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Dispute Settlement Body
18 March 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 March 2003

Chairman: Mr. Shotaro Oshima (Japan)

Subjects 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

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: 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 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.13)

2. The Chairman drew attention to document WT/DS160/18/Add.13 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 her country had provided an additional status report in this dispute on 6 March 2003, in accordance with Article 21.6 of the DSU. As noted in that report, the United States and the EC had been seeking a positive and mutually acceptable resolution of the dispute. The US administration would continue to engage the US Congress on this issue with a view to concluding a mutually acceptable resolution consistent with WTO rules.

4. The representative of the European Communities said that, as he had already stated at previous meetings, the disappointment of the EC about the US failure to comply with the DSB's rulings grew in parallel to the list of non-implemented decisions by the United States. This situation was very serious, as the increasingly worrying delays of the United States in the implementation of the DSB's rulings had negative effects not only on the economic interests of the industries and Members affected, but also on the WTO dispute settlement system. The EC attached great value to the respect of the rules that had been agreed in the framework of the DSU. The surveillance of the implementation of the DSB's rulings was an important part of the system that WTO Members had set up to resolve their differences. The EC hoped that the United States shared an equivalent commitment for the solution of disputes, and showed determination to implement speedily the DSB's rulings. In that regard, the EC urged, once again, the United States to take rapid and concrete action to settle this dispute and to comply with the DSB's recommendations. He noted that too much time had lapsed since the adoption of the Panel Report and the expiry of the reasonable period of time to implement the ruling, and at the same time the US status reports continued to provide only vague reassurances about the work of the US administration with the US Congress. The EC expected more substantial progress towards bringing the US Copyright Act into compliance with the TRIPS Agreement.

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.13)

6. The Chairman drew attention to document WT/DS136/14/Add.13 – WT/DS162/17/Add.13 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 her country had provided an additional status report in this dispute on 6 March 2003, in accordance with Article 21.6 of the DSU. Legislation repealing the 1916 Act was 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 introduction of a repealing bill in Congress was most welcome. Unfortunately, the EC noted with great disappointment that the repealing Act, as currently drafted, would not terminate the actions pending in courts. The position of the EC in this respect was well-known. The EC had repeatedly stated that a proper implementation should not only repeal the 1916 Anti-Dumping Act, but should also terminate the pending court cases. He noted that three cases were pending before US courts against EC companies and two of these cases had been initiated after the initial deadline for implementation. In July 2001, the EC had agreed to give extra time for implementation on the express understanding that the repeal legislation would terminate the pending court cases. The EC companies were bearing substantial litigation costs to defend themselves against claims based on a legislation that had clearly been condemned and should have been repealed long time ago. A repeal with effects limited to future cases would only serve to prolong the dispute.

9. The representative of Japan said that it was extremely unfortunate that her country was not only forced to repeat previous statements about the lack of implementation by the United States, but also had to express its regret that the bill repealing the 1916 Act, introduced to the House of Representatives on 4 March 2003, would have no effect on the pending cases. Japan had already expressed its deep concern both in Washington (DC) and in Geneva, and hoped that its efforts had not fallen on deaf ears. The non-compliance of the United States even after more than two years since the adoption of the Panel and the Appellate Body Reports was giving rise to serious doubts about the United States' commitment to the dispute settlement system and to the WTO. The Japanese respondent companies were suffering real damages because of this WTO-inconsistent Act, which should be repealed as early as possible in the first session of the 108th Congress currently underway. Moreover, as Japan had stated clearly on numerous occasions, all the pending cases had to be terminated. Japan found no reason why introducing repealing bills with proper retroactive effects to terminate the pending cases would be difficult, since such bills had been indeed introduced to the 107th Congress. Japan expected the US administration to do all it could to ensure the earliest possible implementation and reminded the United States of Japan's right to suspend concessions or other obligations.

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.6)

11. The Chairman drew attention to document WT/DS176/11/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 US Section 211 Omnibus Appropriations Act of 1998.

12. The representative of the United States said that her country had provided a status report in this dispute on 6 March 2003, in accordance with Article 21.6 of the DSU. The US administration would work with the Congress with a view to resolving this dispute.

13. The representative of the European Communities said that the EC would like to stress that almost half of the additional period of time for implementation had already elapsed. The EC reiterated its hope that the US administration and the US Congress were actively taking advantage of the extra time and would ensure that full implementation was reached by the new deadline. He also recalled 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 accepted by US Federal Courts, which applied Section 211 to trademarks succeeding to an abandoned trademark. Therefore, the EC could not accept the position of the US administration 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 Cuba said that her delegation wished to reiterate that the failure of the United States to meet its WTO obligations in respect of Section 211 Omnibus Appropriations Act of 1998 was damaging the credibility of the dispute settlement system. Moreover, as her delegation had stated on previous occasions, Section 211 was a unilateral measure against Cuba and was an obstacle to the development and implementation of foreign investment in Cuba that was associated with the international marketing of Cuban products. Cuba associated itself with the statement made by the EC with respect to the issue of non-application of Section 211 to abandoned trademarks. Consequently, Cuba requested that the above-mentioned Act be repealed, as this was the only appropriate solution to this dispute.

15. The representative of the United States said that her country was not aware of any court decisions concerning Section 211 other than those that the EC itself described in its written submissions to the Panel. If the EC knew of subsequent decisions, the United States would be interested to know what they were. In any case, however, the United States reiterated that the DSB's recommendations and rulings in this case did not relate to the issue of abandonment.

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.6)

17. The Chairman drew attention to document WT/DS184/15/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 US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that her country had provided a status report in this dispute on 6 March 2003, in accordance with Article 21.6 of the DSU. With respect to the recommendations and rulings of the DSB that had not been addressed in the 22 November 2002, anti-dumping duty determination of the US Department of Commerce, the US administration would continue to consult and to work with the Congress with a view to resolving this matter with Japan in a mutually satisfactory manner.

19. The representative of Japan said that the original reasonable period of time in this proceeding had been extended, upon the request of the United States, until the end of the first session of the 108th US Congress or 31 December 2003, whichever would be earlier. She said that Japan had not objected to this extension based on the United States' commitment to implement the DSB's recommendations and rulings. However, the United States had to live up to its obligations as soon as possible, including

having the necessary legislation introduced and passed in the current Congressional session. The United States had to continue to consult closely with Japan on the status and content of implementation. Japan hoped that it would not have to repeat the same statements over and over again for many more months.

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

2. United States – Subsidies on upland cotton

(a) Request for the establishment of a panel by Brazil (WT/DS267/7)

21. The Chairman recalled that the DSB had considered this matter at its meeting on 19 February 2003 and had agreed to revert to it. He drew attention to the communication from Brazil contained in document WT/DS267/7.

22. The representative of Brazil said that this was the second time that his country was requesting the establishment of a panel concerning subsidies granted by the United States to upland cotton. As his delegation had stated at the 19 February DSB meeting, the US 2002 Farm Bill and other US legislation guaranteed and mandated the payment of a wide variety of export and domestic subsidies for the production, use and export of US upland cotton. These subsidy payments for the marketing year ending on 31 July 2002 alone totaled almost US$4 billion. As the situation had not evolved since the first request made on 19 February 2003, Brazil wished to reiterate its request for a panel at the present meeting. The subsidies in question violated the Agreement on Agriculture, the SCM Agreement and the GATT 1994. Consistent with Articles 4.2 and 7.2 of the SCM Agreement, Brazil had set forth statements of available evidence regarding the existence of and adverse effects generated by such subsidies. Brazil noted that on 19 February 2003, the United States had asserted to the DSB that Brazil and the United States had not consulted on, *inter alia*, export credit guarantee programmes that related to agricultural products other than upland cotton. Brazil wished to draw the attention of the United States to footnote 1 contained in its request for consultations as well as to questions 9.1-9.5 of Brazil's First Set of Questions and Request for Production of Documents. These documents clearly indicated that Brazil had consulted with the United States and had requested detailed information from the United States concerning all US agricultural goods guaranteed under the GSM 102, GSM 103, and SCGP programmes. Moreover, he recalled that the Brazilian delegation had specifically focused the attention of the United States, on 3 December 2002, on the non-upland cotton aspects of Brazil's consultation requests when the United States had sought to assert, incorrectly, that Brazil's request for consultations had referred to upland cotton. Finally, Brazil noted, once again, that in its request for the establishment of a panel, it had invoked the Annex V procedures under the SCM Agreement. As a result, the DSB was required pursuant to paragraph 4 of Annex V to designate a representative to facilitate the dissemination of information. Brazil expected that, consistent with paragraph 1 of Annex V, the United States would cooperate with Brazil, and the representative designated by the DSB, in the collection of factual information concerning Brazil's claims in the weeks ahead.

23. The representative of the United States said that her country was disappointed that Brazil had decided to request, for a second time, that a panel be established on this matter. The United States recognized that a panel would be established at this meeting, but, for the reasons stated at the 19 February meeting of the DSB, it continued to believe that this panel request would serve neither Brazil's nor the United States' interests. Those interests lay in the successful conclusion of the Doha Development Round agriculture negotiations. The United States suggested that the energies of both countries would be better spent ensuring that the WTO agriculture negotiations were successful. However, it appeared that Brazil was attempting to litigate for a reduction in US cotton support that was not embodied in the United States' WTO commitments. The United States believed that US cotton support programmes were within its allowable WTO limits and were consistent with its WTO

obligations. Therefore, the United States was prepared to vigorously defend its cotton support programmes. Litigating this dispute would not provide Brazil with the result it desired.

24. While the United States had listened again to Brazil's statement at the present meeting, in the US view, Brazil in its panel request had referred to a measure which was not the subject of consultations. Brazil was now attempting to expand the challenged measures to include measures that allegedly provided export assistance for "other eligible agricultural commodities", in addition to those measures that allegedly provided export assistance to "upland cotton". There was no basis for Brazil's panel request on these newly identified measures relating to "other eligible agricultural commodities" on which Brazil had not requested consultations.

25. The United States noted that Brazil had not identified the third-country markets relevant to the Annex V process. This prevented any "third-country Member concerned" from fulfilling its obligation under paragraph 1 of Annex V to notify to the DSB, "as soon as the provisions of paragraph 4 of Article 7 have been invoked", the authorities and procedures relevant to any requests for information under the Annex V process. The United States was of course prepared to continue informal consultations with Brazil on this matter, with a view to having the DSB consider it and take a decision at a future meeting.

26. The representative of Argentina said that, as it had been stated at the 19 February DSB meeting, his country was concerned about the detrimental effects, for the world market and in particular for developing countries, resulting from the level of domestic support provided by the United States for cotton production, cotton export subsidies and export credit guarantees for cotton and other products. In view of these considerations, Argentina wished to reserve its right to participate as a third party in the proceedings. It considered it important for third parties to have timely access to the information collected by the representative to be designated by the DSB under Annex V of the SCM Agreement. Such information was an essential tool for presenting the legal arguments in a subsidies case. Since Annex V did not contain anything about the nature of the information gathered, nor did it limit access to that information only to the parties to the dispute, Argentina considered that it could not be regarded as a restriction for a third party which had already joined the consultations due to its interest in the case. Argentina believed that non-receipt of the above-mentioned information, gathered under a multilateral procedure – as the person collecting the information was a DSB representative – would mean restricting the rights of third parties and limiting their ability to participate in the process because they did not have essential data on the measures that were the subject of the dispute.

27. The representative of India said that, at the 19 February DSB meeting, his country had registered its interest to become a third party to this dispute. India had a strong trade and systemic interests in this dispute. Like Argentina, India also wished to register its interest to be associated with the Annex V procedures and to receive the information gathered by a representative to be designated by the DSB.

28. The representative of Pakistan said that his country also had a substantial trade interest in this dispute and wished to reserve its third-party rights to participate in the Panel's proceedings as well as to be associated with the Annex V procedure.

29. The representative of the European Communities said that the EC's position on this matter was the same as that of Pakistan.

30. The representative of Brazil said that with regard to some of the assertions made by the United States, paragraph 4 of Annex V stated that "The DSB shall designate a representative to serve the function of facilitating the information-gathering process", and this designation should take place at the present meeting so that the information-gathering process could be completed within the established 60 days. Any delay in the designation of a facilitator would distort the process. Brazil

noted that two names had been proposed on 5 March 2003 and a fax had been sent to delegation on 10 March 2003 informing them that, in accordance with Brazil's request to initiate the procedures of Annex V, the Chairman of the DSB was conducting consultations with the parties with a view to designating a representative to serve the function of the information-gathering process. Brazil noted with concern that the United States was not in a position to accept the two names proposed. Brazil was also concerned that the United States had not informed in advance of its objections to the names proposed so that other names could have been suggested. It was Brazil's view that the identification of third-country markets should not prevent the designation of such a facilitator. It was clear that such an identification could even be made during the process and one thing should not be conditioned upon the other. Brazil recalled that paragraph 1 of Annex V established that every Member shall cooperate in the development of evidence to be examined by a panel in procedures related to Article 7.4 of the SCM Agreement.

31. The representative of China said that his delegation had the same position like Argentina, India and Pakistan and wished to reserve its third-party rights to participate in the Panel's proceedings.

32. The representative of the United States recalled that the appointment by the DSB of such a representative pursuant to Annex V required a decision by the DSB. The United States noted, however, that neither the airgram nor the agenda for the present meeting referred to taking such a decision. The United States recognized that the Chairman had sent a fax to all delegations advising them of his consultations with Brazil and the United States on this matter. However, as this item required a decision of the DSB, in the view of the United States, it had to be inscribed on the DSB's agenda in the customary manner, for inclusion in the airgram that was circulated ten days before the meeting. Further, this issue was not yet ripe for a decision by the DSB. In particular, the United States noted that Brazil had not identified the third-country markets relevant to the Annex V process. This prevented the United States from forming judgments as to which Member's representative would be appropriate to serve as the DSB representative. In addition, at the present time, the United States was not prepared to endorse participation by third parties in the Annex V process. Annex V did not contemplate participation by third parties in the process or access to such information. The United States also noted that in "Indonesia – Autos", it did not appear that the information gathered had been provided to third parties. The United States believed that was the appropriate approach. As it had stated previously, the United States remained prepared to continue informal consultations with Brazil on this matter, with a view to having the DSB consider it and take a decision at a future meeting.

33. The representative of Chinese Taipei said that her delegation wished to be associated with the statements made by India, Pakistan and the other speakers who had expressed their interest in reserving third-party rights.

34. The representative of Brazil said that in light of the statement made by the United States, he wished to remind Members that, as indicated in the third paragraph of its panel request, Brazil had requested that the DSB initiate procedures under Annex V of the SCM Agreement. The same format was used by the United States in its panel request regarding the case "Indonesia – Autos" in 1997. It was, therefore, puzzling that the United States should raise such an interpretation. It was obvious from Brazil's panel request that all procedures contained in Annex V, including the designation of a representative by the DSB had been included on the agenda in due time and form. It was also worth noting that the only other case where the Annex V process had been invoked; i.e. "Indonesia – Autos", the issue of designation of the representative to serve the function of facilitating the information-gathering process had been dealt with when the item was on the DSB's agenda for the second time. No special item was foreseen and the DSB had designated the representative at that meeting so that the 60-day process would follow its course. Paragraph 4 of Annex V stated that the DSB shall designate a respresentative to serve the function of facilitating the information-gathering process. This designation should take place at the present meeting so that the information-gathering process be completed within the established 60 days. Any delays in this regard could lead to distortions in the process. Brazil regretted that the United States had raised objections at the present

meeting in spite of the explicit request contained in Brazil's panel request. In order to deal with this anomalous situation Brazil wished to inform delegations that it would request a special meeting of the DSB to be convened as soon as possible to designate a DSB representative. Brazil hoped that the United States would cooperate so that both parties would be in a position to agree on a name before that meeting.

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

36. The representatives of Argentina, Canada, China, Chinese Taipei, the European Communities, India, Pakistan and Venezuela reserved their third-party rights to participate in the Panel's proceedings.

37. The Chairman recalled that, as it was indicated in his fax sent to Heads of Delegations on 10 March 2003, Brazil had requested the DSB to initiate the procedures provided for in Annex V of the SCM Agreement. As stated previously, in accordance with these procedures, the DSB was required to designate a representative to serve the function of facilitating the information-gathering process needed by the parties and the panel. In order to meet Brazil's request, he had been consulting with the parties to the dispute on this matter. It was his intention to propose that the DSB appoint this representative at the present meeting. However, these consultations had not yet been completed and, therefore, he was not in a position to do so at the present meeting. He hoped to be able to make a proposal in this regard as soon as possible.

38. The DSB took note of the statement.

3. Canada – Measures relating to exports of wheat and treatment of imported grain

(a) Request for the establishment of a panel by the United States (WT/DS276/6)

39. The Chairman drew attention to the communication from the United States contained in document WT/DS276/6.

40. The representative of the United States said that, as described in the consultation request of 17 December 2002, the United States was concerned that Canada's measures relating to wheat exports and to the treatment of imported grain appeared inconsistent with Canada's obligations under the GATT 1994 and the TRIMs Agreement. The US concerns with respect to wheat exports involved the wheat sales practices of the Government of Canada and its state-trading enterprise, the Canadian Wheat Board. Under Article XVII of the GATT 1994, Canada was obligated to ensure that its state trading enterprise made sales in a non-discriminatory manner and in accordance with commercial considerations, and that it afforded the enterprises of other WTO Members an adequate opportunity to compete. The United States was concerned that Canada had entirely abdicated this responsibility. Canada provided the Wheat Board with extensive privileges that detached the Wheat Board from the market forces that determined the conduct of private enterprises. Yet Canada had adopted no measures to ensure that the Wheat Board made sales in accordance with the standards set out in Article XVII. US concerns with respect to imported grain involved discrimination in the rules governing the Canadian grain handling system and the Canadian rail transportation system. In particular, Canadian law severely restricted access of imported grain to Canadian elevators and other grain handling facilities. Canadian law also favoured domestic grain over imported grain in the rules establishing the rates charged by Canadian railroads, and in the rules governing the allocation of railcars. These measures appeared inconsistent with Canada's national treatment obligations. On 31 January 2003, the United States and Canada had held consultations on these matters. Canada had indicated no willingness to consider any modifications to its measures governing trade in grain. Indeed, the delegation of Canada would not even discuss the meaning, or describe the application, of the pertinent Canadian statutes and regulations. Accordingly, the United States requested that the

DSB establish a panel pursuant to Article 6 of the DSU with standard terms of reference to examine these matters.

41. The representative of Canada said that his country had held consultations with the United States in January 2003 in order to discuss its concerns regarding the export of wheat by the Canadian Wheat Board and the treatment accorded by Canada to grain imports. While this was the first time that the two countries had discussed these issues under the WTO procedures, it was certainly not the first time that such discussions had been held. In fact, these consultations were one more episode in a long-running series of grain-related discussions and information exchanges between the two countries at the level of both Ministers and officials over the past decade and a half. In addition, between 1990 and 2002, the US government had requested or had conducted nine studies and/or investigations which, among other things, had examined the consistency of Canada's grain sector polices with Canada's trade obligation. A number of these studies/investigations had been conducted by the US International Trade Commission, and the US General Accounting Office. At the end of each investigation, the same conclusion was reached each time – Canada's grain sector policies, and more specifically the activities of the Canadian Wheat Board, were consistent with Canada's trade obligations. Canada was, therefore, disappointed that the United States had now requested that a panel be established to examine these issues. Canada's grain sector and transportation policies were fully consistent with the WTO rules and obligations. Thus, Canada could not consent to the request by the United States to establish a panel on these issues.

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

4. Canada – Export credits and loan guarantees for regional aircraft

(a) Recourse by Brazil to Article 22.7 of the DSU and Article 4.10 of the SCM Agreement (WT/DS222/10)

43. The Chairman recalled that at the DSB meeting on 24 June 2002, Brazil had requested authorization from the DSB to take appropriate countermeasures against Canada pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU. Since Canada had objected to the countermeasures proposed by Brazil, the matter was referred to arbitration in accordance with Article 22.6 of the DSU and Article 4.11 of the SCM Agreement. He drew attention to document WT/DS222/ARB which contained the Arbitrator's decision on this matter as well as to the communication from Brazil contained in document WT/DS222/10.

44. The representative of Brazil said that the Panel in the dispute under consideration had found that a number of transactions concerning Canadian exports of regional aircraft were inconsistent with Article 3.1(a) of the Subsidies Agreement. He recalled that the DSB had adopted the Panel Report pertaining to this matter on 19 February 2002 and had recommended that Canada withdraw the prohibited subsidies within 90 days. The 90-day period had expired on 20 May 2002. At the DSB meeting held on 22 May, Canada had indicated that it had not and would not withdraw the subsidies at issue. By letter dated 23 May 2002, Brazil had requested authorization from the DSB, pursuant to Article 22.2 of the DSU and Article 4.10 of the SCM Agreement, to take appropriate countermeasures against Canada. Canada had objected to the level of suspension proposed by Brazil by letter, dated 21 June 2002, and the matter had been referred to arbitration. The Arbitrator had circulated its award on 17 February 2003. The Arbitrator had decided that the suspension by Brazil of the application of obligations under Article VI:6(a) of GATT 1994 and under the Agreement on Import Licensing Procedures, and of tariff concessions and related obligations under GATT 1994 covering trade in a total amount of US$247,797,000 would constitute "the appropriate countermeasures" under Article 4.10 of the SCM Agreement. Brazil noted that the Arbitrator's award against Canada amounted to US$3.28 million per subsidized aircraft. Thus, the Arbitrator had confirmed that the level of the Canadian subsidy was more than 2.5 times that found to have been provided earlier by Brazil through PROEX (US$1.25 million per aircraft). Pursuant to Article 22.7 of the DSU and

Article 4.10 of the SCM Agreement, Brazil now requested authorization from the DSB to take action against Canada by suspending concessions or other obligations at the level set out in the Arbitrator's award. The form in which Brazil intended to implement this authorization remained as set out in its original request circulated on 24 May 2002. Brazil very much hoped that the conclusion of this dispute would mark a new phase in the ongoing discussions between Brazil and Canada to resolve the overarching issue of subsidies in the global market for regional jet aircraft. To this end, Brazil reaffirmed its commitment to bilateral negotiations to achieve a level playing field for Brazil and Canada – a level playing field that was fair to both countries' industries and recognized the realities of the markets in which each operated, the structural differences between their economies and the necessity of adjusting the present legal framework, especially the Subsidies Agreement, to reflect these differences.

45. The representative of Canada said that the Arbitrator had agreed with Canada that it was appropriate in this case to base the level of countermeasures on the amount of the subsidy at issue rather than on what Brazil had alleged was a "harms-based" methodology. However, Canada had serious reservations about the Arbitrator's decision to increase the level of countermeasures by 20 per cent, ostensibly to induce Canada to "reconsider its current position to maintain the subsidy at issue". He recalled that, in the decision of the Article 22.6 arbitration in the case on "Brazil-Aircraft", Canada had been authorized to take countermeasures against Brazil as a result of Brazil's refusal to withdraw its illegal subsidization of 1,118 aircraft. In that case, Brazil had not only refused to withdraw the subsidies it had provided, but Brazil had made commitments to grant illegal PROEX subsidies in respect of some 300 regional aircraft after the Panel Report in the "Brazil-Aircraft" case had been circulated to Members. In the present case, the Panel had found that Canada had committed itself to providing subsidized financing for the purchase of 75 aircraft and that Canada had done so in response to a similar below-market offer made by Brazil's manufacturer in the expectation that it would be covered by the government of Brazil. Canada acknowledged to the Arbitrator and Brazil that it would honour its contractual commitments and would not withdraw the financing commitments it had made for 63 aircraft undelivered as of the compliance date. Despite the fact that this acknowledgement echoed Brazil's position in the "Brazil-Aircraft" case, despite the far fewer number of aircraft at issue and despite the fact that Canada's financing offer was responsive, the Arbitrator in this case had decided to increase the appropriate level of countermeasures by 20 per cent.

46. Additionally, Canada had three concerns about the systemic implications of the Arbitrator's decision to adjust the level of countermeasures. The first concern related to the nature and purpose of countermeasures. In explaining its decision to increase the level, the Arbitrator had stated that the function of countermeasures under Article 4.10 of the SCM Agreement was "to induce compliance". Yet as the Arbitrator itself had acknowledged, and as had been well-established in other cases such as the "EC-Bananas" case, all retaliation under WTO Agreements was intended to induce compliance, whether that retaliation came under the SCM Agreement or more generally under Article 22 of the DSU. Article 4.10 of the SCM Agreement was not unique in this respect. The ultimate purpose of any remedy authorized by this Body was to secure a Member's compliance with its WTO obligations. There was nothing in the SCM Agreement, in the DSU, or elsewhere in the Marrakesh Agreement to suggest that an Arbitrator might impose manifestly punitive measures in response to non-compliance. Yet in this case, the Arbitrator seemed to suggest that the scope of what might be deemed "appropriate" countermeasures might include discretion to adjust the countermeasures based on "aggravating factors", and that Canada's acknowledgement that it would fulfill its commitments was such a factor. There was no justification for this decision, and not only because Brazil's unwillingness to comply was not similarly characterized in the case on "Brazil – Aircraft". The Arbitrator's decision was unjustified because by its very nature, any arbitration under Article 22.6 of the DSU, including those also under Article 4.10 of the SCM Agreement, could only occur when a Member was unwilling to comply with an adverse ruling of the DSB. The Arbitrator itself had acknowledged that under Article 22.1 of the DSU and Article 4.10 of the SCM Agreement, non-compliance was the very event justifying the adoption of countermeasures. It was, therefore, unfathomable that unwillingness to comply could be a so-called "aggravating factor". In Canada's view, Members had never agreed to

create a dispute settlement system that imposed penalties on Members. The focus of the Arbitrator in this case on the so-called, "aggravating factors" reflected a conception of countermeasures as a punitive instrument, a conception that found no support in the SCM Agreement or the DSU. Canada's second concern was that the Arbitrator's decision had the perverse effect of discouraging transparency. If Canada had not been transparent about whether it would withdraw the subsidies at issue, presumably the Arbitrator could not, and would not, have increased the level of countermeasures. The practical result of the Arbitrator's decision was that no Member would ever be clear about its intentions regarding the implementation of the DSB's recommendations.

47. Finally, the decision regarding the amount of the percentage increase was simply without foundation. The Arbitrator had offered no justification for a 20 per cent increase, as opposed to a 10, 15 or even 50 per cent increase, and had never discussed it with the parties. The Arbitrator itself had acknowledged that the level of the adjustment could not be "precisely calibrated", that there was "no scientifically based formula" that could be used to calculate it, and that the amount it chose could be viewed as symbolic. Serious economic consequences could result from the imposition of countermeasures, so Canada questioned the wisdom of adjusting an award of countermeasures where the level of that adjustment was determined capriciously. All Members should be concerned by the judicial activism demonstrated by the Arbitrator in this case. Canada encouraged other Members to add their objections so as to send a clear message to any future Arbitrators that might be tempted to reach beyond the obligations that Members had negotiated and agreed to abide by. Before concluding, Canada would like to express its hope that this decision marked an end to several years of WTO litigation between Canada and Brazil regarding the financing of regional aircraft sales. Canada believed that this dispute could only be resolved at the negotiating table and was, therefore, pleased with the progress that had been made in the negotiations. Canada looked forward to the next meeting of negotiators in early April.

48. The representative of the European Communities said that in this case the Arbitrator had again confirmed that the special standard of "appropriate countermeasure" under Article 4 of the SCM Agreement could appropriately be met by designing countermeasure that "induce compliance". The EC would have preferred the Arbitrator to have explained more carefully how he had arrived at the conclusion that the amount of the subsidy plus 20 per cent was an appropriate or not disproportionate level. It should be clear that the amount of countermeasures could not be increased by an arbitrator so as to be "punitive". While Canada's statements on non-compliance were regrettable, the conditions did not call, in the EC's view, for the authorization of countermeasures which contained a punitive element. From a systemic point of view, the EC was also concerned about the implications of Brazil's authorization request which not only covered different measures but, more importantly, failed to specify the individual products on which countermeasures were to be imposed; Brazil instead relied on a previous notification of a broad list of products which gave it the flexibility to pick and choose products at a later stage. Such an approach apart from creating considerable uncertainty to economic operators failed to ensure effective multilateral control on the equivalence between the suspension of concessions and the level of countermeasures authorized by the arbitrator. Indeed, a DSB authorization to suspend concessions under Article 22.7 of the DSU could not justify a derogation from the obligation to maintain the equivalence between the level of suspension and the level of nullification and impairment under Article 22.4 of the DSU. Therefore, any possible action by the DSB at the present meeting could not be taken as a precedent for the interpretation of the relevant DSU provisions. The EC also intended to have this issue clarified in the ongoing DSU negotiations.

49. The representative of the United States said that her country had several concerns with the Arbitrator's analysis in this dispute. Most fundamentally, the Arbitrator had erred in relying on the approach of the FSC Arbitrator with respect to the meaning of "appropriate countermeasures". That approach had disregarded clear negotiating history indicating that this level had to be proportionate to the trade effects of the measure. Indeed, the FSC Arbitrator had refused to even acknowledge the existence of this negotiating history, or address arguments relating to it. Instead, the Arbitrators in

both disputes had decoupled the level of countermeasures from trade effects, resulting in an essentially arbitrary approach to the calculation of these countermeasures. Recourse to the negotiating history would have been appropriate to see whether it would confirm the meaning derived by the Arbitrators from the text. In addition, the United States shared a number of the concerns expressed by Canada concerning the Arbitrator's decision to increase the amount of the appropriate level of countermeasures in a manner which was, essentially, arbitrary and punitive. After noting that it would be improper to adjust the level of countermeasures based on the simple fact of Canada's non-compliance, the arbitrator appeared to have done essentially just that. In justifying this approach, the arbitrator had referred to the general principle of international law – *pacta sunt servanda* – and the Vienna Convention. However, the Arbitrator's comments missed the point. The arbitrator appeared to suggest that this principle was applicable in WTO disputes by virtue of the absence in the DSU or SCM Agreement of special provisions which would otherwise prevail. This ignored the more fundamental point that, as set forth in Article 3.2 of the DSU, the dispute settlement system was intended to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements. "General principles of international law" were not listed in the covered agreements set forth in Appendix 1 of the DSU, and a WTO adjudicatory body had no authority to enforce those principles. With regard to the EC's criticism that Brazil should have submitted a revised retaliation list after issuance of the arbitration award, the United States noted that the DSU did not require submission of such a list.

50. The representative of Brazil said that his country had no intention to use its rights in a manner that would exceed the amount authorized by the Arbitrator or that it would otherwise be contrary to the present DSU rules.

51. The DSB took note of the statements and, pursuant to Brazil's request under Article 22.7 of the DSU and Article 4.10 of the SCM Agreement, contained in document WT/DS222/10, agreed to grant authorization to suspend the application to Canada of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS222/ARB.

5. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/223)

52. The Chairman drew attention to document WT/DSB/W/223 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/223.

53. The DSB so agreed.

54. The Chairman said that in the context of this item, he wished to inform delegations that a new updated indicative list of governmental and non-governmental panelists had recently been circulated by the Secretariat in document WT/DSB/33, in accordance with the requirement that the list be updated every two years. Following the circulation of that list, new names approved by the DSB in accordance with Article 8.4 of the DSU would be circulated on a regular basis as addenda to this list.

55. The DSB took note of the statement.

6. United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea

(a) Statement by the United States

56. The representative of the United States, speaking under "Other Business", said that her country was pleased to inform the DSB that, as provided for in the 31 July 2002 notification

(WT/DS202/18), the US safeguard measures on line pipe from Korea had been terminated on 1 March 2003.

57. The representative of Korea said that his country welcomed the statement by the United States and appreciated the US implementation by way of terminating the safeguard measures on line pipe from Korea as of 1 March 2003, as agreed by both parties.

58. The DSB took note of the statements.