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Dispute Settlement Body
16 February 2001

MINUTES OF THE MEETING

Held in the Centre William Rappard
on 16 February 2001

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

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1. United States – Definitive safeguard measures on imports of wheat gluten from the European Communities

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure the effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 19 January 2001, the DSB had adopted the Appellate Body Report on "United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2. The representative of the United States said that his country intended to implement the DSB's recommendations and rulings in a manner that respected its WTO obligations. In accordance with Article 21.3 of the DSU, the United States would need a reasonable period of time in which to do so.

3. The representative of the European Communities said that the US safeguard measure on imports of wheat gluten had been condemned by both the Panel and the Appellate Body. In paragraph 183 of its Report, the Appellate Body had found that the safeguard measure "has no legal basis". He underlined that the safeguard instrument was an extraordinary remedy against fair trade and could only be used when strict conditions were respected. In this context, the immediate compliance prescribed by the DSU required an immediate withdrawal of the WTO-incompatible measure. The US authorities had the legal ability to immediately withdraw the safeguard measure for which there was no legal basis, and would have to do so. The EC rebalancing measure on US corn gluten feed, adopted in accordance with the specific provisions of the Agreement on Safeguards, would stop being applied as soon as the US safeguard measure on wheat gluten was withdrawn as in that situation there would be no need for a rebalancing.

4. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

2. Brazil – Export financing programme for aircraft

(a) Recourse to Article 21.5 of the DSU by Canada (WT/DS46/26)

5. The Chairman recalled that the DSB had considered this matter at its meeting on 1 February 2001 and had agreed to revert to it. He then drew attention to the communication from Canada contained in document WT/DS46/26.

6. The representative of Canada said that his country was requesting the establishment of an Article 21.5 panel for the second time. He recalled that at the 1 February DSB meeting, Brazil had blocked the establishment of that panel. He believed that, like Canada, other Members should have strong systemic concerns about Brazil's action in this regard. The intentions of drafters in relation to Article 21.5 of the DSU was to provide for a rapid determination of the WTO-consistency of implementing measures. This was essential in order to ensure the credibility and effective functioning of the dispute settlement system. Canada was requesting an Article 21.5 panel to determine the WTO-consistency of the latest version of Brazil's PROEX programme which had been announced in December 2000. Brazil had repeatedly claimed that this latest version of PROEX, incorporating the changes made in December 2000, was WTO-consistent. Canada did not share Brazil's view and considered that this issue should be examined by the original Panel in accordance with Article 21.5 of the DSU. It was therefore surprising that although Brazil claimed its compliance it wished to avoid an examination by an Article 21.5 panel of the WTO-consistency of its newest PROEX scheme and had blocked Canada's panel request at the 1 February DSB meeting.

7. For more than four years Brazil had claimed that the earlier versions of PROEX were fully consistent with its WTO obligations. Despite these claims, the previous versions of PROEX had been found to be WTO-inconsistent four times, twice by the original Panel and twice by the Appellate Body. Canada was confident that another Article 21.5 panel would reach the same conclusion about the latest version of PROEX. At the 1 February DSB meeting, Brazil had contended that under its revised PROEX programme, no equalization payments would be authorized in amounts that could bring the net interest rate below the Commercial Interest Reference Rate (CIRR). Canada had repeatedly made clear to Brazil, and had stated in the DSB, that the simple insertion of CIRR as a minimum interest rate did not constitute compliance in this case. Full compliance by Brazil would require the introduction of a number of additional disciplines to PROEX, as outlined in the Panel and

Appellate Body Reports. Brazil had continued to state persistently that it would not comply with these other conditions.

8. He noted that at the 1 February DSB meeting Brazil had again confirmed that it would honour its commitments under old contracts by continuing to grant prohibited subsidies under the earlier versions of PROEX. However, Brazil would have to accept that its position with respect to these so-called old contracts flew in the face of the DSB's rulings in this dispute. It was also impossible to reconcile that position with Brazil's claims that it had complied fully with the DSB's rulings. As indicated by the Appellate Body in its report under Article 21.5, with respect to these earlier versions of PROEX: "[t]o continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies." Since Brazil continued to make illegal payments under the earlier versions of PROEX, Canada had sought and had obtained authorization from the DSB to take appropriate countermeasures. Canada was therefore surprised by Brazil's statement made at the 1 February DSB meeting that by seeking an Article 21.5 panel with respect to the revised PROEX scheme, Canada "has opted for the course it should have taken at the outset". Canada was not required to obtain another ruling by an Article 21.5 panel before implementing the countermeasures authorized by the DSB in December 2000. That authorization had been granted as a result of Brazil's ongoing failure to withdraw the prohibited subsidies under its earlier PROEX schemes. The fact that Canada now sought the establishment of an Article 21.5 panel to assess the consistency of the latest version of PROEX did not, and could not in any way, prejudice its legal rights.

9. As stated at previous DSB meetings, although Canada had not yet imposed the countermeasures authorized by the DSB in respect of the earlier versions of PROEX, it retained the full right to do so at any time. Canada noted with deep concern that some senior Brazilian officials had made statements to the effect that if Canada proceeded with the legal countermeasures authorized by the DSB, Brazil would take action – unilateral and illegal action – against Canadian imports and investments. Canada was simply insisting that Brazil honour its negotiated commitments. In response, Brazil threatened to disrupt and to damage legitimate trade and investment. Canada had hoped that such threats would have ended once the legal framework for the settlement of disputes had been established. Brazil's statements threatened not only Canada, but also the systemic integrity of the dispute settlement process. Canada therefore continued to hope that Brazil would abide by all the obligations it had undertaken when it had become a Member of the WTO. Although, at the 1 February DSB meeting, Brazil had blocked Canada's request, it could not do so at the present meeting. The DSB had to apply the negative consensus rule and establish a panel. Canada looked forward to proceeding quickly with the Article 21.5 process and would assert its position vigorously before the reconvened panel.

10. The representative of Brazil noted that when this item had been on the agenda for the first time, he had pointed out that it would be essential to hold consultations on this matter due to the uncertainty and lack of transparency regarding the situation of the regional aircraft market. Brazil had requested such consultations on a number of Canadian programmes which affected the regional aircraft industry, and believed that it would have been useful to hold consultations on the revised Brazilian export financing programme. Several delegations had shared Brazil's position. Brazil, therefore, regretted that such consultations had not been requested by Canada. Under the DSU provisions, since Canada's request was on the agenda for the second time, the panel would have to be established, even though certain procedural violations had taken place. In this regard, he noted that consultations on the revised PROEX had never been held and the systemic question as to whether or not consultations were required under Article 21.5 procedures had not been addressed. Brazil, therefore, reserved all its rights in this regard.

11. Brazil always maintained that before the adoption of any countermeasures it was necessary to have a multilateral determination of inconsistency of the challenged programme with the WTO

Agreements. Since 6 December 2000, Brazil's PROEX programme was in full conformity with the WTO disciplines. Brazil had consistently indicated that if Canada disagreed with this assessment, it should have immediately sought the establishment of a panel under Article 21.5 of the DSU. However, instead of pursuing this course of action, and on the basis of a unilateral determination of non-conformity of the new PROEX programme with WTO disciplines, Canada had acted in a way that not only fell short of minimum expectations concerning compliance by Members with their WTO obligations, but also caused irreparable damage to the interests of Brazilian producers. First, Canada had sought authorization to adopt countermeasures against Brazil while the revised PROEX programme had not been reviewed. His country was surprised by Canada's action since bilateral consultations were being held with a view to reaching a mutually agreed set of compensations regarding the "old" contracts. Furthermore, no consultations had been held on the revised Brazilian programme. Second, while the revised PROEX programme had not yet been reviewed, Canada had announced that it would "retaliate" - this was the precise word repeatedly used in the announcement – against the Brazilian aircraft manufacturer Embraer in international transactions. This countermeasure, under the guise of retaliatory illegal subsidies, had not and could not have been approved by the DSB. Such "retaliation" involved a programme found to be in violation of the WTO disciplines. During bilateral discussions, Canada had guaranteed that this programme was being revised and would soon be amended. Such blatant violation of WTO disciplines had prompted Brazil to take action. He noted that consultations on this matter as well as on other matters would be held on 21 February 2001. Third, on 2 February 2001, prior to the revision of the PROEX programme and shortly after Brazil had objected to the first panel request, Canada had announced the imposition of its ban on Brazilian meat products, supposedly on grounds of sanitary and phytosanitary concerns. This action had not been authorized by the DSB. Brazil had stated that it would pursue the matter in the proper WTO body and he did not wish to enter into details at the present meeting.

12. He noted that the public opinion in Brazil had established a firm and clear linkage between the ban on beef and the Aircraft dispute. One had yet to hear a single voice in Brazil upholding that the ban was just an unfortunate coincidence. The same view seemed to prevail in Canada. Canadian health officials had denounced the lack of a scientific basis for the measure and the ill-disguised link between the ban and the Aircraft dispute. Similar statements by representatives of the private sector, academics, media analysts, and politicians had been found in all Canadian press reports following the announcement of the ban. Some of them had been eloquent in this respect. Brazil believed that Canadian authorities did not fully appreciate the immeasurable consequences of the action taken on 2 February and hoped that Canada would now seriously look into this matter. By accepting to receive a visit of a team of Canadian and NAFTA experts, Brazil had offered the opportunity for Canada to withdraw those arbitrary measures without delay. He underlined that Canada's action caused extensive injury and damage to the Brazilian economy in general, and to the Brazilian meat exporters in particular. Harm had been caused to a degree that surpassed any reasonable test of proportionality between cause and effect. This situation could not and would not be taken lightly. Brazil was reserving all its rights under the WTO Agreements and in particular the SPS Agreement. There was still the question about Canada's request for a panel. After making unilateral determinations and taking unilateral action of such magnitude and consequences, it was not clear what Canada was seeking by resorting to dispute settlement procedures and whether it was trying to seek further ways of damaging bilateral trade or legitimizing its *ex post* unjustified actions. Either way, Canada was pushing Brazil towards a spiral of unpredictable consequences.

13. The representative of Canada said that his country disagreed that Article 4 consultations were a precondition to the establishment of an Article 21.5 panel. No such requirement was set out in Article 21.5 of the DSU. Moreover, there had been several compliance panels established by the DSB despite the fact that no Article 4 consultations preceded the panel request. These included the compliance panels in the cases on Australian Salmon (WT/DS18), Australian Leather (WT/DS126), Shrimp (WT/DS58) and, indeed, the two compliance panels previously established in the case on Brazil-Aircraft and Canada-Aircraft. Similarly, in the High-Fructose Corn Syrup case (WT/DS132),

the US request for an Article 21.5 panel made no reference to prior consultations. Despite this, the DSB had established the Article 21.5 panel, and no Member had objected to this. Moreover, a requirement for prior consultations would be contrary to the object and purpose of Article 21.5, which was to provide for a rapid adjudication of an implementation dispute. Since the entire process was only 90 days, it would be absurd to read into Article 21.5 the requirement of a 60-day consultation period. Furthermore, Canada and Brazil had effectively held extensive consultations. In the nine months since the circulation of the Article 21.5 panel report in May 2000, which had confirmed that Brazil's last set of revisions to PROEX did not bring it into compliance, Canada and Brazil had met no less than six times to discuss Brazilian compliance. These consultations had taken place in May 2000, in New York; in June 2000, in Geneva; in July 2000 in Montreal; in August 2000 in São Paulo; in September 2000 in New York and in November 2000, in Rio. In the course of these consultations, Canada had precisely informed Brazil as to what, in its view, would constitute compliance and Brazil had given Canada an explicit indication of the PROEX revisions that it then had announced in December. Brazil had stated clearly that it was unprepared to consider any further changes to its PROEX scheme. Under these circumstances, to find that the DSU required Canada and Brazil to engage in additional consultations under Article 4 would be a triumph of form over substance and reason. This was nothing more than another attempt by Brazil to delay an independent assessment of its claim that its latest revisions to PROEX were WTO-consistent. More fundamentally, in the absence of such an express requirement for consultations, which in this case clearly did not exist, the DSB had to apply the negative consensus rule and establish the panel.

14. He said that, in response to Brazil's statement, he wished to make some comments regarding the ban on Brazilian beef. First, he wished to describe the actions taken by Canada on 2 February 2001 as well as to provide Members with essential background information on these actions. Second, he wished to advise Members on where matters currently stood as well as on the immediate steps to be taken. Third, he wished to stress that Canada's action was taken exclusively to protect the health of Canadians from the risk of Bovine Spongiform Encephalopathy (BSE), and the suspension was unrelated to other issues or disputes. On 2 February 2001, Canada had suspended imports of food products from Brazil which were subject to Canada's policy for BSE. This was a prudent and reasonable measure to protect Canadians from the risk of this serious disease. It was Canada's policy not to accept imports of certain animal products such as beef from a country, unless it recognized that country to be BSE-free. On 16 April 1998, Canada had submitted a formal notification of its BSE policy to the WTO (G/SPS/N/CAN/39) which had been implemented on 15 June 1998. This policy had taken into account the comments received on an earlier proposed policy which had been notified on 9 January 1997 (G/SPS/N/CAN/18). Upon adoption of its BSE policy in 1998, Canada had requested a number of countries to provide information in order to assess their BSE status. The information sought by Canada was based on the multilateral criteria established by the International Office of Epizootics, the body whose competence in this field was specifically recognized by the SPS Agreement. Brazil was the only country that had not complied with Canada's request for information. The information provided by Argentina, Uruguay, United States, Australia and New Zealand had allowed the Canadian Food Inspection Agency (CFIA) to conduct a proper assessment to allow for their recognition as BSE-free in accordance with the established process.

15. In a letter dated 28 May 1998, Brazil had been formally notified of Canada's new BSE policy, and it had been provided with a questionnaire to be used in assessing its BSE status. A detailed chronology of Canada's attempts to obtain this information was contained in a CFIA fact sheet which was part of a package to be made available to Members. Up to the time of the suspension of imports by Canada on 2 February 2001 and despite its notification and numerous follow-up requests, Brazil had not provided the information necessary to allow the CFIA to begin the assessment as required by Canada's BSE policy. On 25 January 2001, the Food and Agriculture Organization (FAO) had issued a report on the significant potential that BSE might have already moved from Europe. On 30 January 2001, there had been reports that Brazil had initiated an audit of imports of live animals from BSE-infected countries. Such imports into Brazil from Europe had continued until 1999. These

two events – the FAO report and the information that Brazil had continued imports of European live animals until 1999 – were important factors in the CFIA's decision to take temporary action, for health and safety reasons, pending the provision of full information from Brazil and the completion of a risk assessment. The CFIA had taken this technical decision based on its legal obligation to protect the health of the public. As well, the CFIA operated in a broader trilateral context, in that it cooperated closely with its US and Mexican counterparts pursuant to a technical consultative arrangement among the NAFTA countries.

16. With regard to the second point concerning where the matter stood and immediate next steps, he said that in notifying Brazil of its actions, Canada had indicated that it would, as a priority, conduct a risk assessment, assuming that Brazil would make full information available. Since the imposition of the ban on 2 February, Canada had had very good technical cooperation with the responsible Brazilian officials. The CFIA had sent a team of Canadian scientists to conduct an on-site visit in Brazil this week as part of its continuing process to fully assess the Brazilian regulatory system for the risk of BSE. This team had also been joined by scientists from the US and Mexican governments. This quick response to information provided in the past week by Brazil showed the high priority that Canada ascribed to the early and satisfactory resolution of this issue. At the same time, the scientists would take the time needed to do their jobs. They would not cut any corners. The tripartite delegation was clarifying documentation provided by Brazil in the past week in its response to the Canadian questionnaire. The delegation was to focus on gaining further information, and/or clarification, on three specific risk factors. The three risk factors were as follows: (i) feeding and rendering practices to be led by Canada; (ii) import practices to be led by Canada and Mexico; and (iii) surveillance and laboratory procedures to be led by Canada and the United States. These scientists would seek and analyze information on important matters such as the procedures that were in place to eliminate the risk of contamination of the cattle population through feed, the management procedures in place to mitigate the risk associated with importation, and trace back information on imports from BSE affected countries. The need for this additional information was the very purpose of the on-site visit to Brazil, which would help expedite the BSE review process. The on-site visit was expected to last five days and Canada would complete its assessment of the Brazilian regulatory system expeditiously once all pertinent information had been received and reviewed. Canada had made it abundantly clear that if Brazil met Canada's requirements to be assessed as BSE-free, the temporary suspension of imports would be lifted. However, Canada was not, and would not be complacent about BSE. It was rigorous in monitoring and assessing such diseases in order to make advancements in scientific developments and to put prudent and reasonable measures in place to guard against these diseases. Canadians expected no less. The Canadian government would fulfil its responsibilities to protect the health of its citizens.

17. Canada was disturbed by suggestions made by some senior Brazilian officials in the media that the measures it had taken were related to the Aircraft dispute, and that they were a form of unofficial and not authorized "retaliation". This was a serious allegation and Canada emphatically rejected such a link. The actions taken by Canada were related exclusively to safeguarding its food supply, and to the protection of public health. The Aircraft dispute was a separate and totally different issue, which was currently being dealt with in other fora, including the Article 21.5 panel and in the consultations that had been requested by Brazil. To allege such a linkage between aircraft and BSE was unhelpful and completely unwarranted. BSE was a public health issue, not a trade issue. Notwithstanding these allegations, Canada would continue to work closely with Brazilian scientific and technical officials in an effort to seek an early and satisfactory solution and one that fully protected the health and safety of Canadians.

18. The representative of Brazil said that his delegation welcomed the statement made by Canada concerning the procedures invoked in relation to Brazilian beef. However, he noted that some references contained in that statement were incorrect. For example, the reference that Brazil had not provided information after the ban had been imposed was incorrect. Brazil had learned that the ban

would be imposed and immediately thereafter it had asked Canada for time to reply and had obtained 24 hours. Brazil had replied within 24 hours but the ban had been in place the next day. Brazil and Canada enjoyed the best possible relations and had many points in common. It was therefore surprising that Brazilian authorities, at an appropriate high or diplomatic level, had not been informed by their Canadian counterparts of their intentions. Ministers of Agriculture of the respective countries had met five times in the past year, but this subject had never been raised. Furthermore, the ban had been imposed by a country that had, at least, one case of proven BSE on a country that did not have proven BSE cases. It was therefore not surprising that Brazilian public opinion had made the link between the Aircraft dispute and the beef ban. Also many Canadians i.e. entrepreneurs, bankers, politicians and academics had made comments thereon. He noted that David Westway of the Centre of Research for Neuro-Degenerative Disease of the University of Toronto had stated that the chances of cattle in Brazil having BSE were quite low. Mr. Westway added that Canada, on the other hand, was not testing enough animals to know for sure. Although it was recognized that safety should come first, there was a need to preserve some proportion. Canada's action did not match the very friendly relations that the two countries maintained and wished to continue to maintain. For that reason, Brazil was surprised. The Canadian public opinion had also received this news with a mixture of disbelief and embarrassment. These questions would be addressed in the proper forum and, he believed, good relations between the countries would continue.

19. The representative of Canada said that Canadian public opinion was not in disbelief or embarrassment because it was aware that public health was the priority. He underlined that it was not for diplomacy or politics to discuss technical issues. The CFIA had made its decision based on the technical and legal framework. BSE was not an issue to be discussed in the political or diplomatic circles. Health and safety issues should not be resolved through political or diplomatic efforts. He noted that Canada had had one case of BSE in 1993 which involved a cow imported from the United Kingdom. Canada had acted quickly and forcefully and the entire herd had been slaughtered. Since then there had been not a single case and Canada had been testing regularly.

20. The representative of Japan said that his country was concerned about the prolongation of this dispute and repeated resorts to Article 21.5 of the DSU in this case. Japan hoped that a panel to examine this matter would contribute to a mutually satisfactory resolution of the dispute.

21. The representative of Malaysia said that he wished to raise some systemic issues in relation to this case. He did not wish to comment on the beef ban, but to underline that any SPS measure should be based on scientific evidence or at least available scientific evidence in pursuance of Article 5.7 of the SPS Agreement. He regretted that two meetings of the DSB were necessary in order to establish an Article 21.5 panel. This was a compliance stage and the panel should have been established when the request had appeared on the agenda for the first time. He reiterated his country's position that a request for an Article 21.5 compliance panel did not have to be preceded by a formal Article 4 consultation process. Nevertheless, some consultations should be held as a matter of good practice and the party intending to invoke an Article 21.5 panel should inform the other party of its intention to do so. Notwithstanding the fact that, as stated by Canada, consultations had been held on numerous occasions in the dispute at hand, it was not clear whether Canada had informed Brazil of its intentions to invoke Article 21.5 of the DSU. Canada had also stated that the insistence on holding consultations in this case implied that the procedure was more important than the substance. Malaysia did not agree with this position. There was a need for certain procedures to be followed. He reiterated that it was not his country's position that there should be Article 4 consultations. He recalled that in the Shrimp case (WT/DS58) before Article 21.5 of the DSU had been invoked, Malaysia had held consultations with the United States. However, these consultations had been held pursuant to the Malaysia/US bilateral understanding reached on 22 December 1999, and not Article 4 of the DSU. The parties had consulted in good faith, but once it had become clear that no solution could be found Malaysia had informed the United States of its intention to request Article 21.5 review panel.

22. The representative of the European Communities said that the EC's position was that under Article 21.5 of the DSU there was a need to hold Article 4 consultations. The text of Article 21.5 referred to the dispute settlement procedure which comprised several stages, including consultations. He reaffirmed that the EC's position on this issue was unequivocal. With regard to the case at hand, the EC urged the parties to the dispute to find an agreement, which would respect the DSU provisions and would take into account the concerns of the parties.

23. The Chairman said that Brazil had referred to a procedural shortcoming in this process, namely, the absence of consultations. Some Members had expressed systemic interest in this issue. He noted that Brazil had reserved its rights, but was not going to object on this ground to the establishment of a panel at the present meeting. Since there was no consensus at the present meeting not to establish a panel, the DSB would have to establish such a panel. Brazil would be able to raise its concerns before the panel, in accordance with past practice.

24. The representative of Brazil said that his delegation recognized that, as stated by the Chairman, there was no consensus not to establish a panel and therefore such a panel would be established at the present meeting. However, the Chairman had also stated that Brazil had not objected to the establishment of a panel at the present meeting. He underlined that he did not wish to be misinterpreted by the Chairman's statement that Brazil was not objecting to the establishment of a panel.

25. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Canada in document WT/DS46/26. The Panel would have standard terms of reference.

26. The Chairman invited delegations wishing to reserve their third-party rights to raise their flags.

27. The representative of the European Communities reserved third-party rights to participate in the Panel's proceedings.

28. The Chairman noted that the Member who had reserved third-party rights by raising its flag did not need to send any confirmation in writing to the Secretariat. Other delegations who might wish to reserve their third-party rights should do so through a written communication within the next five days after the meeting.

29. The representative of Australia sought confirmation as to why in this case the Chairman had indicated a five-day period for notification of third-party rights.

30. The Chairman said that this was in line with previous cases dealing exclusively with prohibited subsidies because in those cases all time-periods were cut by half. He therefore followed the precedent.

31. The representative of Australia said that his delegation's understanding was that the ten-day rule for notification of third-party rights stemmed from a decision of the DSB. Although his delegation would work on the assumption that the five-day period applied in this case, it would seek clarification of this, if it seemed appropriate, over the next days.

32. The representative of Brazil noted that the DSB was establishing a panel pursuant to Article 21.5 of the DSU, not Article 4 of the SCM Agreement.

33. The representative of Malaysia said that his country shared the concerns expressed by Australia and Brazil. He recalled that there was another case dealing with prohibited subsidies in

which a five-day period for notification of third-party rights had been announced and one delegation had raised systemic objections that it had difficulties in accepting five days, but nevertheless had not objected to it. However, that delegation had expressed the view that this should not create a precedent for future cases. The deadline in this case was five days, but this should not create a legal precedent in anyway and delegations would have the possibility to revert to this issue. He noted that in the previous Article 21.5 panel pertaining to the Aircraft cases a time-period of five days for the reservation of third-party rights had applied, therefore, there was a precedent in this area.

34. The Chairman said that the deadline for notification of third-party rights in this case was five days but this did not create a precedent in any way and delegations had the possibility to revert to this issue in future. He noted that in the previous Article 21.5 panel in the Aircraft cases, a time-period of five days had been observed for the reservation of third-party rights. Therefore there was a precedent in this area.

35. The representative of Australia said that his delegation would accept the five-day period specified by the Chairman, but would seek clarification from the Chairman through the Secretariat in the form of a document explaining the basis for this ruling. He was concerned that a five-day period in this instance, particularly since the weekend was involved, would not give his authorities adequate time to consider a systemic interest in this case. He reiterated that the Chairman had indicated that a five-day period would be appropriate in this case and that Australia would seek clarification on this matter. If after consulting the relevant DSB decisions and DSB practice on this matter, it was decided that the 10-day period was the appropriate and legal time-frame, a clarification would be given to Members by the Chairman.

36. The Chairman said that it was his understanding that Australia was proposing that the issue be left to the discretion of the Chairman after some thorough research.

37. The representative of Brazil said that it had been stated that a similar approach had been taken under the Article 21.5 procedure in the Aircraft case the first time around. He noted that at that particular point in time all deadlines had been agreed bilaterally by Brazil and Canada. There was a systemic issue involved in this case, namely, whether a panel was being established under Article 4 of the SCM Agreement or Article 21.5 of the DSU. It was his understanding that the Chairman would undertake some research on this subject.

38. The representative of Malaysia said that his delegation would abide by the Chairman's decision provided that there was some clarification on this issue.

39. The representative of the United States sought confirmation of his understanding regarding the reference to the Chairman's statement as a ruling. It was his understanding that the statement by the Chairman was a traditional statement rather than the Chairman's ruling that third parties should reserve their rights within five days from the date of the establishment of a panel. He did not wish to enter into the historical background in detail behind the traditional Chairman's statement at the present meeting and only sought confirmation that his understanding was correct.

40. The Chairman confirmed that he had not made a ruling but a traditional statement.

41. The representative of Hong Kong, China said that Brazil had stated that in the case at hand, all deadlines had been agreed by mutual agreement between the two parties. In his delegation's view, a five or ten-day requirement was the right of third parties not the parties to the dispute and should not be affected by a mutual agreement between the parties to the dispute.

42. The representative of the European Communities said that his delegation wished to reserve its right on this matter. As stated by the United States this practice did not emanate from the DSU but

dated back to the GATT and had been followed by Chairpersons for practical reasons. He reserved the EC's right as to whether Article 4.12 of the SCM Agreement might apply to the Chairman's statement. It was not clear and the EC did not have a definitive position on the question as to whether Article 4.12 was applicable to the Chairman's statement.

43. The Chairman proposed to follow a procedure envisaged by Australia, namely, that the deadline for notification of third-party interests was five days in this case. The matter would be examined and the Secretariat would prepare a note on this issue. If on reflection an extension of the five-day period were to be required, he would notify delegations to this end.

44. The DSB took note of the statements.

3. Argentina – Measures affecting the export of bovine hides and the import of finished leather

(a) Report of the Panel (WT/DS155/R and Corr.1)

45. The Chairman recalled that at its meeting on 26 July 1999, the DSB had agreed to establish a panel to examine the complaint by the EC. The Report of the Panel contained in document WT/DS155/R and Corr.1 had been circulated on 19 December 2000. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Panel Report had been circulated as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of the EC. In accordance with Article 16.4 of the DSU, the adoption procedure was without prejudice to the rights of Members to express their views on the Panel Report.

46. The representative of the European Communities said that the EC welcomed the conclusions and recommendations of the Report which related to long-standing difficulties encountered by European industry. The EC noted with satisfaction the Panel's ruling on Article X:3(a) of the GATT 1994, which recognized the importance of ensuring the confidentiality of business information in the context of customs procedures. The Report had also confirmed the fundamental principle of ensuring non-discriminatory taxation of imported goods, as provided for in Article III:2 of the GATT 1994. Respect for this principle was essential and Members, when making their decisions in the tax area, had to ensure that there was no discrimination against imported goods in any form. The EC wished to comment on one specific point of the Report, namely, the Panel's interpretation of the relationship between paragraph (d) of Article XX of the GATT 1994 and the chapeau of that provision. The EC believed that the measure to be examined under Article XX(d) was the actual measure in dispute in each case, and in particular its infringing provisions, and not the general design of the measure. In the EC's view that interpretation had been confirmed by the Appellate Body's Report in the case on Korea-Beef (WT/DS161).

47. The representative of Argentina said that his country wished to thank the members of the Panel for their efforts to resolve a case which had proved particularly complex in view of the large number of factual issues involved. The Panel's work confirmed the effectiveness of the dispute settlement mechanism as an instrument which underpinned the principles and commitments negotiated during the Uruguay Round. Argentina also wished to express its satisfaction with the Panel's finding that there had been no violation of Article XI of the GATT 1994, thereby disproving the alleged existence of a de facto prohibition or restriction on exports of Argentine leather. This should bring closure to the successive submissions by the EC which had led it to question various aspects of the Argentine leather export regime and which had culminated in a Panel proceeding of a much broader scope than the topic originally considered. With regard to the less significant finding in respect of the EC's contention concerning a partial and unreasonable administration of laws and regulations in the light of the provisions of Article X:3(a) of the GATT 1994, Argentina was pleased

to announce that it had already taken the first steps towards adjusting its customs procedure with a view to strengthening the confidentiality of export formalities. In this connection, a preliminary protection mechanism was already in operation and was likely to be finalized in the near future.

48. As previously indicated, Argentina regretted that the initial dispute had been extended by the EC to tax issues concerning the collection of VAT and profit tax, areas which were far removed from the leather export regime and which touched on matters of particular importance for the fiscal balance of a developing country like Argentina. His country was disappointed with the Panel's conclusion that, in their present form, the resolutions which provided for the collection of advance VAT and profit tax on imports were inconsistent with Article III:2 of the GATT 1994. However, Argentina drew attention to the merit of the Panel's recognition of the need for the "percepciones" and "retenciones" regimes. In this context, and in the light of its WTO obligations, Argentina intended to follow the steps provided for in the DSU without taking the dispute to an Appellate Body. Argentina was glad to have a discussion with the EC and to be able to reach agreement on certain issues. Argentina believed that in future more attention could be paid to Article 21.2 of the DSU concerning the particular attention to be given to developing countries. His country would revert to these points if and when there was an opportunity under the framework of the DSU.

49. The representative of the United States said that while not taking a position on the specific outcome in this dispute, his country was pleased with the Panel's Report in two respects. First, the Panel had found that a measure such as that at issue, whereby interested private parties were invited to participate in the export process, could constitute a prohibited restriction on exports under Article XI of the GATT 1994; although it had found insufficient evidence in this particular dispute. This conclusion was important from a systemic point of view because it addressed whether Members could avoid WTO obligations by permitting private parties to take actions that would be prohibited if taken by a Member itself. Second, the United States was pleased that, in examining whether Argentina's "advance" turnover tax was consistent with Article III:2 of the GATT 1994, the Panel had been careful to determine that the tax was in fact a tax on products, and not on income in deciding that the tax fell within the scope of Article III:2 of the GATT 1994.

50. The DSB took note of the statements and adopted the Panel Report contained in WT/DS155/R and Corr.1.

4. Statement by Argentina concerning the rejection by the United States of Argentina's request to be joined in consultations pursuant to Article 4.11 of the DSU in the case on: "United States – Continued Dumping and Subsidy Offset Act of 2000"

51. The representative of Argentina, speaking under "Other Business", said that his country wished to raise its systemic concerns with regard to the rejection by the United States of Argentina's request pursuant to Article 4.11 of the DSU to be joined in the consultations requested by Australia, Brazil, Chile, European Communities, Korea, India, Indonesia, Japan and Thailand, pertaining to the case on: "Continued Dumping and Subsidy Offset Act of 2000", the so-called Byrd Amendment (WT/DS217). The dispute settlement system provided for consultations to enable Members who had doubts about the consistency of a measure adopted by another Member to seek clarification of the scope of that measure and thus try to reach a satisfactory solution. Other Members who considered that they had a substantial trade interest could have recourse to Article 4.11 of the DSU. Argentina had expressed its desire to be joined in the above-mentioned consultations because it considered that it had a substantial trade interest and had explained its reasons in writing in document DS217/2, dated 15 January 2001. However, Argentina's request had been rejected. Argentina, therefore, wished to express its concern about the US rejection of its request to join consultations without any explanation or statement of the reasons for doing so. It was Argentina's understanding that the spirit and the letter of Article 4.11 of the DSU required, at the very least, a basic explanation of the reasons for rejecting a request for which the other party believed to be justified. The right of Members to reject requests to

join consultations should not be exercised completely at their discretion. In Argentina's view, this right required, at the very least, an explanation as to why that Member believed that a claim of a substantial trade interest was unfounded.

52. The representative of Canada said that, like Argentina, his country had sought to join the consultations on this matter. Canada's request had also been rejected by the United States, essentially without reasons. He noted that the United States had taken similar actions in prior disputes. He therefore wished to offer three brief related comments on this issue. First, Article 4.1 of the DSU stated that Members "affirm their resolve to strengthen and improve the effectiveness of the consultation procedures". Canada did not see how a summary rejection of a request to join consultations, without reasons, either strengthened or improved the effectiveness of consultation procedures. Second, Article 4.11 of the DSU allowed Members to join consultations if they had a "substantial trade interest". The term "substantial trade interest" was broadly worded and, in Canada's view fully encompassed a commercial and a systemic interest, or both. If the drafters of the DSU had intended to limit participation in consultations to those Members with a commercial interest only, they would have used explicit language to this effect. Third, the purpose of consultations was to resolve disputes without having to resort to a panel process. A rejection of a request to join consultations would only encourage the rejected parties to seek their own set of consultations. This, in Canada's view, was inimical to the speedy resolution of disputes involving multiple parties. Therefore, a broad reading of Article 4.11 was consistent with both the wording and the intent of the DSU, and helped to enhance the stability of the dispute settlement system.

53. The representative of India said that his country fully endorsed and supported the statements made by Argentina and Canada. He noted that India's steel and other products were being subjected to several anti-dumping and countervailing proceedings by the US authorities. India had therefore sought to join as a third party in the consultations requested by EC in the case on "United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat products form Germany (DS213) and "United States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe" (DS214). However, the United States had rejected India's requests without any reason. In the latter dispute, the United States had sent its rejection after consultations had been held. Those consultations had been held in the morning of 26 January 2001 and the rejection had been faxed to India that evening after 5 p.m. It was India's understanding that the United States had orally informed Canada in advance that its request to join consultations had been rejected. However, it had chosen to inform India only after the consultations had been held. This was indeed regrettable. As Canada had pointed out, the purpose of consultations was to resolve disputes without having to resort to the panel process. The summary rejection by the United States would encourage Members to initiate more disputes. As stated by Canada, this was inimical to the system.

54. The representative of Japan said that his country shared the views expressed by Argentina, Canada and India that a rejection of a request to join consultations without clear reasons did not strengthen or improve the effectiveness of the consultation procedure. It further considered that if such rejections prevailed, a Member to which a request for consultations was made would be able to exclude third parties from consultations and would choose only those third parties who supported it. Japan had a systemic concern about this issue. In his country's view, if a Member other than a consulting Member considered that it had a "substantial trade interest" in consultations being held pursuant to Article XXII:1 of the GATT 1994 and Article 4.11 of the DSU or other corresponding provisions, its participation as a third party should be accepted, unless the Member to which a request for consultation was made explained the reason as to why it did not agree that the claim of substantial interest was well-founded.

55. The representative of Hong Kong, China said that his delegation had not made any request to join in the consultation in the case at hand. However, it had a strong interest in the case and was

monitoring it very closely. Hong Kong, China also wished to reserve its rights under the DSU in this regard. At this juncture, his delegation wished to echo the systemic concerns raised by Argentina, Canada, India and Japan.

56. The representative of Brazil said that his country was also a party to this dispute and would have no problem if some Members had joined in the consultations on this matter. Brazil was concerned about the manner in which Members sometimes responded to requests to be joined in consultations under Article 4.11 of the DSU. Brazil had submitted to the United States its request to be joined in consultations in the case related to the methodology of the US in anti-dumping procedures concerning the change of ownership of previously state-owned enterprises. This procedure had been initiated by the EC and Brazil had a similar dispute in parallel. Brazil had held consultations on this matter and would wish to be joined in the consultations held between the EC and the United States. Brazil hoped that the United States would look at its request favourably.

57. The representative of the European Communities said that his delegation wished to make some systemic points. The EC was one of the parties involved in the dispute at hand and had no problem with the requests made by other parties to be joined in the consultations. Article 4.11 of the DSU provided that the defendant had the right to decide whether or not a request to join consultations should be accepted. Therefore, the EC had to abide by the decision taken by the United States. However, it was in the interest of the system to allow for the broadest possible participation of third parties in the dispute settlement process. The EC was open in this regard. He wished to know why responses from the country to whom the request for consultations was addressed were not made public and what was the practice in this area. He believed that it might be useful to know which countries and for what reasons rejected other countries' requests under Article 4.11 of the DSU.

58. The representative of the United States noted that all delegations were aware of the text of Article 4.11 of the DSU which stipulated that the Member shall be joined in the consultations, if it had a substantial trade interest provided that the Member to which the request for consultations was addressed agreed that the substantial trade interest was well-founded. Therefore, the first question was whether the claim for substantial trade interest was well-founded. The next question was whether the Member agreed with that. There was nothing in that provision that referred to an explanation as to why the request had not been accepted or why the Member did not agree that the request was well-founded. There was nothing along the lines that some delegations had sought in the DSU text, calling for acceptance unless a detailed explanation was provided.

59. While all these questions had been raised at the present meeting, the United States had not been contacted by any of these delegations on this matter. This was unusual. He noted that the term used in Article 4.11 of the DSU was a "substantial trade interest" and meant just that. It implied that the trade of another Member was being affected. It had been stated that the purpose of the system was to ensure the broadest possible participation in the dispute settlement system. The United States disagreed with that. The purpose was to resolve disputes. In this case, turning consultations into essentially a working party was not the best way to resolve disputes. He did not think anyone could claim in this case, given the long list of those who had requested the consultations, that there was not a broad participation in these consultations. The United States could not see how a Member could have a substantial trade interest in a challenge to a measure in the abstract. In particular when that measure had never been applied and for which implementing regulations had not even been developed, let alone having a substantial trade interest when the measure had not been applied.

60. With respect to the question asked by the EC, he noted that a discussion had taken place in the past on the issue of making available to other Members responses to Article 4.11 requests to join consultations. The United States had long had a practice of providing to the DSB all of the responses to requests to join consultations even though this was not required under Article 4.11 of the DSU. This issue had been discussed in the DSB and Members had been asked to provide all responses to the

Secretariat as well as to other Members. An extensive discussion had also been held on these issues in the course of the DSU review, and most of these points had been addressed at that time.

61. The representative of Argentina noted that the US response had been received by his country on 5 February at 5 p.m. and the consultations were scheduled to be held at 10 a.m. on 6 February.

62. The Chairman said that this matter had been raised at the 27 July 2000 DSB meeting[1] in relation to the agenda item on: "Third-Party Participation in GATT Article XX Consultations in Relation to the Case on United States – Section 306 of the Trade Act of 1974 and Amendments Thereto". He drew attention to paragraph 96 of the minutes of that meeting which stated the following: "The Chairman drew attention to Article 4.11 of the DSU which stipulated that a 'Member shall be joined in the consultations provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event, they shall so inform the DSB'. Therefore, when a claim for joining in consultations was accepted, the DSB was informed. His proposal was to circulate the names of Members that had been accepted to join consultations under Article 4.11 of the DSU, but there was no obligation to notify the names of Members that had not been accepted." He believed that the Secretariat had adopted the practice of circulating the names of Members that had been accepted. It was not really feasible to do so for those who had not been accepted because there was no obligation to inform the DSB in that case. Members could reflect on this matter.

63. The DSB took note of the statements.

5. Election of Chairperson

64. The Chairman recalled that at its meeting on 8 and 9 February 2001, the General Council had taken note of the consensus on a slate of names for chairpersons to a number of WTO bodies including the Dispute Settlement Body. On the basis of the understanding reached by the General Council, he proposed that the Dispute Settlement Body elect Mr. Roger Farrell (New Zealand) as Chairman of the body by acclamation.

65. The DSB so agreed.

[1] WT/DSB/M/86.