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MINUTES OF MEETING

Held in the Centre William Rappard
on 15 April 2003

Chairman: Mr. Shotaro Oshima (Japan)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.14)

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.13 - WT/DS162/17/Add.14)

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.7)

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.7)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.14)

2. The Chairman drew attention to document WT/DS160/18/Add.14 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

3. The representative of the United States said that his country had provided an additional status report in this dispute on 3 April 2003, in accordance with Article 21.6 of the DSU. As noted in that report, the United States and the EC were seeking a positive and mutually acceptable resolution of the dispute. The US administration was making good progress with the US Congress on this issue with a view to concluding a mutually acceptable resolution consistent with WTO rules. The United States was hopeful that the parties to the dispute would soon be notifying the DSB of additional information in this regard.

4. The representative of the European Communities said that the EC welcomed the positive statement made by the United States and looked forward to further progress on this matter.

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

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.13 – WT/DS162/17/Add.14)

6. The Chairman drew attention to document WT/DS136/14/Add.14 – WT/DS162/17/Add.14 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

7. The representative of the United States said that his country had provided an additional status report in this dispute on 3 April 2003, in accordance with Article 21.6 of the DSU. As noted in that report, legislation repealing the 1916 Act had been introduced in the US House of Representatives on 4 March 2003 (H.R. 1073). The US administration would continue to work with the US Congress to achieve further progress in resolving this dispute with the EC and Japan.

8. The representative of the European Communities said that the EC wished to stress again that a proper implementation in this case implied that not only the 1916 Anti-Dumping Act should be repealed, but that the pending court cases should also be terminated. He recalled that in July 2001, the EC had agreed to give extra time to the United States for implementation on the express understanding that the repeal legislation would terminate the pending court cases. Again, in February 2002, the EC had accepted to suspend the arbitration on its request for retaliation since a proposal to repeal the 1916 Anti-Dumping Act and to terminate the cases was being examined by the US Congress. EC companies were now involved in three cases brought under the 1916 Anti-Dumping Act. Two of these cases had been initiated after the initial deadline for repealing the 1916 Anti-Dumping Act. It was clearly not acceptable that EC companies were bearing substantial litigation costs and that they might ultimately be condemned regarding claims brought under a legislation that was clearly condemned and should have been repealed long ago. The EC urged, once again, the United States to put a definitive end to this dispute by repealing the 1916 Anti-Dumping Act and by terminating the on-going court cases.

9. The representative of Japan said that her country noted with great concern that no reference had been made by the United States either in its status reports nor in its statements at the DSB's meetings as to how exactly and how urgently it intended to implement the DSB's recommendations and rulings in this proceeding. She recalled that the Panel and the Appellate Body Reports had been adopted two and a half years ago. The persistent lack of implementation by the United States would only lead to the erosion of confidence in the WTO dispute settlement system. The United States had to repeal the WTO-inconsistent 1916 Anti-Dumping Act as early as possible in the first session of the 108th Congress currently underway. It was regrettable that the legislation introduced in the House of Representatives on 4 March 2003 would have no effect on the pending cases. This meant that, even with the passage of this legislation, the Japanese respondent companies would continue to suffer serious damages, including substantive legal costs. Japan had made it abundantly clear that the bill to repeal the 1916 Anti-Dumping Act would have to have retroactive effects to terminate the pending cases. The content of the 4 March bill was, therefore, not acceptable. This situation was rather puzzling, since the bill with retroactive effects had been indeed introduced to the 107th Congress. Japan requested that the US administration coordinate much better with the Congress and specifically report to the DSB on the status of its efforts to ensure the introduction and passing of the repealing bills with proper retroactive effects. Japan strongly urged the United States, once again, to implement the DSB's recommendations and rulings at the earliest possible time in a correct manner, and reminded the United States that it retained the right to suspend concessions or other obligations in this case.

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

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.7)

11. The Chairman drew attention to document WT/DS176/11/Add.7 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

12. The representative of the United States said that his country had provided a status report in this dispute on 3 April 2003, in accordance with Article 21.6 of the DSU. The US administration would continue to work with the US Congress with a view to resolving this dispute.

13. The representative of the European Communities said that the EC strongly hoped that it would not have to add this case to the list of non-implemented cases by the United States. He noted that the United States had now little more than two months to ensure that implementation was reached by the new deadline. The EC would like to stress that two bills that would repeal Section 211 were

now pending in the US Congress. He also wished to recall the EC's position on abandoned trademarks. The Panel had relied on the affirmations made by the US representatives that Section 211 would not apply to a new trademark after a former trademark, to which Section 211 might have applied had been abandoned. This interpretation was not shared by US Federal Courts, which had refused to read an abandonment exception in Section 211. Therefore, the EC could not accept the US administration's position that there was no need to clarify that Section 211 did not apply in cases where the trademark had been abandoned by the original owner.

14. The representative of the United States said that he wished to respond to the last point made by the EC. As the United States had stated at the previous DSB meeting, if the EC was aware of any court decisions concerning Section 211 that had not been disclosed to the Panel or the Appellate Body, the United States wished to know what they were. As far as the United States was concerned, the parties had fully briefed the Panel and the Appellate Body on court decisions involving Section 211. Therefore, it could not be said that such decisions represented new information. In any case, the United States wished to reiterate that the DSB's recommendations and rulings in this case did not relate to the issue of abandonment.

15. The representative of Cuba said that her delegation noted the status report submitted by the United States and, once again, wished to reiterate that a lack of compliance by the United States with the recommendations undermined the credibility of the DSB. Cuba encouraged the United States to comply with the recommendations in relation to Section 211 by the deadline of 30 June 2003. Her country wished to be associated with the statement made by the EC with regard to the issue of non-application of Section 211 to abandoned trademarks.

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

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.7)

17. The Chairman drew attention to document WT/DS184/15/Add.7 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 3 April 2003, in accordance with Article 21.6 of the DSU. With respect to the recommendations and rulings of the DSB that were not addressed in the 22 November 2002 anti-dumping duty determination of the US Department of Commerce, the United States continued to work with the Congress to resolve this dispute. On 14 April 2003, Ambassador Zoellick and Secretary of Commerce Evans had written to the US Congress supporting specific amendments to Section 735(c)(5) of the Tariff Act of 1930 to implement the DSB's recommendations and rulings. The US administration would work for passage of these amendments.

19. The representative of Japan said that, as her country had stated at previous DSB meetings, Japan had not objected to the extension of the reasonable period of time in this proceeding only because the United States had committed itself to implementing the DSB's recommendations and rulings, including having the necessary legislation introduced and passed in the first session of the 108th Congress. Continued and multiple non-implementation by one of the largest WTO players and one of the most frequent users of the dispute settlement system posed serious and real threat to the credibility of the WTO as a whole. Japan noted the statement made by the United States at the present meeting and looked forward to receiving more details regarding the letter that had been sent to the US Congress. Japan looked forward to an early implementation by the United States in this proceeding and to close and substantive consultations by the United States with Japan on the status and content of implementation.

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

2. Uruguay – Tax treatment on certain products

(a) Request for the establishment of a panel by Chile (WT/DS261/4)

21. The Chairman drew attention to the communication from the United States contained in document WT/DS261/4.

22. The representative of Chile said that, in his country's view, the Specific Internal Tax (*Impuesto Específico Interno* – IMESI) levied on the first alienation and import of certain consumer goods such as beverages, wines, liqueurs, tobacco, cigarettes, automobiles, lubricants and fuels was inconsistent with Uruguay's WTO obligations with respect to national and most-favoured-nation treatment. He recalled that the IMESI had been established in Chapter 11 of the 1996 Harmonized Text, as amended by Decree 200/002 of June 2002 and regulated by Decree 96/990 of February 1990. It was implemented on a six-month basis through decrees issued by the Ministry of the Economy and Finance, and on a bi-monthly basis through resolutions of the Directorate-General of Taxation. The IMESI regime was applied in various ways, but generally speaking, the formula for its calculation was based on notional prices; i.e. prices fixed by the Uruguayan authority, in most cases arbitrarily. These notional prices raised the tax base with respect to the actual sales price of the goods. In its request, Chile provided examples of the application of the IMESI to cigarettes, tobacco, wine and liqueurs. In the case of cigarettes, beer, juices and mineral water, not only was a notional price fixed for domestic products, but for imported like products it was doubled. This was known in Uruguay as the "double IMESI", and it clearly represented a form of tax discrimination that was contrary to Article III of GATT 1994. Furthermore, in the case of imported cigarettes, the notional price was determined differently according to the origin of the product, in clear violation of Article I of GATT 1994. In practice, this amounted to an import prohibition.

23. He recalled that on 18 June 2002, Chile had requested consultations with Uruguay, which had taken place in Montevideo on 23 July. At that meeting, information had been exchanged and Chile had taken note of Uruguay's position. It had also been agreed that the Uruguayan authority would be given time to consider and propose a solution to Chile's concerns. In this connection, Chile had taken account of Uruguay's difficult financial situation. However, nine months later, Uruguay continued to maintain a tax regime that was inconsistent with its WTO obligations. Recently, Chile was given the text of a Presidential Decree amending the IMESI. The purpose of this Decree was apparently to place the internal tax treatment of imported and domestic cigarettes on an equal footing. It appeared that this Decree was not yet in force. Although Chile was in the process of evaluating the practical consequences of the Decree in the Uruguayan market, its preliminary reaction was that it did not entirely correct the discrimination against Chilean cigarettes. Besides, Chile's request for the establishment of a panel included other goods which were also the subject of tax discrimination internally and with respect to third countries. Consequently, Chile had no choice, but to request the establishment of a panel with standard terms of reference as set out in Article 7 of the DSU to find that the IMESI, as set out in the above-mentioned legal instruments and other supplementary provisions and/or amendments, was contrary to Articles I and III of GATT 1994. Chile wished to reiterate that, without prejudice to this request, it was ready to seek an effective bilateral solution that was WTO-consistent.

24. The representative of Uruguay said that on 23 July 2002 the consultations requested by Chile concerning the application by Uruguay of the Specific Internal Tax (IMESI) had been held in Montevideo. The EC and Mexico had also been joined in those consultations. In the view of Uruguay, the consultations and the bilateral contacts between Uruguay and Chile constituted an adequate framework for resolving the issue, given the desire for dialogue and understanding demonstrated by both countries during this process. Therefore, Uruguay regretted that Chile had

decided to opt for the establishment of a panel to examine this matter, thus interrupting the process of dialogue, which Uruguay favoured. The reasons and arguments put forward by Chile regarding the IMESI applied by Uruguay were inadmissible as they were not well-founded. For this reason, Uruguay was not in a position to agree to Chile's request for the establishment of a panel on this matter.

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

3. United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina

(a) Request for the establishment of a panel by Argentina (WT/DS268/2)

26. The Chairman drew attention to the communication from the United States contained in document WT/DS268/2.

27. The representative of Argentina said that his country was grateful for this opportunity to provide its views regarding the serious situation faced by an Argentine company concerning its access to the US market due to the maintenance by the United States of anti-dumping measures on the basis of a sunset review conducted between July 2000 and July 2001. Argentina's company in question, Siderca, was the leading producer and exporter of a wide range of steel tubular products, especially in the gas and oil production sector, and it exported more than 70 per cent of its production to over 60 countries. With regard to the particular situation of the company, Argentina considered both the findings of the US Department of Commerce in support of its expedited sunset review, and the findings of the US Department of Commerce and the International Trade Commission (ITC) with respect to the need to maintain the anti-dumping duty measure, to be inconsistent with the United States' obligations under the WTO. Moreover, Argentina's government considered certain aspects of the US laws, regulations, policies and procedures relating to the administration of sunset reviews to be inconsistent with that country's WTO obligations. In this context, and without repeating all of the claims stated in the request circulated in document WT/DS268/2, it was important to highlight some points.

28. Argentina noted that Siderca had made no shipments to the US market since 1995. Its right of defence was impaired by the application of the "expedited" procedure, since it had expressed its full readiness to participate in the review process. The justification for applying the expedited procedure; i.e. that shipments from the company under investigation did not amount to 50 per cent of total exports of the product from Argentina, was insufficient under Article 11.3 of the Anti-Dumping Agreement, in particular since that finding was based on one single shipment that was not made by Siderca. Even if one were to assume that the 50 per cent of total exports requirement imposed by the US Department of Commerce as a condition for not applying an expedited procedure was consistent, the US administration had never been able to identify the origin of the shipment in question. The failure to identify that shipment made the application of the expedited procedure even more questionable. During the sunset review process, the concept of "inadequate response" was equated with a "withdrawal" from the process. This resulted in a presumption of repetition of dumping which was virtually impossible to refute on the basis of the facts, and which was inconsistent with Article 11.3 of the Anti-Dumping Agreement. The findings of the US Department of Commerce with respect to the probability of repetition of dumping were insufficient. They were based on the presumption that because there were no imports from Siderca following the application of the anti-dumping measure, if the measure were withdrawn it was likely that dumping would recur with the margin determined during the original investigation (1.36 per cent). At no time was a new, prospective investigation conducted based on positive evidence. The findings of the ITC were not based on positive evidence, and could not be substantiated by the evidence contained in the record. The ITC used cumulative injury criteria even though Siderca had not engaged in exports of any kind during the period following the application of the anti-dumping measure. Furthermore, the ITC had

failed to properly apply the substantive requirements of the Anti-Dumping Agreement with respect to injury. Nor had the ITC properly analysed the conditions of competition in the international market for companies with Siderca's characteristics or the fact that Siderca was not subjected to any significant access restrictions in its markets other than the United States.

29. Argentina considered that when an anti-dumping measure had been in force for five years, the obligation was to terminate or to withdraw that measure. The maintenance of the measure was an exception, and as such, had to be substantiated by positive evidence adduced in the context of a new and essentially prospective investigation. Indeed, the indefinite maintenance of an anti-dumping measure on the basis of an inappropriate interpretation deprived the main obligations of Article 11.3 of any effective content, particularly if the findings made: (i) were based on criteria which amounted to an irrefutable presumption that injury and dumping would recur; (ii) were not backed by a new investigation with full right of defence; (iii) were based almost exclusively on parameters resulting from the original investigation; and (iv) were not supported by a sufficient analysis of the new context in which the review procedure was taking place. Thus, for these reasons, Argentina requested that, in accordance with Article XXIII of the GATT 1994, Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, the DSB establish a panel with standard terms of reference to examine and find that the measures identified were inconsistent with United States' obligations under the Anti-Dumping Agreement, the GATT 1994 and the WTO Agreement.

30. The representative of the United States noted at the outset that the United States was pleased to see that Argentina, as best the United States could discern from the panel request, had abandoned its claims concerning the initiation of sunset reviews and the *de minimis* standard applicable to sunset reviews. The United States had long maintained that these particular aspects of its sunset review system were consistent with its WTO obligations, and in its Report in the German Steel case, the Appellate Body had so agreed (WT/DS213/AB/R). The United States was, however, disappointed that Argentina had chosen to pursue this matter further by requesting the establishment of a panel to consider other claims. With respect to those claims the nature of which one could discern, the United States was confident that US law – as such and as applied in the sunset review concerning OCTG from Argentina – would be found to be consistent with the United States' WTO obligations. Unfortunately, however, there were some claims the nature of which the United States could not discern from Argentina's panel request. Because the Appellate Body had suggested that a Member might waive its right to object to a deficiency in a panel request if it did not raise its concerns when the DSB considered that request, the United States would at this time comment in some detail on the deficiencies it had identified in Argentina's panel request.

31. The United States' principal problem was with the claims asserted by Argentina other than those claims appearing in sections A and B of Argentina's request for a panel. Specifically, in the first paragraph after section B.4 of Argentina's panel request, Argentina stated that it was challenging "certain aspects" of certain US laws, regulations, policies, and procedures. While Argentina went on to identify the laws, regulations, policies, and procedures, it had never identified which aspects of these items it found objectionable. To make matters worse, Argentina then alleged that these unidentified "aspects" of certain US laws, regulations, policies, and procedures violated a host of Articles of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement, most of said Articles containing multiple and discrete obligations. Argentina had never identified which particular provisions of the US materials violated which particular provisions of the cited agreements. As a result, Members were left to wonder what this portion of Argentina's panel request was all about. Or, to put the problem in terms of Article 6.2 of the DSU, Members were left with the question: What was the legal basis of the complaint?

32. The problem was less severe in the case of sections A and B of Argentina's panel request, because in most instances Argentina had adequately identified the measure in question and the particular sub-paragraphs of Articles that allegedly were violated by the measure. Unfortunately, however, that was not always the case. In sections B.1 and B.2 of its panel request, Argentina alleged

a violation of Article 6 of the Anti-Dumping Agreement in its entirety. Such a claim seemed implausible, and the lack of precision seemed unjustified given that elsewhere Argentina was able to identify the particular paragraphs of Article 6 which it considered to have been violated. Similarly, in section B.3, Argentina alleged a violation of Article 3 of the Anti-Dumping Agreement in its entirety. This sweeping allegation, too, seemed implausible and unjustified. The net result was that with respect to a large portion of Argentina's panel request, the United States simply could not discern the legal basis of Argentina's complaint, and it believed that a panel would agree with the United States, if a panel was established on the basis of the current panel request. Accordingly, an appropriate course of action would be for Argentina to withdraw its current panel request and to submit a new request which complied with Article 6.2 of the DSU and which would enable the United States and all other Members to adequately discern the legal basis of Argentina's complaint.

33. Having said that, the United States had another problem with Argentina's panel request. Put simply, certain of the instruments identified by Argentina did not constitute "measures" that could be challenged. Two of the items in question were, respectively: (i) the Statement of Administrative Action - or "SAA" – accompanying the Uruguay Round Agreements Act; and (ii) the US Department of Commerce Sunset Policy Bulletin. Because these two items already had been dealt with, or were in the process of being dealt with, by panels, the United States would not reiterate its position other than to state that it did not believe that these items constituted "measures". However, there was a third item that was not a "measure" that was properly the subject of a panel request. That item Argentina referred to as the "Determination to Expedite". This Determination to Expedite - which Argentina classified as a "measure" - was in reality nothing more than a preliminary, interlocutory decision made by a Department of Commerce official in the course of the sunset review on OCTG from Argentina. Indeed, as indicated in Argentina's panel request, the so-called "measure" was nothing more than an internal Commerce Department memorandum deciding to conduct an expedited review, as opposed to a full sunset review. As such, it was no different than any of the myriad types of decisions made in the course of an anti-dumping investigation or review, such as a decision to conduct onsite verification or not, extend the deadline for a preliminary or final determination, limit the number of exporters involved, etc., etc. Hundreds, perhaps thousands, of discrete preliminary decisions went into what eventually became an anti-dumping measure. However, paragraph 4 of Article 17 of the Anti-Dumping Agreement made clear that only certain specified types of measures could be the subject of a panel proceeding. These did not include preliminary decisions. Accordingly it was clear that Argentina could not challenge this "Determination to Expedite" as a measure in its own right.

34. Finally, the United States noted that while Argentina purported to request the establishment of a panel with standard terms of reference, its panel request actually requested the DSB to establish a panel with terms of reference that appeared to direct the panel "to find" that the alleged "measures" were inconsistent with the United States' WTO obligations. Remarkably, Argentina was asking the DSB for terms of reference that would prejudge the outcome of this dispute. These were not standard terms of reference. In summary, Argentina's panel request was deficient because it was not sufficient in presenting the problem clearly, and because it purported to challenge things that were not "measures". In addition, the terms of reference sought by Argentina were not appropriate. Therefore, the United States could not go along with the establishment of a panel.

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

4. United States – Investigation of the International Trade Commission in softwood lumber from Canada

(a) Request for the establishment of a panel by Canada (WT/DS277/2)

36. The Chairman drew attention to the communication from the United States contained in document WT/DS277/2.

37. The representative of Canada said that as Members were aware, the softwood lumber industry was of vital importance to the Canadian economy, with yearly exports to the United States valued at some US$10 billion. There were some 800 softwood lumber mills throughout Canada, and the sector employed approximately 180,000 workers. 300 Canadian communities relied on the forestry sector for their economic survival. Canada had already requested panels regarding the countervailing duty and anti-dumping duty determinations made by the US Department of Commerce concerning softwood lumber from Canada. Canada was now requesting the establishment of panel with respect to the threat of injury determination made by the US International Trade Commission (ITC). Turning to the specifics of this case, he said that on 20 December 2002, Canada had requested consultations with the United States regarding the investigation of the ITC in softwood lumber from Canada and the definitive anti-dumping and countervailing duties applied as a result of the ITC's final determination of threat of injury of 16 May 2002. The consultations, which had been held on 22 January 2003, had failed to resolve the dispute. As set out in its request for the establishment of a panel, Canada considered that the United States violated several of its obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. Among other things, he noted five failings: (i) failing to ensure that its determination of threat of material injury was based on facts and not merely on allegation, conjecture and remote possibility; (ii) failing to demonstrate that a change in circumstances, which would create a situation in which dumping or subsidization would cause injury, was clearly foreseen and imminent; (iii) failing to properly consider all factors relevant to determining the existence of a threat of material injury; (iv) failing to ensure that injuries that could be caused by other factors in the future were not attributed to dumped and subsidized imports; and (v) improperly determining that more dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on US domestic producers and that material injury to the domestic industry would occur. Consequently, and in accordance with the relevant provisions of the DSU, the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement, Canada was requesting the establishment of a panel to consider these matters.

38. The representative of the United States said that his country regretted that Canada had chosen to request the establishment of a panel. Following a thorough and careful analysis, the US International Trade Commission (ITC) had concluded that an industry in the United States was threatened with material injury by reason of imports from Canada of softwood umber. The basis for that conclusion was well documented in the ITC's Report. The ITC's determination and the means by which it had been reached was fully in accordance with applicable WTO rules. The United States urged Canada to reconsider its position. The United States, therefore, believed that it would be premature to establish a panel now, and thus it was not in a position to accept establishment of a panel at the present meeting.

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

5. Argentina – Definitive safeguard measure on imports of preserved peaches

(a) Report of the Panel (WT/DS238/R)

40. The Chairman recalled that at its meeting on 18 January 2002, the DSB had established a panel to examine the complaint by Chile. The Report of the Panel contained in WT/DS238/R had been circulated on 14 February 2003, as an unrestricted document pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. He noted that the Panel Report was before the DSB for adoption at the request of Chile. He said that this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

41. The representative of Chile said that at the origin of the dispute was a definitive safeguard measure imposed by Argentina in August 2001 on imports of preserved peaches. This safeguard measure was still in force. This was not the first time that a WTO panel had concluded that Argentina applied a safeguard measure in violation of Article XIX of GATT 1994 and the Agreement on

Safeguards. Chile hoped that Argentina would exercise greater restraint in the future and abstain from applying measures that it knew would be successfully challenged in the WTO. The rights enshrined in the WTO should not be abused. Chile had paid dearly for such abuse, and up to now its exports of preserved peaches to Argentina had been paralysed as a result of a prohibitive measure that Argentina had no right to apply. The conclusions of the Panel were categorical. Argentina had failed to demonstrate unforeseen developments, nor had it reached a determination of increased imports in absolute or relative terms. Moreover, in its determination of threat of serious injury, Argentina had failed to evaluate all of the relevant factors that had a bearing on the situation of the domestic industry, or to provide a reasoned and adequate explanation of how the facts supported its determination, or to find that serious injury was clearly imminent. The results of this report were eloquent and its conclusions spoke for themselves when it came to determining whether or not Argentina respected its WTO obligations. However, in addition to the above claims, Chile had also claimed other violations relating to causality, the report that the competent authorities were called upon to publish, the acceptable scope of application of the measure, and its notification. However, the Panel had decided to exercise judicial economy and had not reached any conclusions in that respect. This was the appropriate decision for the Panel to take, not because Chile considered that its arguments were unfounded, but because it enabled the Panel to issue its report more quickly. Also because its decision confirmed that the safeguard measure was so inconsistent that it was unnecessary to pursue the claims any further.

42. In any case, Argentina now had to withdraw the safeguard in question as soon as possible. Chile also hoped that following this new ruling against it, the Argentine investigating authority would be more cautious in its investigations and its recommendations. It was not insignificant that faced with the same facts, two of the four members of the Board of Directors of the National Foreign Trade Commission had firmly opposed the imposition of the measure. Nor was it insignificant that those Board members based their position on the failure to meet the substantive requirements, a failure that the Panel had subsequently confirmed. Finally, it was no small matter that the said Commission arbitrarily manipulated the figures with the deliberate intention of finding that there had been an absolute or relative increase in imports when in fact, there had never been any such increase. For all the above reasons, Chile asked that this Report be adopted by the DSB and that Argentina bring the challenged measure into conformity with its WTO obligations in the only way possible given the findings of the Panel; i.e. by terminating the safeguard measure as quickly as possible.

43. The representative of Argentina said that his country wished to comment on the adoption of the Panel Report before the DSB at the present meeting. First, Argentina thanked all the panelists for their efforts in resolving a particularly complex dispute. His country did, however, have reservations about the Panel's findings on some of the claims made by the complaining party regarding its compliance with the Agreement on Safeguards. Nevertheless, his country wished to express its satisfaction with the Panel's finding that the Argentine investigating authority did not act in a manner inconsistent with its obligations under Articles 2.1 and 4.1(b) of the Agreement on Safeguards by basing a finding of the existence of a threat of serious injury on an allegation, conjecture or remote possibility. Accordingly, Argentina decided not to use its right of appeal, given that the system's resources were limited and had to be used sparingly. In the light of its WTO obligations, Argentina intended to follow the steps set out in the DSU and would, therefore, continue to examine the Panel Report over the next thirty days and, pursuant to Article 21.3 of the DSU, it would inform the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings pertaining to this case.

44. The representative of the European Communities said that the EC had participated as a third party in the proceedings of this Panel since it had a substantial interest at stake in the measure which had negative impact on the EC's exports. The EC, therefore, welcomed the outcome of the Panel which largely confirmed its views. The EC urged Argentina to swiftly remove the measure which was the only viable alternative to comply with the rulings in this case.

45. The DSB took note of the statements and adopted the Panel Report contained in document WT/DS238/R.

6. United States – Subsidies on upland cotton

(a) Statement by Brazil regarding Annex V of the SCM Agreement.

46. The Chairman said that this item was on the agenda of the present meeting at the request of Brazil, and he invited the representative of Brazil to introduce this item.

47. The representative of Brazil said that on 18 March 2003 at the request of Brazil and pursuant, among others, to paragraph 4 of Article 7 of the SCM Agreement, the DSB had established a panel concerning subsidies granted by the United States on upland cotton. Already in its first panel request, dated 7 February 2003, Brazil had requested that the DSB initiate the procedures provided in Annex V of the SCM Agreement. It was important that Members were aware that the only requirement for the development of evidence under the procedures of Annex V was the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement. By invoking Annex V, the DSB was required, pursuant to paragraph 4 of the same Annex, to designate a representative to facilitate the information-gathering process, which had to be completed within 60 days of the referral of the matter to the DSB. On two occasions, the United States had blocked the designation of this representative: i.e. on 18 March and subsequently on 31 March 2003 at the special DSB meeting requested by Brazil. On both occasions the designation had not taken place because the United States had objected to the designation of a representative, unless, as the DSB had been informed on 31 March, Brazil were to agree that the proceedings under Annex V be suspended until the Panel had made a ruling on the applicability and validity of Annex V – a ruling that could not be made until the end of the Panel's proceedings and long after Annex V would have ceased to be useful. In other words, the United States would agree to the designation of a facilitator provided that such a facilitator would be prevented from facilitating the information-gathering process in a timely and effective manner. This amounted to a "Catch-22" situation.

48. On 1 April 2003, Brazil, although regretting that the information-gathering process could not yet benefit from the presence of a representative due to procedural maneuvers by the United States, had sent a list of questions to the United States and to third-country markets identified by Brazil. Several of these countries had indicated their willingness to cooperate in the process, as required by paragraph 1 of Annex V. The absence of cooperation on the part of the United States remained strikingly telling. With a view to providing another opportunity for a satisfactory outcome in this situation, Brazil had requested the Chairman, on 10 April 2003, to reconvene the meeting suspended on 31 March immediately after the present meeting. As Brazil had pointed out to the Chairman and to the United States, the purpose of that meeting would be the designation, by means of a DSB decision, of the so-called facilitator to accompany the procedures, as required by paragraph 4 of Annex V. Despite a formal request by Brazil, the Chairman had decided not to reconvene the meeting.

49. Brazil regretted that it had never been so difficult to have a facilitator. Brazil was becoming increasingly concerned with the procedural wrangling and detours which might have an impact on its rights in this dispute and which were rendering the procedures of Annex V meaningless. First, Brazil could not see why the question of designation of the representative had not yet been put by the Chairman for a decision by the DSB, as required explicitly by paragraph 4 of Annex V and as had been repeatedly requested by Brazil. If in the consultations and in previous meetings it had become clear that the parties had different views on this issue, the matter should then have been immediately submitted to the DSB for a decision. To state that an agreement between the parties was a pre-condition for submitting the question to the DSB was to create a new procedural obstacle that had absolutely no legal basis. Second, Brazil regretted the decision of the Chairman not to reconvene the suspended meeting although Brazil had made a formal request to this effect. The decision not to reconvene the suspended meeting prevented a possible solution, or at least a satisfactory outcome, that

might have occurred during the meeting. It also forced further undue delays in the proceedings. To express a wish for an agreement between the parties did not make up for a decision by the DSB. To set as a condition for the resumption of that meeting an agreement by the parties was equivalent to delegating the DSB's role to the demanded party. To create additional procedural hurdle amounted to another Catch-22 situation, equivalent to the one created by the Peace Clause allegation put forward by the United States at the previous special DSB Meeting.

50. The fact that the United States resorted to every procedural manoeuvre to render the procedure under Annex V ineffectual was deplorable, if understandable. Brazil was, however, distressed at the prospect of the DSB being manoeuvred into a situation of helplessness because of a failure to act in accordance with the legal texts. What should have been a straightforward procedure under the DSB and the SCM Agreement had indeed become a test for the effectiveness of the WTO dispute settlement mechanism. This was an issue of systemic importance and, like all systemic issues, one which would, unless dealt with properly by the DSB, come back to Members, long after this Panel ruled on the WTO compatibility of US subsidies on upland cotton. In conclusion, Brazil wished to renew its request for the designation of the representative, the functions of which could still be useful at this stage of the proceedings. In accordance with paragraph 4 of Annex V and Rule 17 of the Rules of Procedure for meetings of the General Council, Brazil, therefore, requested once more that the Chairman submit this matter now for a decision by the DSB.

51. The representative of the United States said Brazil's decision to invoke both the Agreement on Agriculture and the SCM Agreement prior to the expiration of the Peace Clause of the Agreement on Agriculture raised procedural questions that had not previously been faced by the DSB, particularly with respect to the interaction between the Peace Clause and the provisions of the SCM Agreement. The United States had approached these issues in a spirit of cooperation and had proposed a sequence of events that would have allowed for an orderly and logical resolution of these issues without prejudice to either party's position. Brazil would like to use the Annex V procedures to develop information from the United States and third-country Members concerned for Brazil's serious prejudice claims. But the Peace Clause precluded bringing an action based on those claims unless Brazil could show that the Peace Clause was inapplicable. The Annex V procedures were available only to establish claims of serious prejudice under the SCM Agreement. Contrary to suggestions made at the previous DSB meeting by Brazil, they were not available to gather information for purposes of showing whether the Peace Clause applied under the Agriculture Agreement. Thus, it was the United States that would be prejudiced if it were required to develop and provide information relating to measures that were "exempt from actions based on" Articles 5 and 6 of the SCM Agreement pursuant to the Peace Clause.

52. In trying to bridge the differences in positions, the United States had proposed a pragmatic way to safeguard both parties' positions. Under the US proposal, in the unlikely event the panel were to determine that the Peace Clause did not preclude Brazil's claims, the parties could then engage in the Annex V process. Brazil had not accepted this proposal. Instead, Brazil had submitted questions as though the Annex V process were available. In so doing, Brazil requested that Members undertake the burden of providing data that would, in light of the Peace Clause, be completely irrelevant to the panel proceedings. The United States hoped for Brazil's cooperation in finding a way through the procedural issues raised. The US proposal to allow the Annex V process to run if the panel decided the Peace Clause was not applicable remained open.

53. Also, in response to the last point made by Brazil, the United States noted that the agenda item at the present meeting concerned only Brazil's statement regarding Annex V, not the appointment of the DSB representative under paragraph 4 of Annex V nor a decision by the DSB under paragraph 2 of Annex V to initiate the Annex V procedures. In any event, the United States continued to believe that it was premature to appoint a DSB representative at this meeting. As the United States had explained at the 31 March DSB meeting as well as at the present meeting, Brazil was not entitled to use the Annex V procedures at this point. The United States had proposed a

pragmatic way to safeguard both parties' positions and hoped for the cooperation of Brazil in finding a way forward.

54. The representative of the European Communities said that the DSB had already decided to establish a panel in this case on the basis of the request pursuant to Article 7.4 of the SCM Agreement and with the terms of reference which included Articles 5 and 6 of the SCM Agreement. In the EC's view the DSB had to take a decision at this meeting on Brazil's request to appoint a facilitator. The obligation resulted from Annex V paragraph 4 was clear and unconditional. With regard to the point raised by the United States, the EC believed that this was an issue of jurisdiction which could not be decided by the DSB nor by the Chairman, but only by the panel. Therefore, by continuing to frustrate Brazil's rights and preventing the DSB from complying with its obligation, Members were entering into a difficult situation whereby Annex V was not applicable. The EC wished to know why the matter had not yet been presented to the DSB to perform its task.

55. The Chairman said that he wished to respond to some questions raised by delegations at the present meeting. With respect to Brazil's request to reconvene the meeting which had been suspended on 31 March, he recalled that, pursuant to the agreement reached between Brazil and the United States, prior to that meeting, he had stated in his concluding remarks that that meeting would be reconvened once an agreement was reached. That statement had been accepted by all Members present at that meeting, including Brazil. Given the continued differences between the parties it was, therefore, not possible to reconvene the suspended meeting. This was without prejudice to any other rights that Brazil might have in this regard. With respect to the question why the DSB was not in a position to make a decision to appoint a facilitator, it was obvious that for the DSB to decide on this matter, a decision would have to be taken by consensus and there were parties who had not yet accepted that certain procedures should be followed. At this point in time the DSB could not arrive at a decision on this matter.

56. The representative of Brazil said that the agreement between Brazil and the United States before the 31 March DSB meeting was to suspend the meeting. Brazil had not gone into the matter that the meeting would be reconvened once an agreement was reached. It was Brazil's understanding that the statement by the Chairman was an expression of the wish for that agreement to be reached and not a condition for the reconvening of the meeting, as the Chairman had stated. It was hard to imagine that an issue could only be decided upon as long as the demanded party was willing to give in to other arguments. With regard to the issue being presented to the DSB, he said that the point was that the Chairman was making a judgment based on his informal consultations that no decision could be made at this stage. However, once Brazil requested the Chairman to present the matter for a decision by the DSB, the Chairman would have to take up this matter and, in accordance with the rules of procedure, the DSB would have to come to a conclusion, but the Chairman could not take over the functions of the DSB, as stated in paragraph 4 of Annex V. It was up to the DSB Members to reach a decision in accordance with the rules of procedure and not for the Chairman to decide not to present the matter for consideration by the DSB. Therefore, Brazil did not think that it was the role of the Chairman to create additional procedural hurdles and, if this was the case, he wished to ask what would be required for the Chairman to present this matter for a decision by the DSB.

57. The representative of the European Communities said that the Chairman had stated that for the DSB to decide on this matter a consensus was required and, according to the Chairman, there was no consensus. He wished to know on which legal basis the Chairman based himself to decide that a decision pursuant to paragraph 4 of Annex V would have to be taken by consensus. The second question was that if this was obvious, the Chairman should bring this matter to the DSB. The EC shared the view expressed by Brazil that it was not in the power of the Chairman to decide that it was obvious whether or not there was a consensus. The matter should be presented to the DSB and Members would have to see if there was a consensus or a majority or any other situation.

58. The representative of the United States said that he had listened to the comments made by delegations. These comments had moved quite far from the item that Brazil had inscribed on the agenda of the present meeting, which was a statement on Annex V. While it was certainly the case that Brazil had requested the resumption of the suspended item that had been suspended at the 31 March DSB meeting, he wished to recall that that item was suspended pursuant to the DSB decision that had set out the basis on which the item would be suspended. The United States at that time was not in favour of suspending the discussion on that item, but had acceded to Brazil's request that this take place. Thus, it was difficult for the United States to understand the grounds on which Brazil wished to change the basis for moving forward with this item. He also wished to recall that the Brazilian and EC positions on this matter proceeded from the assumption that Annex V applied. As the United States had already explained, that assumption was not correct. The United States wished to reiterate its previous comments that it had held some discussions with Brazil and hoped that these discussions would continue. It recalled that it had expressed to Brazil and to the Chairman in informal consultations that the way forward would be for the parties to continue to discuss this matter in the hope of persuading Brazil to accept the suggestion that had been made by the United States.

59. The representative of the European Communities said that the EC wished to recall that pursuant to paragraph 2 of Annex V, "In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization … ." Therefore, it was clear for the EC that the procedure of Annex V had been initiated by the request of Brazil. There was no condition and there was a clear obligation for the DSB to initiate the procedure. Paragraph 4 of Annex V dealt with the designation of the facilitator. This designation was also an obligation for the DSB. Therefore, the EC wished to know why behind the so-called consensus, an opinion of one party to a dispute might prevail and paralyse the normal functioning of the DSB to perform its task. As stated by the EC the point raised by the United States which might be a valid point was a matter of jurisdiction for the Panel to decide upon. It was not up to the DSB nor its Chairman to decide on this issue by continuing the application of the disposition of Annex V by preventing the DSB to perform its obligation to take a decision. He reiterated the question as to what was the legal basis which had led the Chairman to believe that the application of Annex V needed a consensus.

60. The representative of Brazil said that he wished to clarify the difference between the proposal for an agreement put forward by the United States and the proposal for an agreement put forward by Brazil. On the one hand, the United States had suggested that the matter should be left for the panel to decide and once the panel had decided and had come to the end of its work then it might rule that Annex V would have been applicable and then it would have been a good idea to collect information under Annex V. On the other hand, Brazil had suggested to proceed with the designation of the facilitator and the information-gathering process. The United States would still retain its right to submit to the panel its point of view that that information was not applicable and that it was irrelevant. In that case no harm would be caused to the United States from the information-gathering process. However, instead the United States had suggested to agree to a procedure which would render Annex V ineffective.

61. The representative of the United States said that since Brazil had described the US proposal he wished to clarify the contents of the US proposal. The proposal was for the panel to decide the preliminary question as to whether or not the Peace Clause applied early in the proceedings. In the unlikely event that that decision in fact was that the Peace Clause did not apply to the measures in question, then the Annex V procedure could proceed. At that point, both the United States and Brazil and the over 15 third-country Members concerned identified by Brazil could engage in the procedures called for by Annex V. The procedure proposed by the United States balanced the interests of the parties, provided a practical way forward and would not, as Brazil had suggested at the previous meeting, allow the Annex V procedures to be used to develop evidence on the Peace Clause issue.

62. The representative of Chile said that his delegation was concerned about a dangerous precedent that procedural issues, which had always been decided by panels, were being raised in the DSB. Chile noted that this was not the first time that the United States had done so since it had already attempted to do so on another occasion.

63. The representative of Brazil said that paragraph 5 of Annex V stated that "The information-gathering process outlined in paragraph 2 through 4 shall be completed within 60 days of the date on which the matter had been referred to the DSB under paragraph 4 of Article 7 of the SCM Agreement." Therefore, the parties were long over due in this process of information-gathering. The procedure suggested by the United States would go against what was provided in Annex V and it would also in fact, if one were to agree to that, delay panel procedures contrary to the time-table established under the DSU.

64. The representative of the European Communities recognized that it was difficult for the Chairman to respond to the question raised by the EC concerning the legal basis on which the DSB was supposed to decide on Brazil's request to perform its obligation under Annex V. The EC was still waiting for an answer from the Chairman or the Secretariat regarding the legal basis. He drew attention to Article 2.4 of the DSU, which stated that "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus." However, this was when the DSB was performing a task pursuant to the DSU, but in this case the DSB was acting under the SCM Agreement. He recalled that Article 1, paragraph 1 of the DSU provided that "The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements, as are identified in Appendix 2 to this Understanding". Therefore, for the purpose of applying Annex V the DSB was acting on the basis of the covered agreement – the SCM Agreement – and not under the DSU. Therefore, Article 2.4 of the DSU was not applicable. Therefore, the question was what was the legal basis which enabled the Chairman to consider that a consensus was needed for the DSB to take a decision with regard to the obligation foreseen in Annex V of the SCM Agreement.

65. The representative of Benin said that his delegation wished to be associated with the statements made by Brazil and the EC.

66. The Chairman said that it was his understanding that this agenda item, which referred to the statement by Brazil regarding Annex V of the SCM Agreement, did not provide for a decision to be taken at the present meeting. Given the differences among delegations, he would like to propose that the DSB take note of the statements made and agree to convene an informal meeting immediately after the present meeting in order to further discuss this matter.

67. The representative of Brazil said that, given the previous history of this issue, his delegation was concerned that the Chairman had not addressed the matter at hand. Therefore, it was not possible to go into an informal mode and to continue this discussion indefinitely. There was nothing to prevent the Chairman from putting forward this matter for a decision by the DSB even though it had been placed on the agenda as a statement, but if the Chairman so believed, Brazil wished to have indications, during the formal meeting, as to what exactly would be required for the Chairman to put this matter for a decision by the DSB. It would be useful to do so at this stage given the fact that on another occasion the Chairman had referred to consensus and his perception of a lack of consensus prevented him from putting this matter before the DSB for a decision. It was important that in the formal mode, the Chairman stated for the record what were the necessary conditions for the Chairman in order to put this matter for a decision by the DSB as well as his understanding of the decision-making procedures that would be applicable in such circumstances.

68. The Chairman invited the Secretariat to respond to some questions regarding the legal aspects of the issues under consideration.

69. The representative of the Secretariat (Legal Affairs Division) said that his understanding of the question put by the EC, and alluded to, just a moment ago, by Brazil, was to know what was the legal decision-making procedure for the DSB to designate a representative pursuant to Annex V of the SCM Agreement. It was his understanding that such a decision would have to be taken by affirmative consensus, as required by the DSU for all procedures except for those which required negative consensus pursuant to the DSU.

70. The representative of Brazil said that, as pointed out by the EC, a consensus rule applied to decision-making by the DSB when the rules and procedures of the DSU provided for the DSB to take a decision. However, if a decision were to be made under the covered agreement, it would be useful if the Secretariat could indicate as to whether the DSB in such a case, when acting as the General Council, should take a decision by consensus. This was not clear from the reading of the text and in fact he questioned what would be the meaning of Article 2.4 of the DSU, in particular the first sentence thereof. He recalled that the Chairman in another meeting had decided not to present the issue for a decision by the DSB because of his evaluation, based on his informal consultations, that there was no consensus. However, even if the Chairman considered that consensus were to be required than he did not have the power to decide on the basis of his own evaluation, but rather he should submit the matter for a decision by the DSB and then the DSB would decide on this. Consequently, the Chairman would draw the conclusions from the result of decision-making by the DSB.

71. The representative of the European Communities said that the representative of the Secretariat had referred in his statement to affirmative consensus as a general decision-making rule of the DSB. However, this rule only applied if the DSB was acting on the basis of the DSU. Therefore, when the DSB was taking a decision and acting pursuant to the DSU, and unless there was a specific rule in the DSU, it should do so by consensus. However, in this case action had to be taken pursuant to the SCM Agreement and, therefore, there was a clear ruling in Article 1.2 of the DSU which provided that "the rules and procedures of this Understanding shall apply subject to special or additional rules or procedures on dispute settlement contained in the covered agreements as are identified in Appendix II to this Understanding to the extent that there was a difference between the rules or procedures of this Understanding and the special and additional rules and procedures set for in Appendix II the special and additional rules and procedures shall prevail". The EC believed that the DSB had to take action pursuant to the SCM Agreement and Annex V. Therefore, it was clear that the rules of the SCM Agreement and Annex V should prevail. He, therefore, asked where it was written in Annex V that the DSB shall take a decision by affirmative consensus. In his view, this was a clear obligation and condition. Paragraphs 2 and 4 of Annex V did not specify that the DSB shall designate a representative by consensus. Rather a simple majority would be necessary. He, therefore, asked the Chairman to put this matter to the DSB in order to enable it to perform its obligation.

72. The representative of the Secretariat (Legal Affairs Division) said that it was his understanding that where it was not stated otherwise, the rule of affirmative consensus applied in respect of the DSU and noted that footnote 1 to the DSU stated that "the DSB shall be deemed to have decided by consensus on the matter submitted for its consideration, if no Member, present at the meeting of the DSB when a decision is taken, formally objects to the proposed decision". Nonetheless, if a matter was referred to the DSB and the DSB had to take a decision that still required affirmative action by the DSB.

73. The representative of Japan said that her delegation had a procedural question. Japan did not have any interest in this case and had not participated as a third party in the proceedings, but respected the DSB's proceedings and its effective and efficient functioning. It was Japan's understanding that the procedure under Annex V of the SCM Agreement had been applied only once in the case on "Indonesia – Autos". Japan had been a party to that dispute, but had not invoked the procedure under Annex V of the SCM Agreement. It was the EC and the United States who had invoked that procedure. Japan, therefore, sought clarification either from the Secretariat or the EC as to what

exactly had happened in the DSB when it had decided to nominate Mr. S. Harbinson as a facilitator under Annex V.

74. The representative of Brazil said that with regard to the last explanation provided by the Secretariat, he said that footnote 1 to the DSU gave explanation of the meaning of consensus referred to in Article 2.4 of the DSU, but the issue under consideration was not a doubt about the meaning of consensus, but the applicability of the consensus rule provided in the DSU to a matter which stemmed from the SCM Agreement. Therefore, his understanding of the explanation provided by the Secretariat was that the first sentence in Article 2.4 of the DSU did not have any meaning and that paragraph 4 stated that when the DSB shall take a decision it shall do so by consensus.

75. The representative of the European Communities said that a reference to footnote 1 led him to another observation that a lack of consensus could only be established when a decision were to be presented to the DSB and when a Member formally objected to a decision. Therefore, how the Chairman could consider that it was obvious that there was no consensus without having presented the matter for a decision to the DSB. Even if it was true that a consensus was needed, the Chairman had an obligation to present the matter to the DSB and if a Member formally objected to it then the Chairman could determine that there was no consensus. However, until such time, it was not within the Chairman's power to decide whether the consensus was likely or not. He, therefore, questioned whether the Chairman could take such an important decision which was preventing the DSB from perform its task and obligation. The DSB had to be neutral and should leave to the parties to present the case for adjudication before the panel. Therefore, references to footnote 1 made it impossible for the Chairman to refrain from presenting the matter to the DSB for a decision. Besides, he still wished to have a response from the Secretariat on the question regarding the decision-making procedure for the DSB when the DSB was acting pursuant to the SCM Agreement. The meaning of paragraph 4 of Article 2 of the DSU was clear, but it was also clear that the special and differential rules and procedures contained in covered agreements superseded the ordinary decision-making rule when the DSB was acting pursuant to the covered agreement. Therefore, Article 2.4 of the DSU was not applicable in the situation at hand. He thus wished to know what was the disposition of the SCM Agreement or Annex V which allowed the Chairman and the Secretariat to consider that a consensus was needed in the case under consideration.

76. The representative of the United States said that he wished to make three points. First, with respect to the comments just made by the EC, he recalled that at the 31 March DSB meeting, the United States had indicated that it was premature to appoint a DSB representative at that meeting. That was the view taken at that time and perhaps the EC could take that as some comfort with respect to the Chairman's assessment of a consensus or lack thereof at that time. Second, he also wished to recall what had been stated earlier, namely, that the agenda item had been suspended at the request of Brazil. Third, he reiterated that Members had moved quite far from the item that had been inscribed on the agenda of the present meeting. The nature of the item inscribed on the agenda certainly had not given his delegation nor other delegations or the Secretariat any notice that the question that was now being discussed by Brazil and the EC with respect to a resumption of the suspended agenda item and the definition of consensus would in fact be discussed. The Chairman had made a proposal for consultations or an informal meeting for Members to have an initial exchange of views, and the representative of the United States believed that many Members would wish to consult capitals or seek instructions before expressing themselves definitively on the point under consideration. The United States supported the Chairman's suggestion and looked forward to proceeding with this meeting.

77. The Chairman said that despite the fact that this agenda item was not for a decision by the DSB at the present meeting, there had been a lot discussion on various issues. Obviously there were differences of views and given these differences, he wished to reiterate his suggestion that the DSB take note of the statements made and agree to convene an informal meeting, immediately after the present meeting, to further discuss this matter with those delegations who wished to do so.

78. The DSB took note of the statements and agreed to the Chairman's proposal that an informal meeting be held, immediately after the present meeting, to further discuss this matter.

7. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/226)

79. The Chairman drew attention to document WT/DSB/W/226 which contained an additional name proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/226.

80. The DSB so agreed.

8. Statement by the Chairman concerning a communication from the Appellate Body regarding the proposed amendments to the *Working Procedures for Appellate Review*

81. The Chairman, speaking under "Other Business", drew Members' attention to the letter, which he had received on 10 April 2003, from Mr. James Bacchus, the Chairman of the Appellate Body. The letter indicated that, having taken into account the comments made by delegations on the proposed amendments to the *Working Procedures for Appellate Review*, contained in document WT/AB/WP/5, which had been circulated on 19 December 2002, and having completed consultations with the Director-General and the Chairman of the DSB on this matter, the Appellate Body had prepared the final version of the amendments. The letter also included an explanation of the adjustments made to the proposed amendments circulated in December 2002. As indicated by the Appellate Body, these amendments would take effect on 1 May 2003 and a revised consolidated version of the *Working Procedures* of the Appellate Body would also be circulated in the three WTO languages on that date. He said that the Chairman Bacchus' letter, which contained the amendments, had been circulated as document WT/AB/WP/6 on 10 April 2003.

82. The DSB took note of the statement.