WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
29 July 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 29 July 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Prior to the adoption of the agenda, the item concerning the request for the establishment of a panel in the case on: "Peru – Tax Treatment on Certain Imported Products" was removed from the proposed agenda at the request of Chile (WT/DS255/4).

Subject discussed: Page

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

(b) United States – Anti-Dumping Act of 1916: Status report by the United States

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 two sub-items to which he had 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.6)

2. The Chairman drew attention to document WT/DS160/18/Add.6 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 in accordance with Article 21.6 of the DSU, her country had provided an additional status report in this dispute on 18 July 2002. As noted in the report, the United States had been engaged in discussions with the EC to find a positive and mutually acceptable resolution of the dispute. The United States was working hard to reach a mutually acceptable arrangement consistent with WTO rules. The US Administration continued to engage actively with the US Congress on this matter and looked forward to resolving the dispute.

4. The representative of the European Communities said that his delegation had noted that the US Administration was working with the US Congress, but the EC was still concerned about the lack of implementation of the DSB's recommendations and rulings and about prospects for Congressional action in the short term, taking into account the Summer Recess and legislative elections next autumn.

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.6 - WT/DS162/17/Add.6)

6. The Chairman drew attention to document WT/DS136/14/Add.6 – WT/DS162/17/Add.6 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 the United States had provided an additional status report in this dispute on 18 July 2002, in accordance with Article 21.6 of the DSU. As noted in that report, bills had been introduced in both the US Senate (S.2224) and the US House of Representatives (H.R. 3557) which would repeal the 1916 Act and apply to all pending court cases. She said that the United States would continue to work for further progress in this matter with a view to achieving a mutually satisfactory resolution to this dispute with the EC and Japan.

8. The representative of the European Communities said that to facilitate the implementation of the DSB's recommendations and rulings, the EC had agreed first to extend the implementation deadline by five months and then to suspend the arbitration proceedings until 30 June 2002. This latter deadline had now expired and the latest status report by the United States again showed no progress. The bills introduced in the House of Representative and in the Senate to repeal the 1916 Act and to terminate pending cases had not been adopted or even discussed by the US Congress. This

continuous delay on implementation of this case undermined the credibility of US commitments to compliance. The EC would also like to remind the United States that the proceedings brought against EC companies in the Printing Press case would resume on 8 August, if the 1916 Act had not been repealed by that date. This had become very unlikely with the summer recess starting on 29 July in the House of Representatives and at the end of the week in the Senate. Notwithstanding the clear condemnation of the 1916 Act, EC companies would be involved in extremely costly litigation procedures and could even be found liable. Obviously such a result would not be acceptable to the EC. He stressed again the extreme urgency of getting some positive developments in this case, including action by the US Administration to seek a renewed stay in the court proceedings against the EC companies, pending rapid action by the US Congress to repeal the 1916 Act.

9. The representative of Japan recalled that her country had stated on many occasions in the DSB that its goal was to obtain prompt compliance by the United States. As pointed out at the 24 June DSB regular meeting, the communication contained in WT/DS162/21, dated 4 March 2002, clearly stipulated that "the arbitration proceeding may be reactivated at the request of either party after 30 June 2002 if no substantial progress has been made in resolving this dispute by that date". This date had already passed. Japan therefore shared the EC's concern that the suspended proceedings in the US domestic courts under 1916 Act would be re-opened as of 8 August, which would lead to serious financial consequences for the respondent Japanese companies. Japan strongly urged the United States to continue its best efforts to have the bill repealing the 1916 Act passed by the US Congress as soon as possible. Japan reiterated that it reserved its right to suspend concessions or other obligations with regard to this case.

10. The representative of Mexico said that he wished to express his country's interest in the prompt resolution of this dispute.

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

2. Turkey – Certain import procedures for fresh fruit

(a) Request for the establishment of a panel by Ecuador (WT/DS237/3)

12. The Chairman recalled that the DSB considered this matter at its meeting on 24 June 2002 and had agreed to revert to it. He drew attention to the communication from Ecuador contained in document WT/DS237/3.

13. The representative of Ecuador said that, in accordance with the DSU provisions, his country wished to request, once again, that a panel be established to examine this matter. He then said that his authorities had been informed by the Turkish authorities that Turkey had recently – in the past week – proceeded to amend certain import procedures for fresh fruit in order to meet Ecuador's concerns. Ecuador recognized this gesture of goodwill by Turkey which had been designed to settle this dispute. For its part, and in reciprocity, Ecuador had decided to delay the composition of the panel. In this way, Ecuador would be able to initiate immediately with Turkey a detailed review of the technical implications of the amendment to verify if it did indeed satisfy Ecuador's concerns with regard to the implementation of such measures, and whether the Turkish fresh fruit import regime had been brought into compliance with the covered Agreements. Ecuador believed that it was essential to ensure that the measures that would put an end to this dispute remained in force through a mutually agreed solution, which would be notified to the DSB and to other relevant WTO bodies.

14. The representative of Turkey expressed disappointment with the decision of Ecuador to have the panel established with regard to the dispute over the importation of bananas. He said that, through a communiqué, Turkey had recently amended the existing legislation in order to meet Ecuador's concerns. Consequently, his authorities had immediately informed Ecuador, in writing, of this new

development and had asked Ecuador to withdraw its request for the establishment of a panel. Turkey believed that, as a result of this new legislation, there was no legal basis for the establishment of a panel. Nonetheless, Turkey would try its best in order to find a bilateral solution to this dispute.

15. The Chairman said that it was his understanding that Ecuador had requested the establishment of a panel, but that in light of the new development concerning the Turkish legislation, it would be willing to suspend the composition of the panel once such a panel was established. He therefore proposed that, in accordance with the DSU provisions, the DSB agree to establish a panel.

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

17. The representatives of the European Communities and the United States reserved their third-party rights to participate in the Panel's proceedings.

3. United States – Definitive safeguard measures on imports of certain steel products

(a) Request for the establishment of a panel by Brazil (WT/DS259/10)

18. The Chairman drew attention to the communication from Brazil contained in document WT/DS259/10.

19. The representative of Brazil said that his country had requested consultations with the United States on 21 May, 2002, concerning the definitive safeguard measures on imports of certain steel products, imposed by the United States in Proclamation No. 7529 entitled: "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", of 5 March, and its accompanying memorandum of 7 March. He recalled that consultations under Article 4 of the DSU, Article XXII of the GATT 1994 and Article 14 of the Agreement on Safeguards, had been held in Geneva on 13 June 2002. Brazil and the United States had since jointly considered that the consultations had failed to resolve the dispute. Brazil considered that these safeguard measures, the underlying investigations and ensuing reports, and the decision of the US President to impose safeguard measures were inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards and, as a result, nullified and impaired the benefits accruing to Brazil under those Agreements. More specifically, and as detailed in Brazil's request circulated as WT/DS259/10, the measures implemented by the United States violated a number of provisions including Articles I:1, X:3 and XIX of GATT 1994 and Articles 2, 3, 4 and 5 of the Agreement on Safeguards. The WTO-inconsistent safeguard measures imposed by the United States had caused considerable disarray in the world steel market and had significantly impacted on Brazil's exports of steel and steel products. It was worth noting that the Brazilian steel sector had gone through a large and rigorous privatization and modernization process and had recognizably acquired a high degree of competitiveness in the international market. The Brazilian Government considered that the preservation of free market conditions and the observance of the disciplines of the multilateral trading system were of fundamental importance. Therefore, in accordance with relevant WTO provisions, Brazil had no alternative but to request the establishment of a panel at the present meeting to examine this matter, with standard terms of reference as set out in Article 7 of the DSU. He expressed his delegation's appreciation for the cooperation that had been shown by all Members concerned in this matter to facilitate the consideration of this complaint through a single panel process pursuant to Article 9.1 of the DSU.

20. The representative of the United States said that it was regrettable that Brazil had chosen to challenge the US safeguard measures. These measures were fully consistent with the applicable portions of the Safeguards Agreement and the GATT 1994. The United States believed that the dispute settlement process would ultimately reach the same conclusion. Based on prior discussions between the parties, the United States would not oppose the establishment of a panel at the present

meeting. Consistent with Article 9.1 of the DSU, the United States was of the view that this request should be referred to the single panel already established at the request of China, the EC, Japan, Korea, New Zealand, Norway and Switzerland so that a single panel would consider all eight panel requests.

21. The representative of the European Communities said that the EC welcomed the establishment of a panel upon the first consideration of the panel request and the fact that Brazil's complaint would be examined by the single Panel that had been established to examine the complaints of the EC, Japan, Korea, China, Switzerland, Norway and New Zealand. He recalled that the single Panel had been composed by the Director-General on 25 July 2002 and it was the EC's expectation that the DSU procedure against the steel safeguard measures implemented by the United States would now proceed expeditiously, in particular since the EC's exporters were losing thousands if not millions of dollars everyday.

22. The representative of Japan said that, like the EC, her country welcomed the establishment of a panel to examine this matter. Japan was in agreement with the United States that this matter should be examined by the single Panel established previously at the request of Japan and the other complainants.

23. The DSB took note of the statements and agreed that the request by Brazil for the establishment of a panel with standard terms of reference is accepted. The DSB further agreed that, as provided for in Article 9.1 of the DSU in respect of multiple complainants, the Panel established at the 3 June DSB meeting to examine the complaint by the European Communities contained in WT/DS248/12, which pursuant to the DSB's decisions on 14 and 24 June as well as on 8 July 2002 was also requested to examine the complaint by Japan contained in WT/DS249/6, the complaint by Korea contained in WT/DS251/7, the complaint by China contained in WT/DS252/5, the complaint by Switzerland contained in WT/DS253/5, the complaint by Norway contained in WT/DS254/5, and the complaint by New Zealand contained in WT/DS258/9, would also examine the complaint by Brazil contained in WT/DS259/10.

24. The Chairman said that since a single Panel had been established those delegations who had reserved their third-party rights to participate in the proceedings of the Panel established at the 3 June and then subsequently on 14, 24 June as well as on 8 July 2002 DSB meetings shall be considered as third parties in the Panel established at the present meeting.

25. The DSB took note of the statement.

4. United States – Final countervailing duty determination with respect to certain softwood lumber from Canada

(a) Request for the establishment of a panel by Canada (WT/DS257/2)

26. The Chairman drew attention to the communication from Canada contained in document WT/DS257/2.

27. The representative of Canada said that on 21 March 2002 his country had requested consultations with the United States regarding the final countervailing duty determination made by the US Department of Commerce with respect to certain softwood lumber from Canada on 3 May 2002. He said that these consultations had been held on 18 June 2002, but had failed to resolve the dispute. It was Canada's view that the final countervailing duty determination violated the obligations of the United States under the SCM Agreement. In particular: (i) the investigation had been initiated on the basis of a petition that did not have sufficient evidence of subsidy and that did not adequately identify the petitioners; (ii) the final determination had impermissibly treated the Canadian stumpage practice as a financial contribution in the form of a "provision of goods"; (iii) the final determination had

found a "benefit" through an illegal comparison with benchmarks outside of the market under investigation; and (iv) the final determination had inflated the alleged subsidy rate by a number of means not permitted under the SCM Agreement. Furthermore, Canada also considered that the United States violated its obligations under the SCM Agreement and the GATT 1994 with respect to the provision of expedited and company-specific administrative reviews. Consequently, and in accordance with the relevant provisions of the DSU, the GATT 1994 and the SCM Agreement, Canada was requesting the establishment of a panel to consider these matters.

28. The representative of the United States expressed regrets over the decision by Canada to request the establishment of a panel. As a substantive matter, the United States believed that Canada's claims lacked merit. Of more immediate concern, however, was that in its request for the establishment of a panel, Canada had identified a new measure on which there had not been any consultation. Specifically, Canada's panel request for the first time identified the US Commerce Department's initiation of expedited reviews as an inconsistent "measure". Canada's consultation request did not, however, mention the initiation of these reviews, nor did Canada and the United States consult on this issue. The US Commerce Department did not in fact initiate the expedited reviews until 17 July, almost a full month after the consultations had been held. The United States could not agree to the establishment of a panel at this time. In addition, if Canada sought the establishment of a panel at a future DSB meeting based on its current panel request, the United States would raise the concerns it had just expressed with the panel, if such a panel was established. In the view of the United States, Canada had two options that would be consistent with the DSU. First, if Canada wished to drop its challenge to the initiation of the expedited reviews, it could file a new request for a panel that did not identify that measure. Alternatively, if Canada wished to include the initiation of the expedited reviews as a measure, it could file a new request for consultations and the United States and Canada could have meaningful consultations about this new measure.

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

5. United States – Anti-dumping and countervailing measures on steel plate from India

(a) Report of the Panel (WT/DS206/R and Corr.1)

30. The Chairman recalled that at its meeting on 24 July 2001, the DSB had established a panel to examine the complaint by India pertaining to this matter. The Report of the Panel contained in WT/DS206/R and Corr.1 had been circulated on 28 June 2002 as an unrestricted document. He said that the Panel Report was now before the DSB for adoption at the request of India. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

31. The representative of India said that his country welcomed the Panel Report and was seeking the adoption of the Report by the DSB at the present meeting. India wished to thank the members of Panel as well the Secretariat for their hard work and was gratified that the Panel had found in favour of India on the key issue that the United States had acted inconsistently with its obligations under Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement by refusing to take into account the US sales price information in the anti-dumping investigation and by relying entirely on facts available in determining dumping margin on the steel plate producer, namely, the Steel Authority of India Limited (SAIL). In the investigation, SAIL had submitted detailed questionnaire responses to the US Department of Commerce (USDOC) providing information on its US and home market sales and costs of production of steel plate products. USDOC had conducted lengthy on-site verifications of SAIL's data, during which, as the Panel confirmed, USDOC had found no significant problems with SAIL's US sales database. However, because SAIL's home market sales and cost data had been found to be unverifiable and could not be used "without undue difficulty", USDOC had applied its "long-standing practice" of rejecting the entirety of SAIL's data, including the US sales data, and applying "total adverse facts available". The result was that USDOC had used the highest rate alleged in the petition submitted by the US steel industry – 72.49 per cent. Had USDOC used

SAIL's data which was verifiable and usable, the margins would have been below 15 per cent. The Panel had agreed with India by finding that USDOC had improperly failed to take into account SAIL's US sales data in violation of Article 6.8 and Annex 2, paragraph 3 of the Anti-Dumping Agreement. This was a clear rejection of USDOC's longstanding "total facts available" practice. In the future, it would require USDOC to use partial data supplied by foreign respondents in calculating dumping margins. The practical effect of the ruling would make it more difficult for anti-dumping investigating authorities to generate high dumping margins by not using the data provided by foreign respondents. No longer could investigating officials reject all data submitted by a foreign respondent and instead use pre-selected data provided by domestic petitioners in the anti-dumping petition – data calculated to result in the highest possible margins. The Panel's ruling confirmed that in the future, unless non-biased and objective investigating officials were justified in finding that it was unduly difficult to use the respondent's partial data, these officials had to use the verifiable and timely submitted respondent's data in combination with other information to calculate the dumping margin.

32. However, India was disappointed and remained unconvinced of the Panel's findings and its reasoning on US statutory provisions and on Article 15 of the Anti-Dumping Agreement. The Panel had found that Sections 776(a), 782(d) and 782(e) of the US Tariff Act of 1930 were not mandatory, and therefore, not inconsistent with US obligations under Anti-Dumping Agreement. However, these statutory provisions, especially Section 782(e)(3), imposed conditions/requirements additional to those provided for in paragraph 3 of Annex II of the Anti-Dumping Agreement. They required the respondents before the USDOC to demonstrate that their overall information was complete before their information could be used in the Anti-Dumping investigation. The parties to dispute had admitted that this was additional to those set out in paragraph 3 of Annex II of Anti-Dumping Agreement, yet the Panel failed to address this issue and simply found that the US statutory provisions were not mandatory.

33. Similarly, the Panel had failed to address the US practice of "total facts available" in anti-dumping investigations. It considered this long-standing practice as not a pre-established administrative practice. This practice provided adequate notice to the responding parties before the USDOC as to what would happen to them if they did not provide one of the "essential components" of information. For example, if a respondent knew in advance that it could not provide cost of production information in the USDOC's format, it might not take the trouble of trying to respond to any of requests for information, because any information it would supply would simply be rejected under this continually applied practice. The fact that the DOC was not required to apply this practice as a matter of law would not make it any less an "administrative procedure" that could be subject to challenge under the Anti-Dumping Agreement. If the Panel's reasoning were to be applied, certain procedures whose conformity with the requirements of the Anti-Dumping Agreement might be under doubt, but resorted to during an anti-dumping investigation would not be a "mandatory" practice, this would open the door for US and other anti-dumping authorities to label procedures as "practices" and thereby immunise them from challenge under the Anti-Dumping Agreement.

34. Another disappointing aspect of the Panel Report was its interpretation of S&D provisions, namely, Article 15 of the Anti-Dumping Agreement. The Panel seemed to have found that the word "shall" meant "should" and "must" meant "may". This was contrary to the Appellate Body's interpretation. In particular, India was concerned with the view of the Panel that "the phrase 'when considering the application of anti-dumping measures under this Agreement' referred to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation". The term "considering the application of anti-dumping measures" had to be interpreted as including consideration during the investigative process of the preconditions for the use or employment of anti-dumping measures as well. Any other interpretation would mean that the drafters of the Anti-Dumping Agreement did not take into account the special situation of developing-country Members in relation to the investigative process even though Article 6.13 of the Anti-Dumping Agreement evidenced a special concern for the problems of small companies, including those from developed-

country Members. India was also concerned by the implications of the Panel's finding that a Member was not obligated to have the lesser duty rule in its domestic legislation, as this was not a mandatory requirement. In India's view, this would render various non-mandatory obligations not only in the Anti-Dumping Agreement but also in other agreements devoid of any commitment or meaning. It was India's expectation that the United States would promptly and fully implement the rulings and recommendations of the Panel in this dispute including, if appropriate, the withdrawal of anti-dumping duties imposed on CTL steel plate imports from India.

35. The representative of the United States said that her country wished to thank the members of the Panel and the Secretariat for their hard work. The analysis in the Panel Report showed that the Panel carefully and thoughtfully examined the important matters before it. This dispute involved complicated issues involving the proper interpretation of the "facts available" provisions of the Anti-Dumping Agreement, as applied when an anti-dumping respondent failed to provide the vast majority of necessary information. The United States agreed with most of the Panel's findings in this dispute. For example, the United States welcomed the Panel's rejection of India's challenge to the US statutory "facts available" provisions. The Panel based its analysis in part on the recognition that the meaning of national law was a question of fact. The United States fully supported the Panel's analytical approach. The United States was also pleased that the Panel had rejected India's attempt to expand the types of anti-dumping "measures" potentially subject to WTO dispute settlement. The Panel had correctly concluded that the so-called facts available "practice" was not a measure which could independently give rise to a WTO violation. The Panel had also found, correctly, that India misinterpreted the requirements of Article 15 of the Anti-Dumping Agreement. The Panel had found that the United States had fulfilled the requirements of that provision when it had met with the Indian respondent to discuss the possibility of a suspension agreement. Finally, the United States welcomed the Panel's recognition that a company's failure to provide necessary information might justify the rejection of other information which, if viewed in isolation, would need to be taken into account. Given the interrelated nature of the various elements of an anti-dumping calculation, it was not enough simply to focus on particular pieces or "categories" of information. She said that the United States would also like to comment briefly on one aspect of the Panel's decision with which it did not agree. During the dispute, India had submitted the so-called "Hayes affidavits" in support of its argument that the United States could have used the Indian respondent's US sales price information without "undue difficulty". The Panel had refused to exclude the affidavits from the proceeding because it viewed them as "an aspect of India's argument", and not as new facts. But even if the affidavits were properly viewed as "arguments", they were post hoc arguments that were not raised during the anti-dumping investigation. The United States saw no way to reconcile the Panel's decision to accept India's post hoc arguments with its decision to reject the US arguments on the very same issue on the grounds that those US arguments were themselves allegedly post hoc. Having said that, the United States believed that this Report was thoughtfully and carefully reasoned and wished once again to thank the Panel and Secretariat.

36. The representative of Chile said that his country welcomed the conclusions and findings of the Panel Report. As a third party in this dispute, Chile had a systemic interest in the correct interpretation and implementation of the provisions of the Anti-Dumping Agreement. The Report that would be adopted at the present meeting showed once again how some Members did not rest in their quest to stretch the limits of the Anti-Dumping Agreement disciplines, in an attempt to use them as disguised barriers to trade. Chile valued the fact that the Panel had concluded that the anti-dumping duty order challenged by India was inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994. While Chile did not wish to comment on all the conclusions and findings, it would like to concentrate on an argument advanced by it which was not appropriately reflected in the Panel Report. Indeed, while India and other third parties had argued that paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement were mandatory in nature, based on an interpretation that Chile also shared, Chile had added that the Spanish text of those paragraphs made them mandatory without doubt. In its interim review, the Panel stated that it had not relied on Chile's argument since its analysis and ruling were based on Article 6.8 of Anti-Dumping Agreement which

established that the provisions of Annex II were mandatory. While Chile agreed again with this line of thinking, it would have preferred to see its argument reflected in the Report – in accordance with Article 10.2 of the DSU, especially since those arguments reaffirmed the conclusions of the Panel. Finally, Chile urged the United States to promptly and fully implement the DSB's recommendations and rulings through the withdrawal of the measure in question.

37. The DSB took note of the statements and adopted the Panel Report contained in WT/DS206/R and Corr.1.

6. Proposed nominations for the indicative list of governmental and non-governmental panelists

(a) Statement by the Chairman

38. The Chairman, speaking under "Other Business", recalled that in accordance with the proposals for the administration of the indicative list of panelists approved by the DSB on 31 May 1995, the list should be updated every two years. To this effect, he asked Members to forward updated curricula vitae of persons appearing on the current indicative list contained in documents WT/DSB/19 and Add.1 through 4 as well as any modifications they would wish to make to the list. He proposed that this be done by the end of November 2002 in order to enable the Secretariat to circulate an updated indicative list in December 2002.

39. The DSB took note of the statement.