law. The United States asserted that Article 10, requiring that countervailing duties be imposed pursuant to the provisions of Article VI of GATT 1994 and the SCM Agreement, was applicable only in the case of investigations initiated pursuant to applications made after 1 January 1995, which was not the case here.

212. The United States argued that the application of Article VI of GATT 1994 in this case did not represent the imposition of a new treaty obligation in respect of past acts, facts or situations in violation of Article 28 of the Vienna Convention. The act of imposing a countervailing duty was the act, fact or situation that is relevant. That act -- the imposition of the countervailing duty -- occurred after 1 January 1995. As such, Brazil was obligated to impose duties in accordance with its commitments under GATT 1994.

213. The United States contended that, if GATT 1994 were not interpreted in this fashion, unacceptable, and unintended, results would ensue. For example, Members of the WTO which had not been signatories to the Tokyo Round SCM Code would have no basis upon which to enforce their rights if they were denied an injury test in a countervailing duty investigation commenced before 1 January 1995. GATT 1994 was the applicable provision in such instances and its stand-alone character must be preserved. The United States observed that Brazil itself had brought disputes under GATT 1994, for instance against the United States concerning regulations on conventional and reformulated gasoline.

214. The United States also took the position that, should the Panel find that the Philippines was within its rights to bring this dispute under GATT 1994, the Panel must conduct its examination of

this matter in light of the provisions of Article VI of GATT 1994, without reference to the SCM Agreement or the Tokyo Round SCM Code. The United States observed that the terms of reference for this dispute referred to the relevant provisions in GATT 1994 and the Agreement on Agriculture, as well as the Philippines' request for establishment of a panel, Brazil's communication to the DSB and the record of discussions at the meeting of the DSB on 21 February 1996. Article 7.2 of the DSU states that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Thus, the only trade agreements which the Panel is free to use as guidance in determining the legal rights and obligations of the parties in this case are those which are covered agreements and are cited by the parties. Since the Tokyo Round SCM Code is not a "covered agreement" listed in Appendix 1 of the DSU, the United States argued that the Panel has no authority to apply the Tokyo Round SCM Code. Further, the SCM Agreement was equally unavailable as guidance for the Panel. By its own terms, Article 32.3, the SCM Agreement applied only to investigations initiated pursuant to applications made after 1 January 1995. Given the DSU mandate in Articles 3.2 and 19.2 that panels "cannot add to or diminish the rights and obligations provided for in the covered agreements," it was important that the Panel not consider agreements that were neither covered agreements nor cited by the parties. To do so would affect the rights and obligations of the parties in contravention of the terms of Article 3.2 and 19.2.

215. The United States asserted that the Philippines' first submission referred, without directly citing, to concepts which mirror those contained in the Tokyo Round SCM Code and/or the SCM Agreement, but to which Article VI of GATT 1994 makes no reference. The United States argued that if the Philippines cannot rely on these Agreements directly, it may not incorporate their principles by indirect reference.

216. In support of its position, the United States referred to the report of the Panel in the Oilseeds case. That Panel found that it could only make findings in respect of GATT 1947 and could not interpret the Tokyo Round SCM Code:

> "The Panel was established to make findings 'in the light of the relevant GATT provisions'; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position".[57]

217. The United States identified specific passages in the Philippines' first submission which referred to concepts in the Tokyo Round SCM Code and/or the SCM Agreement, which were not found in Article VI of GATT 1994, and asserted that with regard to these arguments, the Panel should take care to insure that its examination did not extend beyond the concepts as envisaged under Article VI of GATT 1994 to an assessment of the elaborations of concepts in either the Tokyo Round SCM Code or the SCM Agreement. The Panel should, in the United States' view, take a "clean slate" approach to the concepts in Article VI of GATT 1994 and determine on the basis of the information at its disposal whether Brazil's conduct of this investigation was in compliance with the standards of Article VI of GATT 1994 or not. It was imperative that the Panel refrain from creating new rights and obligations that are not included in the text of Article VI or that cannot be fairly said to flow directly from it. To do otherwise would affect the balance of the parties' rights and obligations under GATT 1994, contrary to DSU Articles 3.2 and 19.2.

218. The United States also argued that there were two fundamental flaws in Brazil's injury determination, which made it inconsistent with Article VI of GATT 1994, without reading into that Article the refined standards provided in the Tokyo Round SCM Code or the SCM Agreement. First, Article VI:6(a) requires a causal nexus between the subsidized imports and material injury. However,

[57] Oilseeds, para. 154.

in the United States' view, Brazil's injury determination did not discuss why such a causal nexus might exist. This was not a question of the adequacy of the analysis; the Brazilian determination effectively had no analysis of causation. This absence of causal analysis was inconsistent with Article VI.

219. Second, Article VI:6(a) refers to material injury to "an" established domestic industry. However, the United States asserted that the injury determination in this case did not use a consistent definition of domestic industry for its conclusions concerning material injury. The failure to base conclusions concerning material injury on a consistent industry definition, with no plausible reasons for this inconsistency, was impermissible in the light of the requirement in Article VI to assess material injury to "an" established domestic industry.

220. The United States also argued that the Panel should reject the Philippines' request for specific and retroactive remedies, i.e., that Brazil revoke its countervailing duty on desiccated coconut exports from the Philippines and reimburse any duties collected. In the United States' view, such specific and, in the case of reimbursement retroactive remedies were inconsistent with established GATT practice and the DSU. Instead, the United States argued that the Panel should make a general recommendation, consistent with the DSU and established GATT practice, that Brazil bring its countervailing duty order into conformity with Article VI of GATT 1994.[58] In the United States' view, GATT rules and remedy recommendations are designed to protect expectations on the competitive relationship between imported and domestic products, rather than expectations on export volumes.

221. The United States also argued that the only support for granting specific and retroactive remedies lay in three pre-WTO adopted panel reports involving anti-dumping and countervailing duties. However, the United States argued, a careful analysis of the DSU demonstrated that, insofar as remedies are concerned, the drafters of the DSU did not intend that anti-dumping and countervailing duty disputes be treated any differently than other types of disputes. In addition, even if the DSU were not dispositive on this issue, the Panel should not accord the three adopted panel reports any weight, because (1) the reports themselves were devoid of any justification for treating anti-dumping and countervailing disputes differently than other types of disputes, and (2) a review of the history of unadopted anti-dumping and countervailing duty panel reports indicated that there was no consensus under the pre-WTO regime that specific and retroactive remedies were ever appropriate.

222. Regarding the issue of the scope of the terms of reference, in response to a question from the Panel, the United States stated that the Panel was required to examine "the matter" before it, which in the United States' view referred to the subject matter of the dispute as described in the request for establishment of a panel. Referring to Article 6.2 of the DSU, the United States asserted that, while the complaining party must identify the measures at issue, it need not put the contents of its first panel submission into its request for establishment of a panel, and need only provide a summary of the legal basis sufficient to present the problem clearly. In the United States' view, it followed that particular legal claims did not need to be identified with specificity, for instance by article of the agreement concerned. However, it was necessary to identify the legal basis for the request for establishment of a panel sufficiently to provide fair notice to the defending party and potential third parties. The United States asserted that the degree of specificity needed could best be judged in the context of the particular case, guided by the requirement of provision of fair notice. The United States maintained that an exact description of issues was not required under previous dispute settlement procedures, and to extent it may have been, this practice had been overruled by the terms of Article 6.2 of the DSU.

[58]The United States noted, with respect to the Philippines' claim that Brazil's failure to revoke the countervailing duty on desiccated coconut and to reimburse any duties paid was inconsistent with Brazil's obligations under Article VI:3 and 6(a) of the GATT 1994, that it agreed with Brazil's statement and similarly did not understand how failure to revoke and reimburse, in the absence of a finding that the imposition was inconsistent with Brazil's obligations, could possibly constitute a violation in its own right.

The United States indicated that guidance on the principle it put forward could be taken from the reports of the Panels in the two Salmon disputes.

223. In the United States' view, the resolution of the question whether specific issues were within the terms of reference required examination of the precise terms contained in the request for establishment of a panel. Referring specifically to the instant dispute, the United States argued that, since the legal basis of the complaint referred exclusively to specific articles of GATT 1994, it would not seem to be appropriately within the terms of reference of the Panel to now expand the legal basis of the complaint to entirely new provisions or to new measures, since the DSB would not have been on notice. However, if the claims in dispute merely involve particular arguments regarding the matter referred to in the request for establishment of a panel, and those arguments were based on the legal basis stated in that request, then the Panel could consider those arguments consistent with the terms of reference.

224. The United States took no position with respect to the applicability of the Agreement on Agriculture in this dispute.

VI. FINDINGS

A. Applicable Law

225. The first issue confronting this Panel is to determine whether the legal obligations cited by the Philippines are applicable to the disputed measure. The Philippines alleges that the imposition by Brazil of a countervailing duty on desiccated coconut from the Philippines was inconsistent with Articles I, II and VI of GATT 1994 and Article 13 of the Agreement on Agriculture. Brazil contends that under customary principles of international law and the terms of the WTO Agreement itself, neither GATT 1994 nor the Agreement on Agriculture apply to this dispute, as the investigation leading to the imposition of the measure was initiated pursuant to an application received prior to the date of entry into force of the WTO Agreement. Accordingly, this Panel is required to address, as a threshold matter, whether Articles I, II, and VI of GATT 1994 and Article 13 of the Agreement on Agriculture are applicable to this dispute. It should be emphasized that because this issue relates to the entry into force of the new WTO regime, the question of applicable law facing this Panel will cease to be relevant as this type of dispute becomes rarer and eventually disappears altogether.

1. Applicability of GATT 1994

226. Within the WTO system, the use of countervailing measures is governed principally by GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"). Although the Philippines does not invoke the SCM Agreement in this case and, of course, is not required to do so, its applicability or otherwise to this dispute is highly relevant to the broader issue of applicable law. If we were to conclude that the SCM Agreement did not constitute applicable law in this dispute, in the sense that neither the parties nor this Panel could invoke it in construing the rights and obligations in dispute, we would be presented with the issue whether Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture could apply on their own, independently of the SCM Agreement. If, in turn, we were to find that Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture could not apply on their own, then the non-applicability of the SCM Agreement would render Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture inapplicable as well. In this case, the Philippines' claims under these provisions could not succeed.

227. This Panel should make clear that if we were to find that, because of the non-applicability of the SCM Agreement, Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture do not apply to this dispute, this would not mean that the SCM Agreement supersedes Article VI of GATT

1994 as the basis for the regulation by the WTO Agreement of countervailing measures. It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect, and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods ("MTN Agreements") is demonstrated by a general interpretive note to Annex 1A of the WTO Agreement.[59] The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point.[60] Thus, the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994. Rather, it is whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction.

(a) Applicability of the SCM Agreement

228. Article 32.3 is a transition rule which defines with precision the temporal application of the SCM Agreement. Article 32:3 provides that:

> "Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement".

The WTO Agreement entered into force for Brazil on 1 January 1995. Although the definitive countervailing duty on desiccated coconut from the Philippines was imposed on 18 August 1995, the investigation leading to the imposition of the duty was initiated on 21 June 1994 pursuant to an application made on 17 January 1994, prior to the date of entry into force of the WTO Agreement for Brazil. Thus, in accordance with the ordinary meaning of Article 32.3, the SCM Agreement does not constitute applicable law for the purpose of the dispute before us.

229. We do not find persuasive arguments that Article 32.3 of the SCM Agreement, by referring to "investigations," limits the application of that Agreement only with respect to the "procedural" aspects of investigations. The text of Article 32.3 itself does not indicate that that provision applies only to "procedural" as opposed to "substantive" aspects of an investigation. Rather, it provides that an investigation initiated pursuant to an application made on or after the date of entry into force shall be conducted in accordance with the provisions of the SCM Agreement in its entirety -- procedural and substantive. Moreover, any effort to distinguish between the "substantive" and "procedural" obligations of the SCM Agreement would generate considerable confusion and dispute, as the distinction between the two types of obligations in practice could prove extremely difficult. We share the view of the Philippines that one object and purpose of Article 32.3 is to prevent WTO Members from having to redo investigations begun before the entry into force of the WTO Agreement in accordance with the

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[59]The general interpretive note to Annex 1A provides that, "[i]n the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A of the Agreement Establishing the World Trade Organization … the provision of the other agreement shall prevail to the extent of the conflict". Such an interpretive note would be unnecessary if the MTN agreements superseded GATT 1994.

[60]For example, the SCM Agreement does not replicate or elaborate on Article VI:5 of GATT 1994, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of GATT 1994. If the SCM Agreement were considered to supersede Article VI of GATT 1994 altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended.

new and more detailed procedural provisions of the SCM Agreement. In our view, however, this consideration is equally applicable to the substantive provisions of the SCM Agreement, which differ in significant respects from those of the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the Tokyo Round SCM Code"). Throughout the course of an investigation, both procedural and substantive decisions must be made, and if an investigation were to become subject to new and different rules at some point during the investigation the investigating authorities would be required to return to the beginning and to re-examine decisions already taken.[61] Accordingly, we consider that the concept of "investigation" as expressed in Article 32.3 includes both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto.

230. We find equally unpersuasive the argument that, while Article 32.3 might preclude application of the SCM Agreement to the imposition of a countervailing duty resulting from an investigation initiated pursuant to an application made before the date of entry into force of the WTO Agreement, it does not preclude the application of the SCM Agreement to the continued collection of duties after that date. Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply. If, as the Philippines argues, a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if, as the Philippines argues, that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply -- and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist -- at the time the determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity.

231. In conclusion, we find that the SCM Agreement does not constitute applicable law for the purposes of this dispute.

(b) Separability of Article VI of GATT 1994 and the SCM Agreement

232. Having concluded that the SCM Agreement does not constitute applicable law for the purposes of this dispute, we next examine the implications of this conclusion for the Philippines' claims under GATT 1994. The question presented is whether Article VI of GATT 1994 can apply to a dispute in circumstances where, pursuant to Article 32.3, the SCM Agreement does not apply. In other words, we are confronted with the issue whether the provisions of Article VI of GATT 1994 relating to countervailing duties are susceptible of application and interpretation independently of the SCM Agreement. If the answer to this question is yes, then Article VI of GATT 1994 represents the law applicable to this dispute. If, by contrast, we conclude that, in relation to disputes concerning countervailing measures, Article VI of GATT 1994 is inseparable from the SCM Agreement and cannot be interpreted and applied independently of that Agreement then, pursuant to Article 32.3, the SCM Agreement, and any other provisions that depend on it, do not apply, and we cannot consider the Philippines' claims under Article VI of GATT 1994 in this dispute.

[61]As an example, the determination of the domestic industry must be made at an early stage as a prerequisite to subsequent steps in the investigation. The SCM Agreement contains provisions relating to this definition that are not part of the Tokyo Round SCM Code. If the SCM Agreement applied to ongoing investigations, a WTO Member would be required to re-examine its domestic industry determination in light of these new provisions.

233. As a first step, we will review whether the textual provisions defining the relationship between Article VI of GATT 1994 and the SCM Agreement, in their ordinary meaning, shed light on this issue. We will thereafter consider whether an interpretation whereby Article VI of GATT 1994 applies independently in situations where the SCM Agreement does not apply would be supported by a consideration of the object and purpose of the relevant provisions. After examining precedents under GATT 1947 potentially relevant to the issue of the independent application of Article VI of GATT 1994, we will consider whether there are any consequences of a conclusion that Article VI of GATT 1994 cannot apply independent of the SCM Agreement which would cast doubt on this interpretation.

(i) Textual analysis

234. The reference in Article 32.3 of the SCM Agreement to "this Agreement" in its ordinary meaning would appear to be a reference to the SCM Agreement, thereby suggesting that while the SCM Agreement does not apply to investigations and reviews initiated pursuant to applications made before the date of entry into force of the Agreement for a Member, Article VI of GATT 1994 would nevertheless continue to be applicable in these circumstances. However, a strict application of the term "this Agreement" as used elsewhere in the SCM Agreement could produce manifestly unreasonable results. For example, Article 1.1 of the SCM Agreement contains a definition of "subsidy" and Article 16.1 of the SCM Agreement contains a definition of "domestic industry" both of which are "for the purposes of this Agreement". However, the terms "subsidy" and "domestic industry" are used both in Article VI of GATT 1994 and the SCM Agreement. If the term "this Agreement" were interpreted *strictu sensu* to mean the SCM Agreement, then the definitions of these key terms in the SCM Agreement would be inapplicable to the same terms as used in Article VI of GATT 1994. Such a result could not have been intended.

235. In any event, while Article 32.3 of the SCM Agreement might, taken on its own, most naturally be construed to govern the temporal application of the SCM Agreement and not Article VI of GATT 1994, it might have another meaning when taken in its context. If, for example, it were understood from other provisions of the WTO Agreement that Article VI of GATT 1994 could not be applied independently of the SCM Agreement, the mere fact that Article 32.3 of the SCM Agreement refers only to "this Agreement" could not, in and of itself, sever that linkage. If it were established, by reference to other language elsewhere in the WTO Agreement, that there is an inseparable link between Article VI of GATT 1994 and the SCM Agreement, then the ordinary meaning of Article 32.3, read in conjunction with other relevant provisions, would be that the SCM Agreement, and any other provision of the WTO Agreement that depended on it, would not apply if the terms of Article 32.3 were not met. Under this construction, the term "this Agreement" in Article 32.3 of the SCM Agreement would beg the question rather than answer it.

236. In light of these considerations, we consider that the use by the drafters of the term "this Agreement" does not provide decisive guidance regarding the implications of Article 32.3 for the applicability of Article VI of GATT 1994 to this dispute.[62]

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[62] Interestingly, the Tokyo Round SCM Code contains a note that, if reproduced in the SCM Agreement, might well have been decisive on this point. Note 2 to the Preamble of the Code states that:

> "Wherever in this Agreement there is reference to "the terms of this Agreement" or the "articles" or "provisions of this Agreement" it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement".

The Panel is uncertain why this provision was not reproduced in the SCM Agreement. However, one possible explanation is that such a provision was considered unnecessary in the light of the integrated nature of the WTO (continued…)

237. Another provision relevant to the relationship between Article VI of GATT 1994 and the SCM Agreement is Article 10 of the SCM Agreement, which provides as follows:

> *"Application of Article VI of GATT 1994*[35]
>
> Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.
>
> [36] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994". (footnotes 35 and 37 omitted).

In our view, Article 10 means that, in cases where the SCM Agreement applies, both Article VI of GATT 1994 and the SCM Agreement are applicable and any countervailing measure must comply with both. This is clear from the language stating that countervailing duties must be imposed in accordance with the provisions of Article VI and the SCM Agreement. Article 10 further requires that, in cases where the SCM Agreement applies, countervailing duty investigations must be conducted in accordance with that Agreement. It could be argued that Article 10 only applies in cases where the SCM Agreement applies, and therefore does not expressly address the applicability of Article VI of GATT 1994 in situations where, pursuant to Article 32.3, the SCM Agreement does not apply. On this reading, Article 10 would be neutral, providing little guidance on the issue of separability. However, the title of Article 10 indicates that that Article informs regarding how Article VI of GATT 1994 is to be applied. Article 10 thus suggests that Article VI and the SCM Agreement represent an inter-related package of rights and obligations relating to countervailing measures.

238. Another provision relevant to the relationship of Article VI of GATT 1994 and the SCM Agreement is Article 32.1 of the SCM Agreement, which provides that:

> "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]" (footnote 56 omitted).

Article 32.1, like Article 10, makes it very clear that in cases where the SCM Agreement applies, Article VI of GATT 1994 cannot be invoked as the basis for the imposition of a countervailing duty without reference to the SCM Agreement. As with respect to Article 10, it could be argued that Article 32.1 only applies where the SCM Agreement applies pursuant to Article 32.3, and that it therefore does not instruct as to whether Article VI of GATT 1994 applies where the SCM Agreement does not. It is significant, however, that Article 32.1 refers to the SCM Agreement as interpreting Article VI of GATT 1994. Article VI of GATT 1994 sets forth a series of core concepts central to WTO regulation of countervailing measures (e.g., subsidy, material injury, domestic industry). These concepts are, however, expressed in only the most general terms, and are thus susceptible of a wide range of interpretations. In our view, the Tokyo Round SCM Code and its successor the SCM Agreement were

[62](…continued)
Agreement, and the provisions regulating the relationship of GATT 1994 and the MTN agreements. In any event, we do not consider that the exclusion of this provision from the SCM Agreement sheds much light on the question before us.

developed in part to lend greater precision and predictability to the rights and obligations under Article VI. Article 32.1 makes clear that where the SCM Agreement applies the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement. It is apparent from Article 32.1 that Article VI of GATT 1994 might have a different meaning if read in isolation than if read in conjunction with the SCM Agreement. The drafters clearly foresaw the possibility of conflict between GATT 1994 and the MTN agreements, as evidenced by the general interpretive note to Annex 1A. If there could be conflicts between GATT 1994 and the MTN agreements, there could also be conflicts between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an MTN agreement.

239. We considered whether the potential for two different meanings of Article VI of GATT 1994 could be eliminated by insisting that it should always be interpreted in the light of the SCM Agreement or another such interpretive device. We rejected such a possibility.

240. The clear non-applicability of the SCM to this dispute means that if we were to conclude that Article VI of GATT 1994 may apply on its own, we would be obliged to interpret it as if the SCM Agreement did not exist. In the words of one third party, it would be our duty to take a "clean-slate" approach to the interpretation of Article VI of GATT 1994, avoiding concepts which could not fairly be deemed to flow directly from a proper, self-contained Article VI analysis. It would be legally improper to seek to reconcile any emergent differences between Article VI applied on its own and Article VI as it would be understood in conjunction with the SCM Agreement by reverting to the SCM Agreement, not as applicable law but as an interpretive aid -- even though the latter Agreement by its own terms does not apply to this dispute. Such an approach would be contrary to the ordinary meaning of Article 32.3 of the SCM Agreement. It would not be appropriate for this Panel to incorporate the requirements of the SCM Agreement indirectly where the SCM Agreement does not apply directly. If, then, we interpret the relevant provisions of the WTO Agreement as permitting the application of Article VI of GATT 1994 on its own, there would be a real and altogether serious possibility that Article VI of GATT 1994 would be imbued with one meaning where applied independently, and with a different, and potentially conflicting, meaning where applied in conjunction with the SCM Agreement as required by Article 32.1.[63]

(ii) Object and Purpose

241. What is the relevance of this possibility to the question of interpretation before us? An interpretation which allows this possibility strikes us as contrary to one of the central objects and purposes of the WTO Agreement. This adds considerable weight to the interpretation which regards the provisions concerning countervailing measures in Article VI of GATT 1994 and the SCM Agreement as an inseparable whole.

242. In our view, one of the central objects and purposes of the WTO Agreement, as reflected in the Preamble to that Agreement, is to "develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations…". This is one of the reasons that the WTO Agreement is a single undertaking, accepted by all Members. Unlike the pre-WTO regime, where contracting parties to GATT 1947 could elect whether or not to adhere to the Tokyo Round SCM Code, such option has been removed in the present regime. The integrated nature of the WTO system is reflected in Article II.2, which states that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 … are integral parts of this Agreement, binding on all Members". Essential to this integration is the creation of a single Dispute Settlement

[63]Specific examples are discussed in the context of a related argument in paragraphs 248-252.

Body governed by a single Understanding on Rules and Procedures Concerning the Settlement of Disputes ("the DSU"). A panel established pursuant to the DSU may under Article 7.1 examine any covered agreement(s) cited by the parties to the dispute. This integrated dispute settlement system avoids the problem of legal and procedural fragmentation that characterized the pre-WTO dispute settlement system, and allows a panel to interpret provisions of covered agreements in the light of the WTO Agreement as a whole. To revert to a situation where Article VI of GATT 1994 could have different meanings depending upon whether or not it was applied in conjunction with the SCM Agreement would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid.

243. To repeat, this consideration regarding the object and purpose of the WTO Agreement argues strongly in favour of the conclusion that Article VI of GATT 1994 cannot be applied to a dispute regarding countervailing measures where the SCM Agreement is not applicable.

244. This conclusion is further strengthened by additional consequences which would result from an interpretation that Article VI of GATT 1994 could apply in disputes such as this one where the SCM Agreement does not. As explained below, a signatory to the Tokyo Round SCM Code could find itself subject to obligations under Article VI of GATT 1994 applied alone which are more onerous than those to which it was subject pursuant to Article VI of GATT 1947 applied in conjunction with the Tokyo Round SCM Code and which are also more onerous than those to which it will be subject at such time as the SCM Agreement applies. This would represent a result which is both manifestly absurd and unreasonable.

245. The Philippines and certain third parties appear to assume that Article VI of GATT 1994 and its predecessor in GATT 1947 represent a set of core obligations relating to countervailing measures, and that the SCM Agreement and Tokyo Round SCM Code merely add further substantive and procedural obligations in addition to these core obligations. It follows from this assumption that, since Brazil is required under Article VI of GATT 1947 and the Tokyo Round SCM Code to comply with the relevant provisions of Article VI of GATT 1947, and since the text of Article VI of GATT 1994 is identical to that of Article VI of GATT 1947, Brazil's material obligations under the two Articles are identical. In addition, if this assumption is correct, application of Article VI of GATT 1994 in circumstances where the SCM Agreement does not apply would not place any obligations on Brazil beyond those with which it will eventually have to comply at such time as Article VI of GATT 1994 in conjunction with the SCM Agreement applies. Thus, while the need for a transition rule regulating the application of the new and different provisions of the SCM Agreement is clear, there was no reason for the drafters of the WTO Agreement to apply that transition rule to Article VI of GATT 1994.

246. This Panel considers, however, that this view of the relationship between Article VI and the respective SCM Agreements is erroneous. Article VI of GATT 1947 and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.

247. It is therefore not correct to view Article VI of GATT 1947 and Article VI of GATT 1994 as representing a core of identical rights and obligations. To the contrary, Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code, Article VI of GATT 1994 in isolation, and Article VI

of GATT 1994 in conjunction with the SCM Agreement, each represent a potentially differing set of rights and obligations. Further, it is by no means clear that a measure imposed consistently with Article VI and the Tokyo Round SCM Code or the SCM Agreement would be found to be consistent with Article VI of GATT 1994 in isolation. Thus, if we were to find that Article VI of GATT 1994 applies in cases where neither the Tokyo Round SCM Code nor the SCM Agreement apply, a Member's actions could potentially be found to be inconsistent with Article VI of GATT 1994 even though those actions were consistent with Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code and/or would have been consistent with Article VI of GATT 1994 in conjunction with the SCM Agreement, had the latter agreement applied.

248. A few examples may assist to demonstrate this point. In the dispute under consideration, Brazil in its determination stated that the Philippine government had submitted insufficient data regarding the existence and amount of subsidies to coconut fruit and their pass-through to desiccated coconut producers, and that it had therefore arrived at a level of subsidization for desiccated coconut producers on the basis of the data available. The report by Brazil's investigating authority recommending the imposition of the duties explicitly referred to Article 2.9 of the Tokyo Round SCM Code as its justification for resort to the data available. Article 2.9 states that:

> "In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary or final findings[12], affirmative or negative, may be made on the basis of the facts available". (footnote 12 omitted).

In its submissions to the Panel, Brazil relies on its right to use of best information available in justifying its determination. In support of the proposition that the use of best information available is permitted by Article VI of GATT 1994, Brazil cites to language in the Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties[64], and (contrary to assertions elsewhere that the Tokyo Round SCM Code cannot be used to interpret Article VI of GATT 1994) to Article 2.9 of the Tokyo Round SCM Code. While the Philippines does not challenge the practice of resorting to best information available *per se*, it does contend, relying in part on panel reports decided under Article 2.9 of the Tokyo Round SCM Code, that the use of best information available in this case was improper.

249. Article VI of GATT 1947 does not specifically provide for the use of best information available. By contrast, Article 2.9 of the Tokyo Round SCM Code authorizes the use of best information available, and a number of panel reports pursuant to the Tokyo Round SCM Code have applied that provision. Article 12.7 of the SCM Agreement contains language which is virtually identical to Article 2.9. This Panel does not express any view as to whether and to what extent, had it reached the issue, it would have found that the use of best information available is implicitly authorized by Article VI of GATT 1994. It is clear, however, that the Panel could in principle have reached a different conclusion on that question from that which it would have reached had it applied either the Tokyo Round SCM Code or the SCM Agreement. Under these circumstances, Brazil could have been in the situation where its actions were found to be inconsistent with Article VI of GATT 1994 in isolation, even though those actions were consistent with Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code and would have been consistent with Article VI of GATT 1994 in conjunction with the SCM Agreement had the latter agreement applied. The Panel considers that an interpretation of the WTO Agreement that could lead to such a result would be manifestly unreasonable.

250. A second example relates to the nature of the examination of causation of injury. Article VI:6(a) of GATT 1994 provides (as did its GATT 1947 predecessor) that:

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[64]L/1141 (adopted 27 May 1960), BISD 9S/1994.

> "No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".

Article 6.1 of the Tokyo Round SCM Code provides that "a determination of injury[17] for the purposes of Article VI of the General Agreement" (footnote 17 omitted) shall involve an objective examination of the volume and price effects of imports. Article 6.4 of the Tokyo Round SCM Code further provides that "[i]t must be demonstrated that the subsidized imports are, through the effects[19] of the subsidy, causing injury within the meaning of this Agreement". Note 19 defines those effects to be "[a]s set forth in paragraphs 2 and 3 of this Article"; paragraphs 2 and 3, in turn, refer to the volume and price effects of "subsidized imports". The SCM Agreement contains language virtually identical to that of the Tokyo Round SCM Code. On the basis of note 19, a Tokyo Round Panel determined that the analysis of causation required by Article VI in conjunction with the Tokyo Round SCM Code relates to injury caused by "subsidized imports" rather than by "subsidization" itself. United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153 (adopted 24 April 1994), paras. 328-337.

251. The question whether an assessment of causation of injury should relate to injury caused by subsidization or to injury caused by subsidized imports is a methodological issue with significant implications. The issue is not before us and we therefore are not expressing any view as to how this question would properly be resolved under Article VI of GATT 1994 in isolation, Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code, or Article VI of GATT 1994 in conjunction with the SCM Agreement. However, the conclusions of the Salmon Panel are based on language in the Tokyo Round SCM Code which does not appear in Article VI itself. Thus, it is evident to the Panel that Article VI of GATT 1994 in isolation could be interpreted differently from Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement. Further, the application of Article VI of GATT 1994 in isolation with respect to this issue could result in obligations on an investigating country which are more stringent than those imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement.

252. There are numerous additional examples of provisions of the Tokyo Round SCM Code and/or the SCM Agreement which define or clarify, and potentially modify, the meaning of Article VI. In many such cases, it is by no means inevitable that the obligations imposed by Article VI in isolation would be less than those imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement. For example, both the Tokyo Round SCM Code and the SCM Agreement authorize an investigating authority to exclude from the domestic industry when assessing material injury domestic producers which are also importers or which are related to importers. No such explicit authorization exists in Article VI of GATT 1994. Similarly, the SCM Agreement explicitly authorizes the cumulative assessment of the effects of subsidized imports from more than one country where certain criteria are satisfied. By contrast, neither Article VI of GATT 1947, Article VI of GATT 1994 nor the Tokyo Round SCM Code explicitly authorize cumulation. Indeed, the issue of cumulation under GATT 1947 and the Tokyo Round SCM Code was a matter of controversy among signatories to that Code.

253. In light of the foregoing analysis, it is clear that the application of Article VI of GATT 1994 in isolation could impose on a WTO Member for a certain period of time obligations which in some respects might be more onerous than those to which it would be subject once the SCM Agreement became applicable. This aggravates the problem of differing and inconsistent interpretations identified in paragraphs 238 to 240 above. However, the implications of this analysis extend further. When Brazil initiated its countervailing duty investigation in this case, the WTO Agreement had not yet entered

into force and Brazil could legitimately have expected to be able to proceed, and to have its actions adjudicated, on the basis of Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code. Brazil would further have been aware that the SCM Agreement would not apply to the investigation pursuant to Article 32.3 of that Agreement. If the Panel were to determine that Article VI of GATT 1994 was independently applicable to disputes initiated under the Tokyo Round SCM Code, the Panel would not only be opening a risk of conflicting interpretations of Article VI of GATT 1994 but would be holding WTO Members to a package of rights and obligations that were potentially more onerous than those to which they were subject under Article VI in conjunction with the Tokyo Round SCM Code when they initiated the investigation.

254. We note the Philippines' apparent view that Article VI of GATT 1994 can be interpreted in light of the Tokyo Round SCM Code and practice thereunder. It could be argued that, if this were the case, there would be no risk that Article VI of GATT 1994, in isolation, would be found to impose obligations beyond those imposed by Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code. We do not accept this view. First, this would require stretching the concept of "interpretation in light of the Tokyo Round SCM Code" too far. Even if Article VI of GATT 1994 could be interpreted in light of the Tokyo Round SCM Code, there could still be differences between Article VI of GATT 1994 by itself and the package of rights and obligations contained in Article VI of GATT 1994 and the Tokyo Round SCM Code taken in conjunction that no interpretation of Article VI of GATT 1994 could gloss over.

255. In any event, we do not consider that it would be appropriate to interpret Article VI of GATT 1994 in light of the Tokyo Round SCM Code. Article 31:3(a) of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which is generally held to reflect customary principles of international law regarding treaty interpretation, provides that "any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions" may be taken into account when interpreting a treaty. The Tokyo Round SCM Code may constitute such a subsequent agreement among Tokyo Round SCM Code signatories regarding the interpretation of Article VI of GATT 1947. However, Article II:4 of the WTO Agreement provides that the GATT 1994 is "legally distinct" from the GATT 1947. While GATT 1994 consists of, *inter alia*, "decisions of the CONTRACTING PARTIES to GATT 1947," the Tokyo Round SCM Code is not a "decision" of the CONTRACTING PARTIES. Thus, the Tokyo Round SCM Code does not represent a subsequent agreement regarding interpretation of Article VI of GATT 1994. For the Panel to conclude to the contrary would in effect convert that Code into a "covered agreement" under Appendix 1 of the DSU. If such an approach were followed, WTO Members that were Tokyo Round Code signatories would find that their Code obligations were now enforceable under the WTO dispute settlement system.

256. Article XVI:1 of the WTO Agreement provides that, "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". We recognize that the Pork Panel had indicated, in passing, that the Tokyo Round SCM Code represents "practice" under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Article 31.3 clearly distinguishes between the use of subsequent agreements and of subsequent practice as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent "customary practice" of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994 itself; rather,

only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994.

257. In conclusion, consideration of the relevant textual provisions of the SCM Agreement in their context and in the light of both their own object and purpose, and one of the central objects and purposes of the WTO Agreement as a whole, strongly supports the conclusion that the proper interpretation of the SCM Agreement would not allow Article VI of GATT 1994 to apply independently in situations in which the SCM Agreement does not apply.

(iii) GATT precedents

258. It was argued before us that the Pork Panel[65] constitutes precedent for resolving one of the key questions regarding applicable law -- the separability or otherwise of Article VI of GATT 1994 and the SCM Agreement. That Panel concerned a dispute between two signatories to the Tokyo Round SCM Code. Nevertheless, the Panel was established pursuant to Article XXIII of GATT 1947 and seemed to proceed on the basis of Article VI of GATT 1947 as the law applicable to the dispute in question. It could thus be argued on this basis that past practice indicated that Article VI of GATT 1947 could be applied independently of the Tokyo Round SCM Code. Given that several of the relevant provisions of the Tokyo Round SCM Code are similar to those in the SCM Agreement,[66] it could be further argued that a similar result should be reached in a dispute in the WTO under GATT 1994. Here too we are mindful of Article XVI:1 of the WTO Agreement, which provides that, "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". Moreover, whilst panel reports do not constitute formal precedent that subsequent panels must follow, where relevant they constitute useful and persuasive guidance. After careful consideration, however, we have concluded that the circumstances of the Pork Panel are of very limited relevance to the issue of applicable law before us.

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[65] United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada (adopted 11 July 1991), BISD 38S/30.

[66] Article 1 of the Tokyo Round SCM Code is virtually identical to the first sentence of Article 10 of the SCM Agreement (quoted in para. 237 above), providing as follows:

> *"Application of Article VI of the General Agreement*[3]
>
> Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty[4] on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.
>
> [4] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of the General Agreement". (footnote 3 omitted).

Similarly, Article 19.1 of the Tokyo Round SCM Code is virtually identical to Article 32.1 of the SCM Agreement (quoted in para. 238 above), providing as follows:

> "No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.[38]" (footnote 38 omitted).

259. In the Pork Panel the complainant chose as the forum in which to pursue dispute settlement a panel established pursuant to Article XXIII of GATT 1947 rather than pursuant to Article 18 of the Tokyo Round SCM Code. Article 18.1 of the Tokyo Round SCM Code provides that a panel established thereunder "shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this Agreement". Thus, the dispute in Pork could have been referred to a panel under the Tokyo Round SCM Code. However, the propriety of Article XXIII dispute settlement as a forum for that dispute was not raised by the parties, perhaps because the issues in question focused on concepts in Article VI which were not further elaborated in the Tokyo Round SCM Code. In other words, the central contentious issue before us was neither argued before the Pork Panel nor formed part of its deliberations and findings. Little weight can be given to the Panel's failure to consider the issue *sua sponte*. In any event, it is doubtful whether, given the fragmented nature of dispute settlement in the GATT system, a panel established under Article XXIII of GATT 1947 would have had the authority under its terms of reference to determine, in the light of provisions of the Tokyo Round SCM Code, that GATT Article XXIII was not the proper basis on which to pursue an application.[67]

260. Even if the issue of the choice of GATT Article XXIII dispute settlement had been argued, and if a panel established pursuant to Article XXIII had considered and decided that Article VI of GATT 1947 could be invoked independently of the Tokyo Round SCM Code, this decision would be of limited precedential effect for a panel established under the WTO. It is obvious that under the GATT system, Article VI of GATT 1947 would perforce apply on its own with respect to relations, and potential disputes, between Contracting Parties where one or both of those Contracting Parties was not a signatory to the Tokyo Round SCM Code. The pre-WTO system was, after all, characterized by a fragmentation both as regards applicable law and dispute resolution fora and procedure. We have, as noted, taken the view that one of the central objects and purposes of the WTO Agreement is to eliminate, as far as possible, that fragmentation through the creation of an integrated WTO system. Thus, the relevant provisions of the SCM Agreement being examined by this Panel must be interpreted in an altogether new and different legal context than the comparable provisions of the Tokyo Round SCM Code.

261. Consequently, the decision of the Pork Panel, made in different circumstances under a different regime of obligations, does not persuade us that we should reach a different interpretation of the relevant textual provisions of the WTO Agreement to the one we have reached.

(iv) Transition to the WTO System and the consequences of a finding of non-separability

262. We wish now to examine some of the alleged consequences of an interpretation of the WTO Agreement under which we would find that Article VI of GATT 1994 does not constitute applicable law in the circumstances of this dispute and the contention that such consequences must cast doubt on such an interpretation. One consequence, it is argued, would be to deny access to WTO dispute settlement with respect to a duty imposed as a result of a determination made after the entry into force of the WTO Agreement if that determination was the result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement. Surely, it is argued, if the act of determination took place after the date of entry into force of the WTO Agreement it should be subject to the WTO regime. The other consequence, it is claimed, would be that some WTO Members could be left without a forum to pursue their rights under either the GATT or WTO systems with respect

[67] As provided in the Montreal Improvements to the GATT Dispute Settlement Rules and Procedures, L/6489, dated 13 April 1989, the terms of reference of the Pork Panel were to examine the matter "in the light of the relevant GATT provisions".

to countervailing measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement.

263. In examining these alleged consequences and their possible significance it is important to recall that the issue of applicable law arises because of the particular temporal aspects of this dispute. The WTO Agreement entered into force for Brazil on 1 January 1995. The investigation resulting in the imposition of the duty was initiated on 21 June 1994, pursuant to an application made on 17 January 1994, prior to the date of entry into force of the WTO Agreement for Brazil. The definitive countervailing duty on desiccated coconut from the Philippines was imposed, however, on 18 August 1995 after the Agreement entered into force for Brazil.

264. The transition into a new legal regime, especially in relation to disputes such as this one which straddle the date of entry into force, frequently raises delicate legal issues. Transitional provisions typically try to balance the objective of a swift entry into force of the new agreement with the objective of safeguarding pre-existing and legitimate expectations surviving from its predecessor. In selecting a transitional regime States will balance these oft conflicting objectives. They may, at one extreme, apply the new regime fully to all measures existing at the date of entry into force of the new agreement. They may, at the other extreme, "grandfather" all measures existing at the date of entry into force of the new agreement. They may choose some "in-between" regime. The practice of States varies from agreement to agreement and, often, even within the same agreement, parties may agree on multiple transitional regimes for different subject matters. Delicate and difficult as these legal issues are, their importance abates since in time, as the new Agreement comes fully into force the transitional problems disappear.

265. The transition into the WTO system is clearly characterized by a multiple approach to the problem. In some areas of the Agreement, WTO substantive requirements became operative and dispute resolution became available from the date of its entry into force even in relation to pre-existing measures. E.g., United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R (29 January 1996), WT/DS2/AB/R (22 April 1996) (both adopted 20 May 1996). With respect to countervailing measures, immediate and full applicability of the WTO Agreement would mean that all existing measures, even those based on investigations and determinations completed before the WTO Agreement entered into force, could be immediately open to challenge in WTO dispute settlement proceedings, without the importing Member even having had an opportunity to assess the consistency of such existing measures with the new regime. At the other end of the spectrum, full grandfathering would permanently immunize existing measures from scrutiny under the new regime, even with respect to reviews of those measures. It is, however, abundantly clear that in relation to countervailing measures neither of these two extremes was adopted. The Members of the WTO constructed a more differentiated and gradual transitional regime for its entry into force. Perhaps this was because, unlike a measure whose consistency with the new regime can be evaluated without consideration of the process leading to its adoption, in the case of countervailing duties, procedural and substantive requirements are inextricably intertwined, and in assessing the consistency of a countervailing duty with the new regime, the process leading to its imposition must also be considered. The contours of this regime result from both the temporal provisions of the SCM Agreement and various instruments concerning the termination of GATT 1947 and the Tokyo Round SCM Code.

266. We now return to the two alleged consequences of a finding that Article VI of GATT 1994 does not constitute applicable law to this type of dispute. One result, it is argued, would be to deny access to WTO dispute settlement with respect to a duty imposed pursuant to a determination made after the entry into force of the WTO Agreement if that determination was the end stage of an investigation following an application made before the entry into force of the WTO. Surely, it is argued, if the act of determination took place after the entry into force of the WTO it should be subject to that regime. The other result, it is claimed, would be that some WTO Members could be left without a

forum to pursue their rights under either the GATT or WTO systems with respect to countervailing measures imposed pursuant to investigations initiated in response to applications made before the date of entry into force of the WTO Agreement. These results, it could be argued, are so manifestly absurd and unreasonable as to undermine the plausibility of an interpretation which would hold that Article VI of GATT 1994 does not constitute applicable law to a dispute such as the one before us.

267. After careful consideration this Panel does not accept this proposition for the following principal reasons, which are elaborated further below.

268. In the first place it rests on a simple misconception of the true effect of a finding that Article VI of GATT 1994, standing alone, does not constitute applicable law to a dispute of the type before us. The WTO substantive provisions and dispute resolution procedure are not, in fact, fully denied in either situation. They are, instead, phased in by the transitional provisions in the WTO. Under the WTO countervailing regime (Article VI of GATT 1994 and the SCM Agreement) Members may seek a review of duties imposed pursuant to a determination made after the entry into force of the WTO Agreement. Such a review, if conducted, must comply with the WTO regime even if the duties resulted from an investigation initiated pursuant to an application made before the date of entry into force of the WTO Agreement. Further, under a "sunset" provision, all measures are to be brought under the WTO regime, automatically, no later than five years after the entry into force of the WTO Agreement or the date of imposition of the measure, whichever is later.[68] Likewise, no WTO Members could be left totally without a forum to vindicate their rights with respect to countervailing measures imposed pursuant to investigations initiated as a result of applications made before the date of entry into force of the WTO Agreement. They too would have similar WTO rights through these reviews.

269. We readily acknowledge that the rights and remedies under this phase-in regime are in several respects less extensive and less effective than would be the case had the Agreement provided for a more accelerated transitional regime (say two years instead of five years), or no transitional regime at all, in the field of countervailing measures. But it is surely not for us to comment on the choices made by the framers of the WTO in this regard except as it bears on our interpretation of the WTO Agreement in relation to the non-applicability of Article VI and the SCM Agreement to disputes of the type before us. Even if an interpretation which excluded Article VI would mean, *quod non*, that some measures would be totally immunized from the new regime, this would not constitute in our view, given the wide variety in State practice regarding transitional regimes, a result so manifestly absurd or unreasonable as to throw doubt on such an interpretation, if it were otherwise strongly supported, as is the case here, by the text itself in its context and in the light of the object and purpose of the Agreement. That no measure or Member is, in fact, totally deprived of WTO rights and remedies clearly removes any doubt in this respect.

270. This is further confirmed if one examines the alleged consequences in the context of the overall transition regime to the WTO, which also comprises remedies under special arrangements made in relation to the previous regime. This could not have a direct bearing on the matter of interpretation before us. But, as will emerge, the sequence of negotiating and concluding these special arrangements lends some indirect support to this conclusion. It will also emerge that in some respects any shortcomings that Members may have in relation to measures resulting from investigations initiated pursuant to applications made under GATT 1947 and the Tokyo Round SCM Code, do not arise as a result of

[68]In many cases, the WTO will become effective for existing measures through a sunset review less than five years after the date of entry into force of the WTO Agreement. Specifically, for Members which maintained a sunset provision before the date of entry into force of the WTO Agreement, Article 32.4 of the SCM Agreement provides that a sunset review pursuant to WTO norms must be conducted not later than five years after the date of imposition of the measure, even if the measure was imposed before the date of entry into force of the WTO Agreement.

the transition rules governing the application of WTO rules to countervailing measures as such. Rather, any loss of existing rights arises out of the termination of GATT 1947 and the Tokyo Round SCM Code. At the time the WTO Agreement was signed, no understanding had been reached regarding if and when GATT 1947 and the Tokyo Round SCM Code would be terminated. Thus, we are hesitant, in interpreting the WTO Agreement, to give great weight to the effect of decisions that had not yet been taken at the time the WTO Agreement was signed.

271. Transitional issues, including how and when to terminate the GATT 1947 and the Tokyo Round Codes, were the subject of decisions taken by the Preparatory Committee for the World Trade Organization ("the Preparatory Committee"), the CONTRACTING PARTIES to GATT 1947 and the Tokyo Round SCM Committee after the WTO Agreement was signed but before its date of entry into force. One such decision, adopted by the Tokyo Round SCM Committee at the invitation of the Preparatory Committee, recognizes that, if signatories withdrew from the Tokyo Round Code or the Code were terminated immediately, certain countervailing measures might be subject neither to the Tokyo Round SCM Code nor to the SCM Agreement. In order to resolve this situation, the Decision provides that, in the event of withdrawal from or termination of the Tokyo Round Subsidies Code, the Code nevertheless will continue to apply with respect to any countervailing duty investigation or review which is not subject to application of the SCM Agreement pursuant to the terms of Article 32.3 of that Agreement. The Decision, which is to remain in effect for two years from the date of entry into force of the WTO Agreement, also provides that the Tokyo Round SCM Committee will remain in operation for the purpose of dealing with any dispute arising out of such an investigation or review. Finally, signatories undertake to make best efforts to expedite to the extent possible such investigations and reviews and procedures for the settlement of disputes so as to permit Committee consideration of any such dispute within the period of validity of the Decision.[69] Article 2.14 of the Tokyo Round SCM Code provides that investigations shall, except in exceptional circumstances, be concluded within one year of initiation. Thus, it appears that, even where the initiation of an investigation occurred after the date of entry into force of the WTO Agreement, pursuant to an application filed before that date, this Decision generally would allow a signatory an adequate opportunity to pursue dispute settlement under the Tokyo Round SCM Code with respect to any investigation or review not covered by the SCM Agreement.

272. The Philippines and Brazil are both signatories of the Tokyo Round SCM Code, and the Philippines could thus have invoked the dispute settlement provisions of that Code. We do not mean to suggest by this observation that this Decision in itself forecloses the Philippines from pursuing a claim under Article VI of GATT 1994. The availability of Article VI of GATT 1994 as applicable law in this dispute is a matter to be determined on the basis of the WTO Agreement, rather than on the basis of a subsequent decision by the signatories of the Tokyo Round SCM Code taken at the invitation of the Preparatory Committee. However, the invitation by the Preparatory Committee to the Tokyo Round SCM Committee to take this decision appears to represent an acknowledgement that Article 32.3 might leave WTO Members without a remedy with respect to certain countervailing measures, and provides at least a partial resolution to that situation.

273. The Philippines argues, and we acknowledge, that the foregoing Decision does not apply to all countervailing measures not subject to the SCM Agreement pursuant to Article 32.3 of the Agreement. Specifically, where one of the parties to a dispute involving countervailing measures is not a signatory to the Tokyo Round SCM Code, relations between the parties are governed only by GATT 1947. These parties cannot of course rely on the transition mechanism created by the Tokyo Round SCM Committee. We note, however, that a transitional decision of the CONTRACTING PARTIES to GATT

[69]See Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, SCM/187 (adopted 8 December 1994).

1947 resolved in part the dilemma confronting these parties. Pursuant to the Decision on the Transitional Co-Existence of the GATT 1947 and the WTO Agreement, L/7583 (adopted 8 December 1994), the GATT 1947 continued in force for one year after the date of entry into force of the WTO Agreement. The Decision further provided that, in the light of unforseen circumstances, the CONTRACTING PARTIES could decide to postpone the date of termination of GATT 1947 by no more than one additional year. As a result, Contracting Parties to GATT 1947 which desired to pursue dispute settlement with respect to a countervailing measure to which neither the Tokyo Round SCM Code nor Article VI of GATT 1994 in conjunction with the SCM Agreement applied had an additional year in which to invoke GATT 1947 dispute settlement.

274. The Panel is aware that Article 32.3 of the SCM Agreement, in conjunction with the transition decisions discussed above, does not create a seamless transition from the GATT 1947 to the WTO system. Under Article 32.3 of the SCM Agreement, countervailing duty investigations that were ongoing or with respect to which an initiation decision had not yet been made as of the date of entry into force of the WTO Agreement are not subject to Article VI of GATT 1994 in conjunction with the SCM Agreement. We are aware of several such countervailing duty investigations, as well as of a number of anti-dumping investigations that are similarly situated as a result of Article 18.3 of the WTO Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement), which is the counterpart in that Agreement to Article 32.3 of the SCM Agreement. However, the Sub-Committee on Institutional, Procedural and Legal Matters of the Preparatory Committee for the World Trade Organization considered a two-year period of co-existence between the GATT 1947 and the WTO Agreement. Had the Preparatory Committee ultimately recommended such a decision to the CONTRACTING PARTIES to the GATT 1947, this potential gap in coverage would not exist. Thus, the gap in coverage identified by the Philippines results from the terms on which the GATT 1947 was terminated, rather than from Article 32.3 of the SCM Agreement. Therefore, little interpretive emphasis can be placed on the existence of such a gap when interpreting the WTO Agreement.

275. In any event, the SCM Agreement by its own terms enters into effect with respect to existing measures over time. In this respect, we note that reviews of existing measures initiated pursuant to requests made after the date of entry into force of the WTO Agreement are subject to the SCM Agreement. Article 21.2 of the Agreement provides that:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately".

276. We further note that there is an outer limit to the non-applicability of Article VI of GATT 1994 in conjunction with the SCM Agreement in the form of a sunset clause. Article 21.3 of the SCM Agreement provides that:

> "any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the

> duty would be likely to lead to continuation or recurrence of subsidization and injury.[52]" (footnote 52 omitted).

Article 32.4 of the SCM Agreement specifies the manner in which this provision will enter into force under the Agreement's transitional regime:

> "For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph".

277. We recognize that these provisions regarding review are not comparable in effect to the immediate application of the WTO Agreement to all countervailing measures. The effect of reviews regarding the continued need for imposition of countervailing measures will likely be prospective and, depending on the date of imposition of the measure and the circumstances subsequent to its imposition, the exporting country Member may or may not be entitled to an immediate review. Nevertheless, it is clear from this provision that measures to which the WTO Agreement is not immediately applicable will nevertheless be brought under WTO disciplines over time pursuant to reviews under Article 21.2 of the SCM Agreement. Further, even measures maintained and imposed under the pre-WTO regime, and not subject to a review under Article 21.2 of the SCM Agreement, will ultimately be brought under WTO disciplines under this sunset provision.[70]

278. From the foregoing analysis, it is apparent that the WTO Agreement, in conjunction with the arrangements for the termination of GATT 1947 and the Tokyo Round SCM Code, create a transitional regime under which WTO disciplines and WTO dispute resolution become applicable to countervailing measures in a determined, phased-in manner. In other words, measures that are not immediately subject to the WTO regime are, for a limited period of time, insulated from scrutiny under that regime, although they may be subject to scrutiny under the old regime. The principal features of the transition to the WTO regime are as follows:

> Any countervailing measure imposed as a result of an application made on or after the date of entry into force of the WTO Agreement for a Member is immediately subject to WTO rules, and WTO dispute settlement, as is any review of a measure initiated as a result of an application made on or after the date of entry into force of the WTO Agreement for a Member.
>
> With respect to measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement:
>
> > Between Members which were signatories to the Tokyo Round SCM Code access to dispute settlement under that Code remains available for two years after the entry into force of the WTO Agreement. If dispute resolution under the Code is not sought, or

[70]We note that there are virtually identical provisions in the Anti-Dumping Agreement governing reviews of the need for continued imposition of duties and sunset. We further note that Article 9 of the Anti-Dumping Agreement requires that Members have either a prospective or retrospective duty assessment system. At least one Member with a retrospective duty assessment system applies WTO norms to such retrospective duty assessments. In such cases, the provisions of the Anti-Dumping Agreement would apply to the collections of all duties for the period covered by the retrospective duty assessment, which may include duties for periods prior to the entry into force of the WTO Agreement. Because the issue is not before us, this Panel expresses no opinion as to whether this is a requirement of the Anti-Dumping Agreement, nor as to whether a duty assessment system is required by the SCM Agreement.

> in the unusual case where the two-year period is insufficient, WTO dispute resolution will become available following reviews initiated pursuant to applications made on or after the entry into force of the WTO Agreement. At the outer limits, obligatory sunset reviews will bring measures under WTO disciplines and WTO dispute resolution will become available.
>
> For disputes among Members one or both of which were not signatories to the Tokyo Round SCM Code, dispute resolution under GATT 1947 was available for one year after the entry into force of the WTO Agreement. Otherwise, the WTO regime becomes effective for such disputes through reviews, the operation of the sunset clause, and the eventual availability of WTO dispute resolution in the same manner as for Tokyo Round SCM Code signatories.

It is not for us to comment on the choices made by the parties in setting up the regime for transition to the WTO regime in the field of countervailing measures -- save to mention that any transitional regime involves compromises. There is, in our view, nothing in this construction that is so unreasonable as to undermine this Panel's conclusion, based on our interpretation of the relevant textual provisions, that Article VI of GATT 1994 is not independently applicable to a dispute to which the SCM Agreement is not applicable.

279. It has been argued that it would be inconsistent with the object and purpose of the WTO Agreement to interpret that Agreement in a manner that denies a Member access to WTO dispute settlement with respect to a countervailing duty imposed after the entry into force of the WTO Agreement. The imposition of that duty, it is argued, constitutes an independent act which, since it takes place after the entry into force of the WTO Agreement, should be subject to its strictures. The problem in this case is that the circumstances underlying Brazil's imposition of a countervailing duty on imports of desiccated coconut are part of a process which straddled the date of entry into force of the WTO Agreement. It is an accepted principle of customary international law, reflected in Article 28 of the Vienna Convention, that rights and obligations under a new treaty do not apply retroactively. How to apply that principle to the particular case of a countervailing measure based on a process begun before, but completed after, the date of entry into force of the WTO Agreement, is a matter of great legal delicacy. We note that the parties to the dispute and certain third parties presented extensive arguments regarding the application in this case of the principle reflected in Article 28 of the Vienna Convention. But it should be noted that the principle set forth in Article 28 applies "[u]nless a different intention appears from the treaty or is otherwise established…". In this case, the Panel has reached its conclusions on the basis of the intention of the drafters as evidenced in the text of the WTO Agreement itself. Accordingly, we have not addressed the parties' arguments regarding customary principles of international law, nor do we express any view regarding the application of such principles in other contexts under the WTO Agreement. In our view, the SCM Agreement recognizes the principle of non-retroactivity, and taking into account the complexities of applying this general principle in the context of countervailing duties, resolves the difficult question of the operation of the general principle in this specific context through transition rules which spell out the precise temporal application of the SCM Agreement, as described above. By virtue of our conclusion that Article VI of GATT 1994 does not apply where the SCM Agreement does not apply, the same resolution of this problem would apply to Article VI of GATT 1994. In our view, this result is neither manifestly absurd nor unreasonable. Indeed, we consider it to be fully consistent with the purpose identified in the Preamble of the WTO Agreement to develop an integrated multilateral trading system. Even if the text allowed any interpretive leeway on this issue, which in our view it does not, any possible advantages of an interpretation which allowed immediate recourse to WTO dispute resolution under Article VI alone with respect to any countervailing duty imposed after the date of entry into force of the WTO Agreement is far outweighed by all the problems and difficulties flowing from such an interpretation, which, as discussed above, would lead to manifestly absurd and unreasonable results.

280. We recognize that Articles I, II and VI of GATT 1994 are interrelated, and that Article VI allows measures which might otherwise be inconsistent with Articles I and II of GATT 1994.[71] Clearly, the fact that the WTO Agreement creates a transition regime in which Article VI of GATT 1994 and the SCM Agreement become effective in a phased manner with respect to certain countervailing measures does not mean that, until those provisions become effective, such measures are inconsistent with Articles I and II of GATT 1994. It could not have been the intention of the drafters in creating a gradual, phased-in entry into force of Article VI and the SCM Agreement to render all measures subject to the phase-in immediately invalid. To the contrary, as explained above, this Panel concluded that the effect of this transition regime is to insulate countervailing measures imposed as a result of an investigation initiated pursuant to an application made before the date of entry into force of the WTO Agreement for a Member until such time as the measures are subject to a review to which Article VI of GATT 1994 and the SCM Agreement apply. Needless to say, this result has no bearing on the force and effect of Articles I and II of GATT 1994 with respect to measures other than those countervailing measures subject to the transition rule set forth in Article 32.3 of the SCM Agreement.

281. In light of the provisions of the WTO Agreement, interpreted in their context and in light of their object and purpose, as discussed above, this Panel concludes that Article VI of GATT 1994 does not constitute applicable law for the purposes of this dispute. As a result, the Philippines' claims under Articles I and II, which derive from their claims of inconsistency with Article VI of GATT 1994, cannot succeed.

2. Applicability of the Agreement on Agriculture

282. This Panel now turns to the question of the applicability of the Agreement on Agriculture to disputes such as this one, which involve countervailing measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement for a Member. The Philippines claimed that, even if the programmes at issue in Brazil's investigation constitute subsidies on coconut fruit, the programmes fully comply with the developing country and *de minimis* exemptions from domestic support commitments under Article 6 of the Agreement on Agriculture. Thus under Article 13(b)(i) of that Agreement the programmes are exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the SCM Agreement. Brazil contends that Article 13 of the Agreement on Agriculture only applies to countervailing duties subject both to the Article VI of GATT 1994 and the SCM Agreement, and that this is not the case here.

283. Article 13 of the Agreement on Agriculture provides that:

> "During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):
>
> . . .

[71]Reflective of this relationship is Article II:2(b), which provides that "[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product … any anti-dumping or countervailing duty applied consistently with the provisions of Article VI*" (note omitted). We note that the application of this provision requires a judgement regarding whether a countervailing duty is "applied consistently with Article VI". Here the measures are neither "consistent" nor "inconsistent" with Article VI of GATT 1994; rather, they are simply not subject to that Article, and any assessment of their consistency should be performed by reference to Article VI of GATT 1947 and, with respect to Tokyo Round SCM Code signatories, also with reference to that Code.

(b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:

(i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations…".

Note 4 to Article 13 provides that:

"'Countervailing duties' where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures".

284. We have previously concluded that neither Article VI of GATT 1994 in isolation, nor Article VI of GATT 1994 in conjunction with the SCM Agreement, apply to the measures at issue in this dispute. Countervailing duties are subject to Article 13 of the Agreement on Agriculture only if they are "covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures". Thus, we conclude that Article 13 of the Agreement on Agriculture does not apply to this dispute.

285. We further note that Article 13 of the Agreement on Agriculture reinforces our conclusions regarding the non-applicability of Article VI of GATT 1994 to this dispute. First, it appears from the text of Article 13 (specifically, to the consistent references to Article VI of GATT 1994 and the SCM Agreement) that the drafters expected that Article VI of GATT 1994 and the SCM Agreement would operate only in conjunction. Thus, Article 13 demonstrates that the WTO Agreement establishes an integrated package of rights and obligations relating to the use of countervailing measures. These rights and obligations are found in Article VI of GATT 1994, the SCM Agreement, and the Agreement on Agriculture. We do not consider that this package of rights and obligations would operate as intended if portions of the package were found to apply to a countervailing measure when other portions did not.

B. Failure to Consult

286. The Philippines requests a finding that Brazil's refusal to hold consultations under Article XXIII:1 of GATT 1994 in this matter is inconsistent with its obligations under that Article and Articles 4.1, 4.2 and 4.3 of the DSU. Brazil in response argues that the Philippines has failed to state a claim in this regard, and that therefore this issue is not within the Panel's terms of reference.

287. The Philippine's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU provides that "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former[3]". Moreover, pursuant to Article 4.6 of the DSU, consultations are "without prejudice to the rights of any Member in any further proceedings". In our view, these provisions make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member.

288. This Panel is bound to examine only those claims which fall within the scope of our terms of reference. In this case, the parties agreed to special terms of reference, directing the Panel to examine the "matter" referred to the DSB for settlement by the Philippines in the request for establishment of a panel, taking into account Brazil's submission in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996.

289. The parties disagreed concerning the standard by which a panel should evaluate whether a claim is within the terms of reference of a panel under the provisions of the DSU. Article 6.2 of the DSU requires that a request for establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In our view, at a minimum, it should have been possible, based on a reasonable reading of the documents determining the scope of the terms of reference, to conclude that this Panel would be asked to make findings regarding Brazil's failure to consult.

290. We examined the Philippines' request for establishment of a panel, and the additional documents the Panel was directed to take into account, in order to determine whether the Philippines had stated a claim regarding Brazil's failure to consult sufficiently to bring it within the scope of the Panel's terms of reference. The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to consult. It also identifies the countervailing measures imposed by Brazil, the Philippines' assertions of various violations with regard to those measures, and requested findings with respect to those measures. However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. We consider it self-evident that Brazil's submission in document WT/DS22/3 does not state a claim on behalf of the Philippines. Finally, while the record of the discussions in the DSB meeting of 21 February 1996 repeats the Philippines' view that consultations were not held because Brazil refused to consult, there is again nothing in that record that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. In our view, it would not have been possible, based on a reasonable reading of the documents determining the scope of the Panel's terms of reference in this dispute, to conclude that the Panel would be asked to make any finding regarding Brazil's failure to consult. We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference.

C. Translation of DTIC Opinion 006/95

291. On 12 June 1996, the second day of the Panel's first meeting with the parties, Brazil submitted a two-page document setting forth corrections to its translations of Interministerial Ordinance No. 11 and DTIC Opinion 006/95, indicating that the initial translation did not properly reflect the original Portuguese-language determinations. The Philippines objected to consideration of the corrected translations of the two texts, asserting that there were substantive differences between the initial and corrected translations. The Philippines subsequently submitted a letter objecting to the "acceptance" of the corrected translations, objecting to Brazil's failure to provide advance warning of the pending corrections, and inferring that the corrections were made in response to arguments made during the oral presentations of the Philippines and third parties and/or to address some of the concerns expressed in our questions to Brazil. The Philippines indicated three instances in which it considered that Brazil had gone beyond translation corrections to change the substance of the documents.

292. On 17 July 1996, at the Panel's second meeting with the parties, we issued the following ruling concerning this issue:

"The Panel takes note of the Philippine's request that the Panel 'not accept' the corrected translation, and in particular of the objections of the Philippines regarding corrections 1, 7 and 9 to Interministerial Directive no. 11.

"The Panel considers that it would have been preferable had Brazil confirmed the accuracy of its translations prior to submitting them to the Panel. However, for the Panel to decline to accept any linguistic corrections on the grounds they differed from the initial translation would prevent the Panel from reviewing should it become necessary the countervailing duty in light of the actual determination made by Brazil.

"The Panel has before it the original Portuguese-language text of Interministerial Directive no. 11 and translations prepared by both parties. The Panel will refer to both the Philippine and corrected Brazilian translations should it be required to consider the language of that Directive. Should there be any material difference between the two translations with respect to relevant language in the Directive, the Panel will if and as required resolve any such difference by reference to the original Portuguese-language Directive.

"The Panel has before it the original Portuguese-language text of DTIC Notice 06/95. Should the Panel be required to refer to DTIC Notice no. 06/95, and if the language considered was subject to correction by Brazil, the Panel will confirm the accuracy of the corrected translation by reference to the Portuguese-language text of the Notice. The Philippines may inform the Panel if it considers that any of the corrections inaccurately reflects the original Portuguese-language Notice.

"Should the Philippines consider that any modification to the Panel's procedures is required to accommodate these circumstances, the Panel is prepared to entertain any request for such a modification".

VII. CONCLUDING REMARKS

293. The substantive questions raised by the Parties to this dispute are a matter of major concern and would merit serious consideration. However, because the issue of applicable law was dispositive in this dispute, this Panel did not reach any conclusion with respect to those substantive questions.

VIII. CONCLUSIONS

294. In light of the findings above, the Panel makes the following conclusions:

(a) Article VI of GATT 1994 does not constitute applicable law for the purposes of this dispute. As a result, the substance of the Philippines' claims under that Article, and of its claims under Articles I and II of GATT 1994 which derive from their claims of inconsistency with Article VI of GATT 1994, cannot be considered by this Panel.

(b) The Agreement on Agriculture does not constitute applicable law for the purposes of this dispute. As a result, the substance of the Philippines' claims under that Agreement cannot be considered by this Panel.

(c) The Philippines' claim regarding Brazil's failure to consult is not within the terms of reference of this Panel and therefore its substance cannot be considered.

295. The Panel, having concluded that the substance of the Philippines' claims are not properly before it, recommends that the Dispute Settlement Body make such a ruling.

ANNEX 1

WORLD TRADE
ORGANIZATION

RESTRICTED
WT/DS22/3
29 January 1996
(96-0276)

Original: English

BRAZIL - MEASURES AFFECTING DESICCATED COCONUT

Communication from Brazil

The following communication, dated 24 January 1996, from the Permanent Mission of Brazil to the Chairman of the Dispute Settlement Body, is circulated at the request of that Delegation.

I have the honour to convey to you herewith a copy of document SCM/193 on the issue of countervailing duties imposed by Brazil on imports of processed desiccated coconut from the Philippines. The matter was referred to during the Tokyo Round Committee held on 31 October 1995.

As you will learn from the paper, during the past few months Brazil and the Philippines have faced, besides substantive issues relating to the Brazilian measure, the question of the applicable law under which consultations ought to be requested. Brazil understands, for the reasons indicated in the position paper, that the Tokyo Round Code on Subsidies and Countervailing Measures should be the only legal framework applicable to the dispute, whereas the Philippines espouse the opposite view.

In order to clarify the matter and to seek transparency on the subject with all the Tokyo Round Committee Members, the Brazilian Mission requested that said position paper be circulated, as a Committee document, among Members of the Committee on Subsidies and Countervailing Measures of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Tokyo Round Committee on Subsidies and Countervailing Measures) before 31 January.

Considering that, at the request of the Philippine Mission, the issue has been included in the agenda for the next meeting of the Dispute Settlement Body to be held on 31 January, I kindly request that the present letter and its attached document SCM/193 be circulated as a WTO document under a DS symbol, to all WTO Members before the DSB meeting.

Brazil understands that the DSB is not the appropriate forum for the discussion on the dispute with the Philippines and wishes to circulate document SCM/193 among WTO Members for information purposes only and without prejudice to its rights under the Tokyo Round Code on Subsidies and Countervailing Measures and to its position on the applicable law.

RESTRICTED
SCM/193
26 January 1996
Special Distribution

(96-0274)

GENERAL AGREEMENT

ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

Original: English

BRAZIL - IMPOSITION OF COUNTERVAILING DUTIES ON IMPORTS OF PROCESSED DESICCATED COCONUT FROM THE PHILIPPINES

Communication from Brazil

The following communication, dated 24 January 1996, has been received from the Permanent Mission of Brazil.

I have the honour to convey to you herewith a position paper prepared by Brazil on the issue of countervailing duties imposed by Brazil on imports of processed desiccated coconut from the Philippines. The matter was referred to during the Tokyo Round Committee held on 31 October 1995.

As you will learn from the paper, during the past few months Brazil and the Philippines have faced, besides substantive issues relating to the Brazilian measure, the question of the applicable law under which consultations ought to be requested. Brazil understands, for the reasons indicated in the position paper, that the Tokyo Round Code on Subsidies and Countervailing Measures should be the only legal framework applicable to the dispute, whereas the Philippines espouse the opposite view.

In order to clarify the matter and to seek transparency on the subject with all the Committee Members, I kindly request that the said position paper be circulated, as a Committee document, among Members of the Committee on Subsidies and Countervailing Measures of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Tokyo Round Committee on Subsidies and Countervailing Measures) before 31 January.

The Permanent Mission of Brazil in Geneva hereby submits relevant information concerning the adoption of countervailing duties on imports of desiccated coconut from the Philippines.

I. Summary of the Investigation and the Legal Framework

1. The Brazilian authorities initiated investigations on subsidies granted to coconut processors in the Philippines and four other countries through Public Notice SECEX No. 40, dated 21 July 1994.

2. The investigations were based on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Tokyo Round Agreement on Subsidies and Countervailing Measures), to which the Philippines and Brazil are parties.

3. After preliminary findings, the Brazilian authorities imposed provisional countervailing duties on imports of Philippine desiccated coconut through Public Notice No. 113, dated 23 March 1995. Later, the Brazilian authorities concluded that subsidies actually existed and imposed definitive countervailing measures on imports of processed desiccated coconut from the Philippines through Public Notice No. 11, dated 10 August 1995.

II. Discussions with the Philippine Side

4. On 10 November 1995, the Permanent Representative of the Philippines in Geneva addressed a letter to the Chairman of the Committee on Subsidies and Countervailing Measures in which she informed that the "Government of the Republic of the Philippines wishes to initiate procedures under Article 17 of the Tokyo Round Agreement on Subsidies and Countervailing Measures …". Brazil replied on 14 November that since formal consultations under the Tokyo Round Code had not been requested nor had taken place, it would be improper to jump to the conciliation process of Article 17. Brazil also indicated that it was ready to start formal consultations upon request by the Philippines.

5. On 27 November 1995, the Permanent Representative of the Philippines addressed a letter to the Permanent Representative of Brazil requesting formal consultations under Article XXIII:1 of GATT 1994. The Brazilian answer, dated 8 December 1995 stated that the Permanent Mission of Brazil was ready for consultations "as long as it was mutually understood that those consultations will be undertaken exclusively under the Code on Subsidies and Countervailing Measures […] resulting from the Tokyo Round, under which auspices coconut subsidies investigations were conducted and countervailing duties imposed".

6. On 13 December 1995, the Philippines replied that the Brazilian answer constituted a refusal of their request for consultations under Article XXIII:1 of GATT 1994.

7. On 10 January 1996, Brazil once again reiterated the contents of its previous letter dated 8 December, in which it was informed that Brazil was "prepared to enter into consultations with the Philippines on the matter of countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines. Since the investigation and the imposition of definitive countervailing duties were held under the Tokyo Round Code on that specific matter […]. Brazil considers that the legal framework for consultations on the subject is the same Tokyo Round Code, which is still in place until the end of the current year for dispute settlement purposes".

8. Brazil has, therefore, for three times offered formal consultations to the Philippines. No reply in the sense of the acceptance of those offers ever reached the Brazilian mission.

9. In a letter dated 16 January 1996 the Government of the Philippines informed the Government of Brazil that they had decided to request a panel.

III. Brazilian Arguments

10. The Brazilian position on this matter is as follows:

(a) The Philippines stand in favour of the application of Article VI of GATT 1994 to this dispute is unacceptable to Brazil and raises relevant systemic issues of interest to all Members of the WTO;

(b) The Brazilian investigation started in 1994, under the Tokyo Round Code on Subsidies and Countervailing Measures;

(c) The Tokyo Round Code is in force until 31 December 1996 and may be invoked by the Philippines;

(d) Furthermore, the scope of Article VI of GATT 1947 is legally distinct from that of Article VI of GATT 1994. Article VI of GATT 1947, as interpreted by the Tokyo Round Agreements, embodied a specific set of rights and obligations; Article VI of GATT 1994, as interpreted by the Agreement on Subsidies and Countervailing Measures, embodies another specific set of rights and obligations. To invoke Article VI of GATT 1994 implies the adoption of the specific views of the WTO agreements as opposed to those of the Tokyo agreements. Therefore, to invoke now Article VI of GATT 1994 to a dispute started under the Tokyo Round Code would constitute an attempt to apply an inappropriate legal framework;

(e) Any attempt to frame the present case within the scope of the WTO agreements constitutes an attempt to circumvent the application of the appropriate law;

(f) No formal consultations ever took place between the Brazilian and the Philippine Missions in Geneva, in spite of reiterated Brazilian offers to do so.

VI. Conclusions

11. In summary, Brazil reiterates its disposition to consult with the Philippine Mission on the basis of the relevant provisions of the Tokyo Round Code on Subsidies and Countervailing Measures.

12. Brazil considers this issue of particular interest to all WTO Members because in substantive terms it goes well beyond the question of the adoption of a certain level of countervailing duties. In fact, the central issue is the question of the application of the appropriate legal framework.

ANNEX 2

RESTRICTED

WORLD TRADE ORGANIZATION

WT/DS22/5
8 February 1996

(96-0478)

Original: English

BRAZIL - MEASURES AFFECTING DESICCATED COCONUT

Request for the Establishment of a Panel by the Philippines

The following communication, dated 5 February 1996, from the Permanent Mission of the Philippines to the Chairman of the Dispute Settlement Body, is circulated at the request of that delegation.

On 27 November 1995, the Government of the Philippines requested the Government of Brazil to enter into consultations pursuant to Article XXIII:1 of the 1994 General Agreement on Tariffs and Trade (GATT 1994). A copy of this request was notified to the Dispute Settlement Body (DSB) as well as to the Council on Trade in Goods, the Committee on Subsidies and Countervailing Measures, and the Committee on Agriculture, in accordance with Article 4:4 of the Dispute Settlement Understanding.

The Philippines requested consultations under Article XXIII:1 because benefits under GATT 1994 are being nullified and impaired as a result of the 121.5 per cent countervailing duty imposed on Philippine exports of processed desiccated coconut products, which is inconsistent with Brazil's obligations under Article VI of GATT 1994, in particular with respect to paragraphs 3 and 6(a).

Even if assuming the development assistance extended to coconut farmers were to be considered subsidies, and that these were passed on entirely to benefit independent desiccated coconut processors, the Brazilian measure would also be inconsistent with Brazil's obligations under Article 13 of the Agreement on Agriculture.

Additionally, the Philippines is of the view that:

1. Brazil did not give the Philippines reasonable opportunity, throughout the investigation, to clarify the factual situation. As previously stated by the Philippine Government, there is no subsidy granted to desiccated coconut processing. Development assistance was provided to coconut farmers through a levy collected from them, and not through the government budget. These were private funds of the coconut farmers.

2. In calculating the amount of the subsidy and the countervailing duty, Brazil relied on *'information available'* which excluded data and information on the type of assistance programmes to the coconut producers that was provided by the Philippines.

./.

3. Brazil calculated the amount of the alleged subsidy and countervailing duty by treating the coconut fruit as substitutable for desiccated coconut when these two products are not like products. Moreover, Brazil is a producer of coconuts and desiccated coconut, both of which are available in the domestic market of Brazil, and should therefore not have treated the coconut fruit as a substitute for desiccated coconut.

4. In investigating the assistance programmes to the Philippine coconut industry, Brazil failed to recognize that these programmes, as implemented by a developing country like the Philippines, should not have been considered as subsidies *per se*. Moreover, as the Philippines had previously testified, the source of funds for the assistance programmes came from a levy on coconut production, and not from any government budget.

For the further information of the DSB, we understand that Brazil has only recently notified the WTO of the instruments that imposed the provisional countervailing duty of 14.1 per cent on 28 March 1995, and the definitive countervailing duty of 121.5 per cent on 21 August 1995.

In its response dated 8 December 1995, Brazil stated that it was prepared to enter into consultations with the Philippines as long as it was mutually understood that those consultations would be undertaken exclusively under the 1979 Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (or, Tokyo Round Code on Subsidies and Countervailing Measures), under which auspices the coconut subsidies investigations were conducted and the countervailing duties imposed.

In a letter dated 13 December 1995, the Philippines replied that Brazil's response constituted a refusal of the request for consultations under Article XXIII:1, but that it hoped that Brazil would be able to engage the Philippines in such consultations within the 30-day period provided in Article 4:3 of the Dispute Settlement Understanding (DSU).

Unfortunately, Brazil has failed to enter into consultations with the Philippines within the period prescribed in the DSU.

The Government of the Philippines requests the establishment of a Panel pursuant to Article XXIII:2 of GATT 1994 and Articles 4 and 6 of the DSU, and under the standard terms of reference provided in Article 7.1 of the DSU. The Philippines requests that the Panel consider and find that:

1. The countervailing duty imposed by Brazil is inconsistent with paragraphs 3 and 6(a) of Article VI of GATT 1994.

2. Brazil should desist from further imposing the countervailing duty on desiccated coconut exports of the Philippines, and reimburse whatever duties were collected.

The Philippines submits this request for the establishment of a Panel for inscription in the agenda of the next meeting of the DSB on 21 February 1996, and further requests that a special meeting of the DSB be convened not later than 15 days after the meeting of 21 February.

ANNEX 3

RESTRICTED

WORLD TRADE ORGANIZATION

WT/DSB/M/11
19 March 1996

(96-0987)

DISPUTE SETTLEMENT BODY
21 February 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 February 1996

Chairman: Mr. C. Lafer (Brazil)

Subjects discussed: Page

1. Brazil - Measures affecting desiccated coconut
- Request by the Philippines for the establishment of a panel (WT/DS22/5)

The Chairman recalled that this matter had been proposed for inscription on the Agenda of the DSB meeting on 31 January. Its consideration was, however, postponed to the next meeting of the DSB. He then drew attention to the communication from the Philippines in document WT/DS22/5.

The representative of the Philippines said that since her country's request for the establishment of a panel was explained in WT/DS22/5 she wished only to point out that the 121.5 per cent

countervailing duty imposed by Brazil on Philippine's exports of desiccated coconut was inconsistent with Brazil's obligations under Article VI of GATT 1994 and other related covered agreements. The measure nullified Philippine's benefits under the GATT 1994. In was her country's view that an investigation should not have been initiated by Brazil nor a countervailing duty have been imposed. Although several meetings had been held with Brazil over the last few months on this matter, it had not been possible to arrive at a mutually agreed solution. Therefore, the Philippines requested that a panel be established at the present meeting and hoped that Brazil would be able to agree to this request.

The representative of Brazil recalled that his country's arguments concerning this dispute were contained in WT/DS22/3. During the last few months, Brazil and the Philippines had been discussing the question of applicable law, i.e., the legal framework to examine a countervailing measure imposed by Brazil on coconut imports from the Philippines. Brazil firmly believed that a measure should be reviewed against the same standards which had been used for its adoption. This principle was contained in Article 32.3 of the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM). Members had also agreed on that principle in the transitional arrangements negotiated in 1994[72]. Overturning this principle would not be very constructive and might cause serious problems for the WTO system. Members were formally and morally requested to abide by the rules which they had established. This issue involved important standards such as fairness, reasonableness and legality. Fairness, because all procedures, decisions and practices under a certain legal system ought to be examined. Reasonableness, since the Philippines had an effective remedy for their complaint in the Tokyo Round Subsidies Code which was in place for dispute settlement purposes until the end of 1996. Brazil was not against the reasonable right of the Philippines to seek redress to what it perceived as nullification and impairment of its benefits. Legality, because decisions had been taken to avoid "contamination" of the WTO with GATT cases. In December 1994, Members had decided that the Tokyo Round Code would be extended until December 1996 in order to deal with cases initiated under that Code, prior to the establishment of the WTO, and that the SCM Agreement would not apply to investigations initiated before 1 January 1995. Brazil and the Philippines were still discussing this matter. Brazil therefore considered that it was premature to establish a panel at the present meeting and wished the DSB to revert to this matter at its next meeting.

The representative of Indonesia, speaking on behalf of ASEAN countries, said that ASEAN countries supported the request for the establishment of a panel. The Philippines had only invoked its rights under Article VI of GATT 1994 to which Brazil was also bound. It had chosen neither to invoke the Tokyo Round Subsidies Code nor its rights under the SCM Agreement. Therefore, ASEAN countries did not support Brazil's view that the question of the applicable law should first be resolved. The Philippines had complied with the DSU requirements and the DSB would have to establish a panel. Indonesia and Malaysia had also been affected by the same measure taken by Brazil on 21 August 1995. The investigation initiated by Brazil on desiccated coconut was inconsistent with its obligations under Article VI of GATT 1994 and the WTO. This had resulted in definitive countervailing duties of 155.57 and 196.5 per cent for Indonesia and Malaysia respectively. He reiterated that Brazil had neither conducted the investigation transparently nor had it provided a reasonable opportunity for Indonesia and Malaysia to clarify the factual situation. Although a set of questionnaires had been answered, and some statistical data and various legal dispositions submitted, Brazil had neglected to take this information into account since it was not supplied in Portuguese. Brazil's Government which should have determined and calculated the subsidy margin on the basis of information available, had violated Article VI of the GATT 1994. Malaysia and Indonesia reserved their right to actively participate in the panel as third parties.

[72] PC/15-L/7586 and PC/16-L7587

The representative of Sri Lanka said that his delegation supported the Philippines' request for the establishment of a panel. His country agreed with the Philippines on the rationale for a panel to examine the countervailing duties imposed by Brazil on exports of desiccated coconut from the Philippines. Sri Lanka was one of the countries which had also been severely affected by Brazil's action on desiccated coconut and coconut milk powder. The countervailing duty imposed by Brazil on 21 August 1995 on imports of desiccated coconut and coconut milk powder amounted to 81.4 per cent and 175.8 per cent respectively. Sri Lanka considered Brazil's action as unjustifiable and unreasonable because it violated Sri Lanka's rights under the GATT 1994. Consultations had been held with Brazil with a view to arriving at a mutually acceptable solution, but the outcome of these consultations had not been positive. Sri Lanka would hold further consultations with Brazil until all prospects of arriving at a mutual settlement were exhausted. Sri Lanka's exports of desiccated coconut and coconut milk powder had come to a halt as a result of Brazil's action. As his country had a direct trade interest in the matter, it reserved its third-party rights.

The representative of the Philippines thanked Brazil for elaborating on its position with respect to the application of Article VI of GATT 1994 contained in WT/DS22/3 and wished to make the following points. First, in past GATT practice it had been recognized that it was up to the complainant to decide whether it wanted to invoke the general GATT provisions -- in this case Article VI -- or the specific Tokyo Round Code provisions. There had been disputes in the past where parties had invoked their rights with respect to Article VI and not the Tokyo Round Codes. Second, the fact that Brazil's investigation had started in 1994 under the Tokyo Round Subsidies Code did not deprive the Philippines of their rights under GATT 1994 and the DSU. The Philippines' view was that the transitional provision in Article 32.3 of the SCM Agreement applied to the said Agreement itself and did not govern the application of Article VI of GATT 1994 which, since its entry into force in 1995, required Brazil to implement countervailing measures only in conformity with Article VI. Third, although the Tokyo Round Committee continued to be in place until the end of 1996, this did not preclude the Philippines from invoking its rights under GATT 1994. Moreover, the Decision of 8 December 1994 on Transitional Co-existence of the Tokyo Round Subsidies Code and the WTO Agreement confirmed the priority of WTO dispute settlement procedures over the Tokyo Round Subsidies Code. The Decision of 8 December 1994 on the consequences of termination of, or withdrawal of, the Tokyo Round Subsidies Code governed only the transition from the Tokyo Round Subsidies Code to the 1994 SCM Agreement. This Decision did not prevent the right of Members to invoke Article VI of GATT 1994 and the DSU. Fourth, Brazil had stated that Article VI of GATT 1947, as interpreted by the Tokyo Round Subsidies Code, was legally distinct from Article VI of GATT 1994, which in turn was interpreted by the 1994 SCM Agreement. To invoke Article VI of GATT 1994 "implied the adoption of the specific views of the WTO agreements as opposed to those of the Tokyo Round Agreements."[73] It was the Philippines' position that Article VI of GATT 1994 and the SCM Agreement were two distinct legal instruments and the Philippines was simply invoking its rights under Article VI of GATT 1994. Brazil also alleged that in spite of its repeated offers to consult no formal consultations ever took place. Consultations had not been held because Brazil refused to consult. She reiterated that on 27 November 1995 the Philippines had requested consultations under Article XXIII:1 on the consistency of Brazil's measure with respect to Article VI of GATT 1994. On 29 November the Philippines had notified the DSB, the Council for Trade in Goods, the Committee on Subsidies and Countervailing Measures and the Committee on Agriculture of its request. On 8 December, Brazil had offered to consult only under the Tokyo Round Subsidies Code. In a letter dated 13 December, the Philippines had stated that Brazil's response of 8 December constituted a refusal to consult under Article XXIII:1. Therefore the Philippines hoped that Brazil would be able to engage in Article XXIII:1 consultations within the 30-day period provided for in Article 4.3 of the DSU. On 10 January 1996 Brazil had responded to the Philippines' letter of 13 December 1995 and had reiterated its offer to consult only under the Tokyo Round Subsidies Code. On 15 January the Philippines had informed Brazil that, since Brazil maintained its position,

[73]SCM/193, p.3.

the Philippines had no other recourse but to invoke Article XXIII:2 of GATT 1994 and Articles 4.3, 6 and 7.1 of the DSU. Thus, on 17 January the Philippines had requested the establishment of a panel. The Philippines sought redress from the actions of Brazil under Article VI of GATT 1994. It had faithfully adhered to the requirements in the DSU, and now requested the establishment of a panel. Since Brazil's did not agree with the establishment of a panel at the present meeting the Philippines requested a DSB meeting within 15 days in order to consider its request for the establishment of a panel.

The representative of Brazil said that his delegation noted all the statements made at the present meeting. He reiterated that this issue involved such important standards as fairness, reasonableness and legality as he had stated in the statement made earlier. He stressed that Brazil had never refused to consult. It had only insisted that consultations should be held under the Tokyo Round Code provisions. The question of applicable law was central to this case and if a panel was established Brazil would request a preliminary ruling on the question of the applicable law.

The DSB took note of the statements and agreed to convene its next meeting on 5 March in order to revert to this matter.

2. United States - Standards for reformulated and conventional gasoline
- Panel report (WT/DS2/R)

The Chairman recalled that at its meeting on 10 April 1995, the DSB had established a Panel to examine the complaint by Venezuela. On 31 May 1995 the DSB had established a Panel to examine the complaint concerning the same matter by Brazil. At that meeting, pursuant to Article 9 of the DSU in respect of multiple complaints the DSB had decided, with the agreement of all parties, that for practical reasons this matter be examined by the panel already established at the request of Venezuela on 10 April 1995. The Panel report, contained in document WT/DS2/R and circulated on 29 January 1996, was now before the DSB for adoption at the request of Venezuela.

Mr. Harbinson (Hong Kong), speaking in his personal capacity on behalf of Mr. Wong, Chairman of the Panel, said that the Panel had been established by the DSB on 10 April 1995 at the request of Venezuela. The Panel had been given standard terms of reference, with Mr. Joseph Wong as Chairman and Mr. Crawford Falconer and Mr. Kim Luotonen as panelists. Australia, Canada, the European Communities and Norway had reserved their rights to participate in the Panel proceedings as third parties. On 31 May 1995, the DSB had established a Panel on the same matter at the request of Brazil. Pursuant to Article 9 of the DSU in respect of multiple complainants the DSB had decided, with the agreement of all the parties, that for practical reasons this matter be examined by the Panel already established at the request of Venezuela. The Panel had met with the parties to the dispute from 10 to 12 July 1995 and from 13 to 15 September 1995. It had also met with the interested third parties on 11 July 1995. The Panel had issued its interim report to the parties on 11 December 1995. Following a request made by the United States pursuant to Article 15.2 of the DSU, the Panel had held a further meeting with the parties on 3 January 1996. The Panel had issued its final report to the parties to the dispute on 17 January 1996. The Panel had examined the final decision adopted on 15 December 1993 by the United States Environmental Protection Agency, "Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline" (the Gasoline Rule). After a thorough analysis of the underlying facts and arguments of the parties, and in the light of the findings contained in the final report, the Panel had concluded that the baseline establishment methods contained in the Gasoline Rule were not consistent with Article III:4 of the General Agreement, and could not be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement. The Panel had therefore recommended that the DSB request the United States to bring the measures in question in conformity with its obligations under the General Agreement. In concluding, the Panel had underlined

that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, Members were free to set their own environmental objectives but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.

The representative of Venezuela expressed his delegation's gratitude to the panelists and the Secretariat for their meticulous and well-structured work. His country appreciated the time and efforts devoted to reviewing and analysing the facts and the legal arguments submitted by the parties during the proceedings, and the efforts in the search for a satisfactory settlement of the dispute. Parties to the dispute had been given equitable opportunity to participate in the proceedings both orally and in writing. The Panel's conclusions followed the same line of reasoning as that of other panels in GATT history. Several aspects of the Panel report deserved special mention. First, the report recognized explicitly that no rule or provision of the WTO Agreement prevented the United States from setting its own clean air standards. Members had sovereign authority in setting their own environmental objectives but they were bound to ensure that national standards and regulations accorded treatment to imported products which was no less favourable than that granted to like domestic products. Second, the report acknowledged what Venezuela had repeatedly stated to the United States namely, that the objectives of the Clean Air Act aimed at improving air quality were not questioned. Venezuela had brought the matter to the Panel to demonstrate that those objectives could be achieved without discriminating against imported gasoline and were in full conformity with the principle of national treatment laid down in Article III of the General Agreement. In this connection, the Panel upheld Venezuela's argument that there was no justification for the discriminatory aspects of the Gasoline Regulation, since several alternative methods were available to the United States to meet environmental objectives without distorting the competitive conditions between imported and domestically-produced gasoline. Far from seeking privileges or special treatment, all that Venezuela had asked of the United States was treatment for Venezuelan gasoline which was not less favourable than the treatment established in the Regulation for the like product of US origin. Therefore, the settlement of this dispute by means of the WTO procedures, had occurred despite Venezuela's wish.

From the beginning of the process of elaboration of the Gasoline Regulation in 1992 until 1994 his country had been proposing alternatives to the United States enabling to avoid all discrimination against imported gasoline. One of these alternatives was an agreement between the two countries to be applied in conformity with the most-favoured-nation principle. Unfortunately the US Congress, when enacting the Gasoline Regulation, had refused funds for putting that proposal into effect. Therefore Venezuela had decided to bring its complaint to the DSB. Thereafter, in the framework of the WTO dispute settlement proceedings, alternatives had been presented to the Panel which, after subjecting them to a thorough and balanced examination, had agreed with Venezuela that they were feasible both practically and legally. Some of the measures were fully consistent with the General Agreement, while others, which were less clearly consistent, at least had the virtue of generating a less trade restrictive effect. In the light of these considerations and in accordance with Article 16.4 of the DSU Venezuela had requested that the adoption of the report be included in the Agenda of the present meeting. However, the United States had notified its intention to apply for a review by the Appellate Body of certain legal aspects of the report. While recognizing that the United States had the right to appeal, its decision to do so could set a pattern which might be followed by Members where panel reports were unfavourable to them. Clearly, this would adversely affect the credibility of panel reports.

The representative of the United States said that the Panel report had been inscribed on the Agenda of the DSB for consideration at the present meeting. However since the United States had notified its decision to appeal certain legal issues, Article 16 of the DSU prevented consideration of the report for adoption at the present meeting. The DSB was not the appropriate forum to discuss

the legal issues of the report that the United States had asked the Appellate Body to review which concerned the panel's consideration of Article XX of the General Agreement. However, the United States had serious concerns about the panel's treatment of issues not covered by this appeal. He was referring to what the United States considered a significant and inappropriate deviation from the customary practice that panels had followed in the past under the GATT 1947. Under past practice, panels had carefully avoided discussing legal issues that were uncontested during the panel proceedings, or unnecessary to the panel's findings in a particular dispute. Since Article XVI:1 of the WTO Agreement affirmed that the WTO shall be guided by the customary practices of the bodies established in the framework of the GATT 1947, it was the United States' expectation that this panel would follow that practice. Regrettably, it did not. In responding to the claim that the US measure in question was inconsistent with Article III:4 of the GATT 1994, the United States did not contest that the measure openly treated imports differently than like domestic products, and the panel acknowledged this position. Nonetheless, the panel proceeded to discuss at length the issue of like products with reference to hypothetical situations not presented, and it did so in a manner that appeared to offer opinions on arguments and issues that had arisen or might arise in the context of disputes other than this one. Such discussion was inappropriate and should serve as a model for what future panels should not do. Article 11 of the DSU clearly set out the limited role of panels, which was "to make an objective assessment of the matter before it, including the facts of the case." By opining on matters that were neither contested nor necessary to reach its conclusions, the panel exceeded these limits. The GATT 1947 panel process gained the confidence of delegations negotiating the DSU in part because of the conservative approach panels generally took in confining themselves strictly to the issues presented for resolution. The departure of this panel from that principle, and its foray into unnecessary *obiter dicta*, did not set a good example for the new WTO system. The United States expected that future panels would refrain from such wandering into policy issues. It simply was not appropriate in the context of dispute settlement.

The representative of Brazil wished to express its gratitude to the panelists, who had put tremendous efforts in understanding and deciding this case, and to the Secretariat who had been efficient and reliable as usual. The decision by the United States to appeal did not, in Brazil's opinion, diminish the merits of this report. One of these merits was the finding that discrimination could not be justified if the disciplines were not respected. One of the other merits of the report was that, "under the General Agreement WTO Members are free to set their own environmental objectives, but they are bound to implement these objectives through measures consistent with its provisions, notably with those on the relative treatment of domestic and imported products".[74] Since the beginning of this dispute settlement procedure, his delegation had expressed its view that this was not an environmental case. Brazil continued to hold this view, and agreed with the conclusions of the panel in this respect.

The DSB took note of the statements and of the US decision to appeal to the Appellate Body the panel report in DS2/R.

3. Turkey - Action on imports of textiles and clothing
   - Statement by Hong Kong

The Chairman drew attention to the request for consultations by Hong Kong contained in WT/DS29/1.

The representative of Hong Kong said that his authorities fully respected the rights of Members to form customs unions or free-trade areas in accordance with the relevant provisions of the multilateral

[74]DS2/R para. 7.1.

instruments which governed such matters. Nonetheless, Hong Kong was very much concerned that the implementation of customs unions or free-trade areas should not adversely affect other Members. He wished to raise Hong Kong's serious concern over a specific issue associated with the implementation of the Customs Union between Turkey and the European Community. On 1 January 1996, quantitative restrictions had been imposed by Turkey on the import of a broad range of textile and clothing products from Hong Kong and other sources i.e. a total of twenty-five suppliers. The imposition of these restrictions was unilateral and without prior notification. Hong Kong had written to the Turkish authorities requesting details of the measures taken and their justification under the WTO Agreement. The response had not provided satisfactory or complete answers to the questions raised. Although the volume of trade affected was relatively small, at stake were important points of principle. The quantitative restrictions violated Article XI of the GATT 1994, which provided for their general elimination, and Article XIII, which required that any such restrictions be administered in a non-discriminatory manner. These restrictions were also inconsistent with Turkey's obligation under Article 2 of the Agreement on Textiles and Clothing (ATC), which stipulated that new restrictions shall not be introduced except under the relevant provisions thereof or GATT 1994. The objective of the ATC was to bring trade in textiles under the GATT disciplines over a period of ten years. During the transitional period, safeguards could only be invoked if serious damage, or actual threat thereof, could be demonstrated. Turkey's action had not met the above-mentioned criteria and the transitional safeguard provisions of the ATC had not been invoked. In the view of Hong Kong Article XXIV could not be interpreted to justify the introduction of the quantitative restrictions by Turkey. In an effort to resolve this issue, Hong Kong had requested consultations with Turkey on 12 February 1996, under Article XXII:1 of the GATT 1994 pursuant to Article 4 of the DSU. It hoped that Turkey would fully discharge its obligations under the GATT and the WTO and urged that the action taken by Turkey be rescinded. In light of the outcome of these consultations, it reserved its rights to take the matter further, should this prove to be necessary.

The representative of the Philippines, speaking on behalf of certain ASEAN countries, namely Malaysia, the Philippines and Thailand which had been affected by the unilateral imposition of quantitative restrictions by Turkey on certain textile and clothing products. At the meeting of the Council for Trade in Goods on 29 January, ASEAN countries had registered their serious concern with the measure taken by Turkey and had stated that they reserved their rights to pursue the matter under the relevant WTO provisions, including GATT 1994 and the ATC. Like Hong Kong, ASEAN countries respected the rights of a Member to form customs unions or free-trade areas in accordance with the relevant multilateral trade agreements. While they welcomed the implementation of the Customs Union between Turkey and the European Community, they believed that Turkey should have ensured that the implementation of the agreement was not at the expense of other Members' rights under relevant WTO provisions. The WTO was a rule-based institution and one expected reasonable compliance with all that was agreed to and that Members would not take actions which would undermine the credibility of the WTO. At the conclusion of the Uruguay Round, Members had committed themselves to bring trade in textiles under the disciplines of GATT 1994 and the ATC. Malaysia, the Philippines and Thailand wished to reserve their rights to participate in consultations requested by Hong Kong. They would also prefer Turkey to withdraw the quantitative restrictions that it had imposed.

The representative of India said that his delegation wished to be associated with the statement made by Hong Kong. India requested Turkey to take into account the serious concerns of Hong Kong and to withdraw the quantitative restrictions it had imposed. Should this not happen, India wished to reserve its rights under the WTO Agreement and, in parallel, wished to express its interest to be joined in consultations requested by Hong Kong.

The representative of Korea shared the concerns expressed by Hong Kong. As a matter of principle, a number of questions remained to be answered concerning the compatibility of this measure with Turkey's commitments under the WTO Agreement. His authorities were currently reviewing

the substantive effect the Turkish measure had on Korea's trade, as well as the legal implications thereof. Pending the results of this review, Korea reserved its rights, including that under Article 4.11 of the DSU concerning the request, to be joined in consultations.

The representative of Peru said that his delegation echoed the views expressed by Hong Kong and wished to reserve its rights, including those under Article 4.11 of the DSU.

The representative of Argentina said that his country shared Hong Kong's concerns regarding the conformity of the unilateral measures adopted by Turkey which also affected imports from Argentina. Consultations were ongoing and Argentina wished to reserve its rights on this matter.

The representative of Colombia said that the concerns raised by Hong Kong deserved careful consideration. Colombia would be following these consultations very closely. It hoped that this matter could be resolved in the best possible manner.

The representative of Brazil said that its exports of textiles and clothing had also been affected by the unilateral measure taken by Turkey. Brazil, therefore, wished to reserve its rights on this issue, including those under Article 4.11 of the DSU.

The representative of Pakistan said that the issue raised by Hong Kong had been discussed by the Committee on Trade and Development (CTD) at its meeting on 29 January. On that occasion, Pakistan had understood Turkey's natural disposition to forge closer relations with the European Communities located in close proximity of that market. His country however noted with disappointment that the formation of the Customs Union had resulted in raising discriminatory barriers against the trade of third countries including Pakistan. Pakistan felt that this raised valid questions about the compatibility of such restrictions with the requirements of the relevant provisions of the GATT. Pakistan noted Hong Kong's statement and would follow with deep interest the consultations requested by it.

The representative of Turkey said that his country had accepted to enter into bilateral consultations with Hong Kong in order to discuss this matter which was covered by Article XXIV:8(a) of the GATT 1994. Turkey was ready to fix a mutually agreed date for consultations with Hong Kong. His delegation noted the statements made at the present meeting and would consider the possible further requests, taking into account the relevant provisions of the WTO Agreement.

The representative of the European Communities informed the DSB that the Communities wished to be joined in the consultations requested by Hong Kong. The measures, as indicated by Turkey, resulted from the implementation of treaty establishing the Customs Union between Turkey and the European Community and were, in the view of the Communities, consistent with the provisions of the General Agreement and in particular were covered by Article XXIV:8.

The representative of Hong Kong said that his delegation noted the request of the Communities to be joined in consultations in accordance with Article 4.11 of the DSU. The language of Article 4.11 was clear in that any claim of substantial interest would be for the responding party, in this case Turkey, to agree. Also, if the request to join consultations was denied then the Member requesting to join consultations might proceed to initiate their own consultations. In the present case, any such request to join consultations were requests to join Hong Kong in consultations with Turkey. The purpose of such requests could not be to join Turkey in consultations with Hong Kong. Otherwise, the decision as to whether the requesting party should be joined in the consultations would be in the hands of Hong Kong rather than Turkey. Hong Kong had no wish to be difficult in this, but hoped that due consideration would be given to the above view on the systemic aspects of this case. Hong Kong was glad that Turkey agreed to bilateral consultations. He referred to a letter from the Turkish authorities indicating that it would not be convenient for them to consult in Geneva in the week beginning of the

11 March, which was the date suggested by Hong Kong. He hoped that in light of the interest which had been expressed by a number of delegations, Turkey might reconsider this matter because given the number of delegations interested, and given the fact that this dispute was taking place under multilateral instruments, it would be far more convenient for consultations to take place on neutral ground.

The DSB took note of the statements.

4. United States - Restrictions on imports of cotton and man-made fibre underwear
- Statement by Costa Rica

The representative of Costa Rica, speaking under "Other Business", recalled that at the DSB meeting on 31 January his delegation had informed the DSB that on 22 December 1995 Costa Rica had requested consultations with the United States with regard to the restrictions on Costa Rica's exports of cotton and man-made fibre underwear (category 352/652). However, these consultations did not arrive at a mutually satisfactory solution. Since the 60-day period for consultations had already expired, Costa Rica would soon request the establishment of a panel to examine this matter. In order for the panel to be established as quickly as possible, Costa Rica wished to request that a meeting of the DSB be convened for this purpose as provided for in footnote 5 of Article 6 of the DSU.

The DSB took note of the statement.

5. Appellate Body - Working Procedures for Appellate Review
- Statement by the Chairman

The Chairman, speaking under "Other Business", recalled that the Appellate Body's Working Procedures for Appellate Review which came into force on 15 February, had been circulated in WT/AB/WP/1. On 19 February informal consultations had been held for the purpose of providing a technical briefing on the Working Procedures during the course of which questions and comments had been made by Members. The package circulated on 15 February contained both the Working Procedures adopted by the Appellate Body and a covering letter from the Chairman of the Appellate Body to the DSB Chairman. The letter addressed the issues raised by Members which had been conveyed to the Appellate Body during the consultations held by the outgoing and incoming Chairmen of the DSB in accordance with the Decision on the Establishment of the Appellate Body contained in WT/DSB/1. It also explained the Appellate Body's reasons for its conclusions on certain key elements of the Working Procedures. For example, on issues of establishment of divisions, rotation and collegiality.

The consultations that he had held on behalf of Members with the Appellate Body, pursuant to Article 17.9 of the DSU and the DSB Decision on the Establishment of the Appellate Body, had the objective of making the Appellate Body aware of the concerns of Members. It was important to familiarize the Appellate Body with the sensitivities of the WTO and its "climate of opinion". Article 17.9 of the DSU contemplated neither a negotiations process nor a formal approval by the DSB of the Appellate Body's working procedures. The consultations contemplated in the DSU and the DSB Decision on the Establishment of the Appellate Body were in the nature of an advice - *consilium* - counsel to, and for the benefit of, the Appellate Body, but not a command - *praeceptum* - that obliged the Appellate Body. Aquinas - distinguished between *praeceptum* - command and *consilium* - advice, by saying that *praeceptum* implied necessity to obey, while *consilium* provided options for those to whom they were given. The Working Procedures for Appellate Review were legally in effect, as of 15 February. They could be modified through the amendment procedure set out in Rule 32 of the Working

Procedures. Finally, he drew the attention of Members to the fact that the Appellate Body had decided that the Working Procedures for Appellate Review would be issued as an unrestricted document.

The representative of Mexico recalled that in accordance with Article 17.9 of the DSU "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information". Mexico had hoped that its concerns, as well as other Members' concerns expressed during the informal consultations, would be reflected in the Appellate Body's Working Procedures. However, he noticed that this was not the case. His country's concerns pertained to the issues of collegiality and nationality of Appellate Body members which might affect the integrity and credibility of the dispute settlement mechanism. In accordance with Rule 4.3 of the Working Procedures "the division responsible for deciding each appeal shall exchange views with the other members before the division finalizes the appellate report for circulation to WTO Members". In other words, the seven members of the Appellate Body would influence the final decision through an exchange of views before the appellate report is finalized. However, Article 17.1 of the DSU provided that "the Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation". He recalled that collegiality was a new concept alien to the issues negotiated in the Uruguay Round. When Article 17 of the DSU was negotiated the idea was that each appellate review would be carried out only by three members of the Appellate Body. On the one hand, Article V:4(b)(i) of the Rules of Conduct stated that persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case (i.e. the three persons) shall review the factual portion of the panel report and complete the form at Annex 3. On the other hand, Rule 9.1, of the Working Procedures of the Appellate Body stated that each member (i.e. each of the seven members) shall take the steps set out in Article V:4(b)(i) of the Rules of Conduct.

Mexico was also concerned that Rule 6.2 of the Working Procedures provided for the "opportunity for all members to serve regardless of their national origin". He recalled that GATT practice, as well as Article 8.3 of the DSU were clear that "citizens of Members whose governments are parties to the dispute or third parties…shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise". This was the best way to avoid possible direct or indirect conflict of interest. His authorities did not doubt the impartiality, honesty and moral integrity of the Appellate Body members. However, it would be very difficult for Mexico, and perhaps for other Members, to explain to some sectors of its national public opinion, in particular those who disagree with free trade, that in a lost dispute a citizen of the other party was a member of the Appellate Body, while no Mexican citizen had the same possibility.

His delegation hoped that the members of the Appellate Body would urgently reconsider the need to maintain the concepts of collegiality and nationality. Mexico reserved its rights under Article 17.1 of the DSU with regard to collegiality. It would also seek, if it considered appropriate, to define more precisely the notion "direct or indirect conflict of interest" in Article 17.3 of the DSU through the Rules of Conduct which were still subject to negotiations.

The representative of Egypt welcomed the fact that the Appellate Body finalized its Working Procedures. His delegation would have wished to have been consulted further in the process of the preparation of the Working Procedures. However, the covering letter from the Chairman of the Appellate Body explained the various issues which would have raised some concerns. Egypt was not concerned over collegiality or over nationality. Appellate Body members would be receiving documents related to all appeals. In accordance with Rule 4.3 of the Working Procedures, the division deciding each appeal shall exchange views -- not consult -- with other members. Working Procedures required only an exchange of views not that due consideration be given to the views expressed. However, the seven members would be overburdened with work since they would have to work as if they were involved

in each and every case. They would have to study and reflect on documents circulated to them and in due course exchange their views. As to the question of nationality of members, all precautions had already been taken prior to their selection. Although the Rules of Conduct had not yet been adopted, the Appellate Body should be bound by these same rules since there were not other such rules available. In connection with Rule 8.1 of the Working Procedures which indicated that the Rules of Conduct for the DSU had only been adopted on a provisional basis, Egypt's position was that the same rules would govern not only the Appellate Body but also the Textiles Monitoring Body. In case these rules were amended in future, ag greater transparency should be observed. While Members would not be involved in negotiating amendments, at least their views would be made known to the Appellate Body members.

The representative of India said his country had already raised some concerns with regard to the Working Procedures and the letter from the Chairman of the Appellate Body during the informal consultations on 19 February. At the present meeting he wished to share some systemic concerns and to draw attention to the substance of the Working Procedures. He recognized that not all concerns could be dealt with by the Appellate Body and that some of them would have to be dealt with by the DSB. At the present meeting he wished only to enumerate those concerns so that in the future Members would be able to deal with them in a manner consistent with the roles that the DSU assigned to the DSB and the Appellate Body.

On the issue of collegiality Members had had different views regarding the extent to which the four members not serving on a division should influence the decision of the division. In his view any process which would enable the four members not serving on the division to be involved in the dispute was contrary to the letter and spirit of Article 17.1 of the DSU. He also mentioned that the circumstances under which the concept of collegiality was brought to the forefront could not be ignored. Rule 4.3 of the Working Procedures was not in accordance with Article 17.1 of the DSU and this problem could not be resolved through Rule 4.4 which is clearly inconsistent with Rule 4.3.

With regard to the question of nationality, there were some practical reasons which made it difficult to have a requirement that a member of the Appellate Body should stand aside in an appeal involving that member's country of origin. Article 17.3 of the DSU stipulated that the Appellate Body members should not participate in the consideration of any dispute that would create a direct or indirect conflict of interest. It was a moot point whether the nationality of a member created a conflict of interest. While one should not attach nationality tags to the Appellate Body members it would have been better for the credibility of the system if a mechanism had been devised to enable an appellant or appellee to convey informally his concerns about an Appellate Body member who was a citizen of a country involved in the dispute. Disputes brought to the Appellate Body were bound to acquire high political visibility and media attention. Therefore, it would not be wise to ignore perceptions. Although Rule 6.2 of the Working Procedures specified the principle of rotation, its mechanics were not spelled out. The DSB needed to be assured that the mechanism for ensuring rotation was reliable.

Rules 8, 9, 10 and 11 had been adopted on a provisional basis and Rule 8.1 implied that Rules of Conduct were not yet approved by the DSB. India was concerned that certain rules acquired legitimacy even before they were brought before the DSB and Members had to find ways of ensuring that this did not recur in the future. He noted that there was some dichotomy. The Appellate Body believed that dealing with the issue of nationality in any other way would be unnecessary in view of the qualifications required for membership of the Appellate Body and undesirable because it would cast doubts on the capacity of the Appellate Body members to be independent and impartial. However, the Appellate Body was willing to accept a situation where there would be a challenge on the basis of financial or professional interests. If the qualifications of the Appellate Body members and their selection process had ensured independence and impartiality in decision-making then there would be not need for the Appellate Body members to have Rules of Conduct.

Rule 32.2 of the Working Procedures stipulated that the Appellate Body might amend its rules in compliance with Article 17.9 of the DSU. In accordance with WT/DSB/1 the DSB Chairman should consult with the Members in order to obtain their views prior to advising the Appellate Body on the working procedures. It would be an anomalous situation if the Members were consulted by the Chairman at the initial stage of preparation of the Working Procedures but not when they would be subsequently amended.

He also had a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU. As to Rule 29 regarding failure to appear, it was not clear as to how the views of a participant who failed to make a written submission and to appear could be heard.

He also noted that the letter of the Chairman of the Appellate Body indicated that the Appellate Body had held consultations with the Chairman of the DSB in December 1995 and January and February 1996. However, the first informal consultations with the Members on this subject had been held on 1 February. It would have been appropriate and useful if informal consultations on this subject had been initiated in December. The Appellate Body members would have been sensitized to various concerns and issues prior to drawing up of their working procedures. If consultations had been held in time Members would probably not face the difficulties at the present meeting. He recalled that the Chairman of the DSB, whenever provided an input to the Appellate Body regarding working procedures was performing an official duty assigned to him in the DSU. It would not be unfair for the collectivity of the DSB to expect that the Chairman would consult Members before providing an input to the Appellate Body, even if there had been no decision by the DSB that the Chairman should consult Members before advising the Appellate Body. He was glad that the Appellate Body had expressed formally its strong commitment to the dispute settlement system as a whole. Countries involved in the Uruguay Round negotiations had the vision and courage to opt for a strengthened dispute settlement system with the Appellate Body at the apex of that system. Members were unlikely to be less committed to the integrity of the dispute settlement system as a whole than anybody else.

The representative of the United States thanked the Chairman for holding the informal meeting on 19 February concerning the Working Procedures for Appellate Review. The technical briefing provided at that meeting had been very useful. On that occasion the United States had expressed some concerns, and in view of the Chairman's commitment to relay those concerns to the Appellate Body, he did not see the need to reiterate them at the present meeting. However, he wished to register some of the clarifications that delegations had received concerning two issues. First, the Appellate Body Secretariat had confirmed that the decisions of the Appellate Body might only "uphold, modify or reverse" the legal findings or conclusions of the panel as provided for in Article 17.13 of the DSU. The United States fully understood that the Appellate Body Secretariat did not presume to speak for the Appellate Body itself, but this helped to clarify the references in Rules 21 and 22 to "the nature of the decision or ruling sought". Second, the proof of service requirement in the Working Procedures could lead to a needless waste of paper. His country noted that the Appellate Body Secretariat had confirmed that proof of service might be provided in a manner consistent with the current practice of indicating on the document itself the parties to whom copies had been sent. He further noted that the Working Procedures were far from perfect. In particular Rule 29 was disturbing in its implications for possible sanctions against Members. However, it would be better to live for a while with the

problems that these rules presented rather than have the Appellate Body entering into a series of too frequent modifications of these new rules.

The representative of Chile supported the statements made by Mexico and India with regard to the question of collegiality. Rule 4.3 of the Working Procedures went beyond what was authorized under the DSU. A division consisting of three members was to decide an appeal and under no circumstances was an exchange of views with other members to take place. An attempt had been made to ensure flexibility in time periods provided for in Rules 18.1 and 29. However, this should not be turned to the disadvantage of the parties. He recalled that the DSU had not authorized the Appellate Body to establish time-periods or to consider the failure to submit a written submission. While Chile was aware that the Working Procedures had been established in accordance with Article 17.9 of the DSU. It wished the Appellate Body to take into consideration the concerns expressed by Members in order to ensure fairness in the implementation of procedural aspects of the Appellate Body.

The representative of Canada said that her country was very interested in the Appellate Body's Working Procedures and had made several suggestions with regard to some important elements of these procedures. The Working Procedures as presently drafted incorporated worthy principles. However, Canada identified some questions and concerns with regard to a few aspects of these procedures. Her country intended to follow closely the application of these procedures. It expected that they would be applied in a practical and flexible manner and that with time Canada's questions would be answered and its concerns would turn out to be unjustified. Her delegation was certain that the Appellate Body would also be closely watching how these procedures worked in practice and would be receptive to the comments and concerns which Members might express at a later date prior to any review of these procedures by the Appellate Body.

The representative of the European Communities said that, like other delegations, the Communities clearly accepted the premise on which the debate in this forum was taking place. The Working Procedures were indeed now operational as indicated in the informal meeting on 19 February and Members were not involved at this stage in any negotiating process. However, the Communities had a number of concerns. The practical concern had already been addressed by the United States and the Communities shared the United States' views. His delegation was concerned in particular with the question of the service of documents as required by Rule 18 and was grateful for the confirmation that, as far as possible, the existing practice would continue. However, Rule 18 should be applied with a degree of flexibility which would indeed allow for the use of technology, the fax machine and copying which would facilitate what could otherwise be a burdensome extra obligation. The legal and judicial concern related to Rule 29; the Communities had a very genuine concern that, in fact, a new law had been created in the sense that failure to make a submission within a prescribed time-limit or to appear in an oral hearing could have the result of the dismissal of the appeal. This was a serious issue which should be drawn to the attention of the Appellate Body. The Community hoped that judgement by default would be the rare exception to the rule and that those concerns be communicated to the Appellate Body. The linguistic concern related to the French and Spanish language versions of the text. The Communities would be submitting some comments in writing as soon as they were available. He stressed that these comments did not relate to substance. The objective was only to ensure conformity as between one language version and another. Rule 8.1 of the working procedures stipulated that on a provisional basis the Appellate Body would adopt only those rules which are applicable to it. But the text of the Rules of Conduct was clear in all cases as to which rules were applicable to it. In other words a rule of *mutatis mutandis* could well apply but one had to be certain what the *mutandis* element contained. For example, on page 17 of the document WT/AB/WP/1 would the footnote on that page fall into the category of the *mutandis*? The Communities would be watching the application of the rules of procedure in the light of experience and hopefully some of the concerns would dissipate. They would be grateful if those concerns could be conveyed to the Appellate Body.

The DSB took note of the statements.