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Dispute Settlement Body
17 February and 19 March 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 February and 19 March 2004

Acting Chairperson: Mrs. Mary Whelan (Ireland)
Chairman: Mr. Shotaro Oshima (Japan)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.23 – WT/DS162/17/Add.23)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.16)

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.16)

(d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.4)

(e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.1 – WT/DS234/24/Add.1)

1. The Chairperson 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". She proposed that the five sub-items to which she had just referred be considered separately.

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.23 – WT/DS162/17/Add.23)

2. The Chairperson drew attention to document WT/DS136/14/Add.23 – WT/DS162/17/Add.23, 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.

3. The representative of the United States said that his country had provided an additional status report in these disputes on 5 February 2004, in accordance with Article 21.6 of the DSU. As noted in the report, legislation repealing the 1916 Act was pending in both the US Senate and the US House of Representatives. On 29 January 2004, HR 1073, which would repeal the 1916 Act, had been favourably reported out of the Committee on the Judiciary of the US House of Representatives. The US administration was continuing to work with Congress to achieve further progress in resolving these disputes with the EC and Japan.

4. The representative of the European Communities said that the EC noted that the Committee on the Judiciary had voted on a bill that would repeal the 1916 Anti-Dumping Act. The EC strongly hoped that this demonstrated a renewed determination of the United States to respect its international obligations. However, the EC expected the United States to inform the DSB as to what further steps it would take to ensure that there was no further delay in the implementation of the WTO ruling. Also, the EC noted that the bill referred to the House floor would not terminate the pending court cases. The EC reminded the United States and the DSB that it had accepted to extend the original period of time for implementation and then to suspend the arbitration preceding on the express understanding that the repealing bill would also terminate the pending litigation.

5. The representative of Japan said that the lengthy period of non-compliance by the United States with the DSB's recommendations and rulings in this proceeding was of an extreme concern not only to Japan, but also to the WTO dispute settlement system. Japan urged the United States not to lose any more time in fulfilling its obligations under the WTO Agreement. While Japan noted that

HR 1073 had been reported out of the House Committee on the Judiciary, it pointed out with much regret that this particular bill was without retroactive effect. She recalled that Japan had been demanding that the legislation repealing the 1916 Act must have proper retroactive effect to terminate the pending cases. The Japanese companies concerned were still incurring substantial damages, including significant legal costs, due to the cases brought against them under the 1916 Act. The United States must make greatest efforts to ensure the passage of the repealing bills and the termination of the pending cases at the earliest juncture during the second session of the 108th Congress. Japan strongly requested the United States to make more detailed reports to the DSB on the status of all the bills pending before the Congress and on its concrete plans for securing the passage of the bills with the proper retroactive effects. Japan had not yet made a final decision on the reactivation of the DSU Article 22 arbitration. Japan wished to remind the United States of its right to suspend concessions or other obligations.

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

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.16)

7. The Chairperson drew attention to document WT/DS176/11/Add.16, 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.

8. The representative of the United States said that his country had provided a status report in this dispute on 5 February 2004, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

9. The representative of the European Communities said that there were presently two bills pending respectively in the House and in the Senate that would, *inter alia*, repeal Section 211. These bills offered a basis to resolve this dispute to the benefit of all. The EC, therefore, trusted that the US administration would support the repeal of Section 211 as a sign of US commitment to effective and non-discriminatory protection of intellectual property rights.

10. The representative of Cuba said that since 2 February 2002, when the DSB adopted the Appellate Body's findings and recommendations concerning Section 211, the United States had continued to submit status reports that showed no progress in the consultations held by the US administration and Congress aimed at implementing those recommendations. On 5 April 2002, the United States and the EC had informed the DSB in writing that they had agreed on a reasonable period of time for implementation of the DSB's recommendations in this case. To this effect, they had agreed that the implementation period would in no event go beyond 3 January 2003. On 7 January 2003, these two Members had further agreed to extend the reasonable period of time until 30 June 2003 and, on that date, they had again agreed to extend the implementation period until 31 December 2003. Finally, on 24 December 2003 the EC and the United States had agreed, for the third time, to extend the implementation period until 31 December 2004. More than two years had now elapsed, but the United States had not yet implemented the DSB's decisions. However, this was not an isolated case. In this context, she noted that at the present meeting, three other disputes were before the DSB, with regard to which implementation by the United States was still pending, with status reports that made no reference of any prompt settlement. This undermined the credibility of the commitments undertaken by the United States in the WTO and the credibility of the WTO itself. Cuba believed that there was every indication that these extensions had been contrived in order to take away from the Havana Club Holding its legitimate rights to the Havana Club mark, and also to bar the Cuban company, Cubaexports, from continued ownership of the mark in the United States. She

noted, once again, that underlying the arbitrary, underhand and anti-Cuban nature of Section 211 was an obvious attempt to give preference to the commercial and political interests of Bacardi. Cuban authorities had appraised developments in this process on the basis that one of the principles of the WTO was to resolve promptly disputes in which a Member deemed its rights or benefits to be nullified or impaired. They were accordingly concerned to note scant and ineffective, not to say non-existent, efforts made to meet fully the commitments entered into. She asked how much longer one had to wait for the United States to comply with the decisions of the DSB and to repeal Section 211, which, it had been shown, was inconsistent with the WTO and its own trademark legislation. Cuba again requested the United States to end this interminable process of consultations between its administration and Congress, and in line with the WTO commitment to finally repeal Section 211.

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

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.16)

12. The Chairperson drew attention to document WT/DS184/15/Add.16, 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.

13. The representative of the United States said that his country had provided a status report in this dispute on 5 February 2004, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress to address the recommendations and rulings of the DSB that had not been addressed by 23 November 2002.

14. The representative of Japan said that her country deeply regretted that the United States could not comply with the DSB's recommendations and rulings before the end of the first session of the 108th Congress in December 2003. The United States must fully implement the DSB's recommendations and rulings as soon as possible. To this end, Japan strongly requested that specific legislative amendments supported by the US administration be introduced in the Congress for consideration and passage during the second session of the 108th Congress.

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

(d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.4)

16. The Chairperson drew attention to document WT/DS207/15/Add.4, which contained the status report by Chile on progress in the implementation of the DSB's recommendations in the case concerning price band system and safeguard measures relating to certain agricultural products.

17. The representative of Chile said that given that his country had complied in both the form and the content with the DSB's recommendations and rulings in this dispute, his delegation had nothing further to add to the statements made in the context of previous status reports as well as at the 23 January 2004 DSB meeting.

18. The representative of Argentina said that, as Chile had stated in its most recent status report, Chile and Argentina continued to disagree, within the meaning of Article 21.5 of the DSU, as to the existence of measures taken to comply with the DSB's recommendations and rulings, given that Argentina considered that Chile had failed to bring into conformity the measure found to be WTO-inconsistent in this dispute. In this respect, he recalled that, on 24 December 2003, both

countries had signed an Understanding Regarding Procedures under Articles 21 and 22 of the DSU with respect to this dispute. This Understanding had been notified to the DSB and circulated in document WT/DS207/16. The parties to the dispute were now working on all the procedural options under this Understanding with a view to resolving their disagreement.

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

(e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.1 – WT/DS234/24/Add.1)

20. The Chairperson drew attention to document WT/DS217/16/Add.1 – WT/DS234/24/Add.1, 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 Continued Dumping and Subsidy Offset Act of 2000.

21. The representative of the United States said that his country had provided a status report on 5 February 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003 legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with the WTO obligations of the United States had been introduced in the US Senate (S. 1299). In addition, as it had done in the previous year's budget proposal, on 2 February 2004, the US administration, once again, had proposed repeal of this Act in its budget proposal for fiscal year 2005. The US administration was continuing to work with Congress to achieve further progress in resolving these disputes.

22. The representative of the European Communities said that for more than three years, the United States had illegally imposed on dumped and subsidized imports a double penalty. The EC welcomed the fact that the US President's budget called for a repeal of the Byrd Amendment. However, the same proposal had been made in 2003 and there had been absolutely no action in the US Congress. Even worse, a significant number of US Congressmen had opposed implementation of the WTO ruling and had instead called for a re-negotiation of WTO rules. The EC expected the US administration to actively work with Congressional leaders in order to ensure rapid compliance with the US obligations under the WTO. Another round of illegal disbursements under the Byrd Amendment would be unacceptable. In the meantime, the EC and other co-complainants had proceeded to exercise their WTO rights. The EC hoped, however, that rapid implementation of the WTO ruling would make it unnecessary to suspend concessions *vis-à-vis* the United States.

23. The representative of Canada said that his country noted the US status report and was disappointed that the United States had not made progress to comply with the DSB's rulings and recommendations. As a result of the non-compliance, on 26 January 2004, Canada and seven other members of the WTO had been forced to seek authorization from the DSB to retaliate against the United States. As his delegation had stated previously, Canada did not favour disruptions to trade and called again upon the United States to repeal the Byrd Amendment.

24. The representative of Chile thanked the United States for its second status report and the statement made at the present meeting. Chile noted that in the budget proposal for the fiscal year 2005, the United States had reiterated its proposal to repeal the CDSOA and to make the duties levied as of September 2003 the last to be distributed to the companies concerned. Chile hoped that with this clear statement of intent, Congress would take appropriate steps to abolish this Amendment. To that end, Chile called upon the US administration to redouble its efforts with Congress to reach such a solution at the earliest possible date, thus obviating the need for Chile to implement the measures for which it had sought authorization from the DSB.

25. The representative of Japan said that her country noted the second status report by the United States in this proceeding with great frustration and disappointment. The content of the second report

was exactly the same as the first one, which showed the total lack of progress in implementation. Given the expiry of the reasonable period of time on 27 December 2003, Japan had no other option, but to request authorization from the DSB to suspend concessions and other obligations. Japan was confident that the Arbitrators would find that Japan's request fully satisfied the requirements of Article 22 of the DSU. Japan looked forward to early issuance of the award by the Arbitrators. Japan strongly urged the United States to implement the DSB's recommendations and rulings as soon as possible by repealing the Byrd Amendment.

26. The representative of Korea said that his country appreciated the US status report. Korea wished that the United States, through an effective co-operation between its administration and Congress, repeal the measure as soon as possible. Like previous speakers, Korea could not accept further disbursements under the Byrd Amendment in the course of 2004.

27. The representative of India said that, like previous speakers, his country appreciated the intention of the United States to implement the DSB's recommendations, which was demonstrated by the inclusion of the intention to repeal the Byrd Amendment in the 2005 budget proposal. Like other speakers, India also urged the United States to repeal the CDSOA expeditiously so that those Members who had started their retaliation proceedings would not need to proceed further.

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

2. United States – Laws, regulations and methodology for calculating dumping margins ("zeroing")

(a) Request for the establishment of a panel by the European Communities (WT/DS294/7)

29. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS294/7.

30. The representative of the European Communities said that the EC's request for a panel explained in detail its concerns with regard to the calculation methodologies used by the United States to establish dumping margins, and the violations of WTO rules that resulted thereof. On 12 March 2001, the DSB had adopted the Panel and the Appellate Body Reports in the Bed-Linen dispute. The reports had found that the EC's methodology since then known as "zeroing" was WTO-incompatible. The EC had stopped the use of that methodology, in accordance with the DSB's recommendations. Obviously, the WTO rules had to apply equally to every Member. He noted that, in many of the specific cases listed in the EC's request, the dumping margin would have been de minimis or even negative, if the United States had not used the zeroing methodology. European exports had been subject to the burden of anti-dumping duties where none should have been imposed or collected. Furthermore, these duties directly financed the US competing products as a result of yet another violation of WTO obligations by the United States; i.e. the Byrd Amendment. Several hundred million dollars of trade were involved. Some of the products (hot-rolled steel, stainless bar, ball bearings) were major export items and other important products would inevitably be involved in the future if the United States was allowed to continue "zeroing ". Therefore, the EC was requesting that a panel be established to examine the WTO compatibility of the US legislation, methodologies and specific determinations in a number of original investigations and administrative reviews as result of the use of zeroing in the establishment of the dumping margin.

31. The representative of the United States said that, for several reasons, his country was disappointed that the EC had decided to escalate this matter by requesting a panel. First, what this dispute was about was whether an adjustment had to be made for something that was not mentioned in either the GATT 1994 or the Anti-Dumping Agreement; namely, a so-called "negative dumping

margin". The EC appeared to believe that the definition of "dumping" – a term that was defined in the GATT and the Antidumping Agreement – should be modified so as to reflect this extra-textual concept. The United States disagreed. The United States also was disturbed by the assertion in the EC's panel request that the US method of calculating dumping resulted in the collection of anti-dumping duties in excess of the actual dumping practiced. The United States could not disagree more. To the contrary, the US method – which took into account non-dumped transactions – ensured that the amount of duties collected equalled the actual dumping practiced. The United States, of course, was aware that the Appellate Body had found the EC's method of calculating dumping to be WTO-inconsistent. However, the US and EC methods were not identical, and the United States was confident that its method would be found to be consistent with its WTO obligations. The United States suggested that the EC should reconsider its pursuit of its claims in this dispute. Finally, the United States noted that it had had some difficulty understanding the nature of the EC's problem due to the fact that the EC's panel request contained several cross-references to numbered "points" that did not, in fact, exist. For example, at one point, the panel request stated that certain claims were made "for the reasons set out under point 3.1(b) below," but there was no "point 3.1(b)". In order for the EC to satisfy its obligations, and to accord the United States its rights, under Article 6.2 of the DSU – as well as to avoid a wasteful procedural fight should a panel be established on the basis of the current request – the United States invited the EC to withdraw its current request and, if upon reconsideration it nevertheless decided to pursue this dispute, to submit a new request that complied with Article 6.2 of the DSU. Indeed, the United States understood that, on 16 February, in the evening, the EC had just submitted a revised panel request. The United States would of course examine this new request, in particular to see if it addressed these concerns, but for the moment it would simply note that it was a new request that had not been submitted 10 days prior to the present meeting and so could not be considered at the present meeting. For the foregoing reasons, the United States was not in a position to agree to the establishment of a panel.

32. The representative of Mexico said that his country had a substantial interest in this dispute, and, at an appropriate time, it would reserve its third-party rights to participate in the panel's proceedings. At this stage, Mexico wished to draw the DSB's attention to a matter of concern. He recalled that on 25 September 2003, Mexico had notified the United States of its substantial trade interest, and of its intention to be joined in the consultations. To-date, Mexico had not yet received any response. It was Mexico's understanding that the United States might wish to consider that Mexico did not have a substantial trade interest and would communicate that view. Nevertheless, the consultations had taken place, but Mexico had never received any official communication. It was a matter of concern that a Member that strived for greater transparency in the dispute settlement mechanism should fail to set an example. The DSU would become meaningless if it could not rely on the political will necessary to give meaning to its provisions.

33. The representative of the United States said that he had taken note of the comments made by Mexico and would refer them to his authorities. However, his recollection was that following the receipt of an initial letter from Mexico requesting to be joined in consultations held in this dispute under Article 4.11 of the DSU, the United States had responded with a letter setting forth its position on any claims of substantial trade interest that might be made on this dispute.

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

3. European Communities – Measures affecting trade in commercial vessels

(a) Request for the establishment of a panel by Korea (WT/DS301/3)

35. The Chairperson drew attention to the communication from Korea contained in document WT/DS301/3.

36. The representative of Korea said that on 5 February 2004, his country had requested establishment of a panel with respect to the EC's measures affecting trade in commercial vessels. The request was focused on the so-called Temporary Defense Mechanism (TDM), which was based on the EC's Regulation 1177/2002, dated 27 June 2002, and the EC member States' measures implementing it. Those measures raised systemic concern with regard to the issue of unilateralism, which was in conflict with the basic principle of the WTO dispute settlement system. The EC stated in its Council Regulation 1177/2002 that the TDM should be authorized to assist the EC's shipyards that had allegedly suffered adverse effects caused by unfair Korean competition. The TDM had been put in place at the end of September 2002 for a duration of 18 months. The EC had also stated in the Regulation 1177/2002 that the TDM should only be authorized after the EC had initiated dispute settlement proceedings against Korea. He recalled that the EC had initiated the proceedings, requesting consultations with Korea on 21 October 2002 under the WTO dispute settlement mechanism (DS273). While any Member was within its right to have recourse to the dispute settlement procedures, in this case, however, there was a serious problem because the EC had not awaited the outcome of the dispute-DS273-before taking countermeasures in the form of the TDM. It was a grave violation of WTO rules to impose unilateral sanctions against another Member prior to the DSB's authorization.

37. The TDM regulation stated that it was authorizing subsidization of the EC's shipbuilding industry only when there was a competing bid from a Korean shipyard. Thus, the TDM was not a broad-based subsidy program meant to assist an ailing EC's industry. Instead, it constituted a unilateral determination of violation and a unilateral imposition of a punitive measure aimed solely at one Member; i.e. Korea. Indeed, the very name of the TDM measure indicated its nature. It was "temporary" because it was meant to be imposed only for the duration of the WTO dispute settlement proceedings. But the SCM Agreement and the DSU were quite explicit that no Member might prejudge such proceedings. In fact, the TDM was completely inconsistent with the position the EC has maintained for decades within the GATT and the WTO. Indeed, the EC had made the end of unilateralism the cornerstone of its Uruguay Round negotiating strategy. Articles 23 of the DSU and 32 of the SCM Agreement were quite clear in prohibiting such unilateral measures. In particular, Article 32.1 of the SCM Agreement prohibited Members from taking specific actions against a subsidy of another Member except in accordance with the WTO Agreements. But that was precisely what the EC had been doing under the TDM Regulation as it specifically permitted EC subsidization when there was competition with Korean – and only Korean – shipbuilders. Furthermore, Article 23.2(a) of the DSU specifically prohibited Members from making a determination to the effect that a violation had occurred, that benefits had been nullified or impaired or that the attainment of any objective of the covered agreements had been impeded, except through recourse to dispute settlement, in accordance with the DSU provisions. The EC had made precisely such a determination outside of the WTO dispute settlement process, even before initiating the WTO dispute settlement proceedings.

38. Korea noted that its request for consultations in this dispute was broader than the measures identified in the present panel request. Korea had decided to proceed ahead with this portion of its claims at this point in time because the EC had proposed on 21 January 2004 to extend by one more year the TDM which had originally been set to expire by the end of March 2004. The systemic importance of the issue had also been taken into account as unilateralism of this sort had to be addressed without any further delay. Korea had not abandoned its other claims with respect to the subsidization of EC commercial vessels. In a new dispute WT/DS307, Korea had requested, on 13 February 2004, consultations with the EC. It had requested these new consultations since the scope of the consultations had been broadened. The new request included, *inter alia*, the Framework on State Aid to Shipbuilding, which provided for broad based subsidization of the EC shipbuilding industry. Furthermore, there continued to be issues regarding whether the EC had provided prohibited and actionable subsidies causing adverse effects which needed further consultations. Finally, and turning back to the panel request, Korea believed that the EC's measure specified in the panel request

constituted a clear violation of its obligation under the WTO regime by the EC and its member States. Korea requested that a panel be established with standard terms of reference.

39. The representative of the European Communities said that the EC was surprised to see Korea's panel request. Korea had originally requested consultations on a number of EC's measures in the shipbuilding area and had sent to the EC over 400 questions. The EC and Korea then had held two rounds of consultations which, however, due to the vast number of Korean questions, remained incomplete. Korea had, at the time, suggested that a third round would follow to complete the discussion of these measures. The EC was, therefore, surprised to see that Korea had asked for a panel without completing the consultations. The surprise was even greater considering that on 13 February 2004, the EC had received a new request for consultations by Korea on the EC's measures in question, which it was now in the process of examining. However, as Korea's new consultations request also covered the measures with regard to which the panel was being requested at the present meeting, the EC had to express its disapproval of this procedural manoeuvring by Korea. The EC, therefore, rejected Korea's request and would vigorously defend its measures in the event of a panel procedure.

40. The representative of the United States said that as the United States understood it, Korea claimed that the EC had done the following: (i) it had determined under its own domestic procedures that Korea's subsidies were inconsistent with its obligations under the Subsidies Agreement; and (ii) as a result of this determination, the EC had provided, or had authorized member States to provide, subsidies to the EC's shipyards. Korea appeared to allege that the first determination was inconsistent with Article 23 of the DSU, based on the reasoning of the panel in the US – Section 301 dispute, in which the EC was the complainant. Korea appeared to allege that the resulting provision of subsidies was inconsistent with Article 32.1 of the Subsidies Agreement, based on the reasoning of the Panel and the Appellate Body in the Byrd Amendment dispute, in which the EC was also a complainant. Suffice it to say that the United States would be following this dispute with the utmost interest.

41. The representative of Korea said that his delegation wished to make a short statement since the EC had expressed its surprise about Korea's new request for consultations, which had been filed on 13 February 2004. He confirmed that two rounds of consultations had been held with the EC on this matter. The EC had expressed its desire to continue with consultations. However, what had prompted Korea's new request for consultations was the fact that the EC had extended the TDM regulations for one more year, which was a clear violation of its obligations under the DSU. Korea looked forward to meaningful consultations under the new request and to any amicable solution to be found to this dispute.

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

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

(a) Report of the Appellate Body (WT/DS257/AB/R) and Report of the Panel (WT/DS257/R and Corr.1)

43. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS257/10 transmitting the Appellate Body Report on "United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada", which had been circulated on 19 January 2004 in document WT/DS257/AB/R, in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. She recalled

that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

44. The representative of the United States said that on 5 February 2004 his country had been pleased to request that the adoption of the Panel and Appellate Body Reports in this dispute be put on the agenda of the present meeting. The United States thanked the Panel, the Appellate Body and the Secretariat for their diligence and hard work throughout the course of this dispute. Needless to say, the United States was pleased by the results. The Panel and Appellate Body Reports had rejected, in all major respects, Canada's claims that the United States had acted inconsistently with the Subsidies Agreement and the GATT 1994 in finding that Canada had provided countervailable subsidies to its softwood lumber industry. The United States was particularly pleased that the Appellate Body had confirmed that countervailing duty administrators had the flexibility under the Subsidies Agreement to accurately determine whether government prices of inputs were below market, even in cases where the local market price was itself distorted by government action. The United States was also pleased that both the Panel and the Appellate Body had confirmed that a WTO Member providing low-cost inputs to specific companies could not avoid the disciplines of the Subsidies Agreement simply by using legal devices that related to the form, but not the substance, of the transaction. These were both important principles that helped ensure that WTO subsidy disciplines remained meaningful. The United States acknowledged the finding that it should have investigated whether subsidies had been passed from one company to another through the sale of logs. The United States was currently examining approaches to implementing this finding. Finally, the United States, once again, wished to emphasize its appreciation for the excellent legal analysis in this dispute.

45. The representative of Canada said that his country wished to thank the Panel, the Appellate Body and the respective Secretariats for their work in this matter. While disappointed in certain of the findings, Canada welcomed these Reports and the additional clarity they had brought to the disciplines of the SCM Agreement. At the present meeting, he wished to concentrate his comments on two substantive points and another point raised by the Reports concerning the effective functioning of the WTO dispute settlement system. First, he wished to turn to the findings of the Panel and the Appellate Body with respect to the pass-through issue. That issue involved the extent to which benefits allegedly attached to an upstream input product, might be presumed to "pass-through" to the downstream *subject* goods. The Panel and the Appellate Body's clear answer had been that such a presumption was not permissible. The Panel had found that the US Department of Commerce's pass-through analysis with respect to "sawmill-to-sawmill" transactions was inconsistent with the SCM Agreement and the GATT 1994. The Appellate Body had upheld this finding and it had also found that the United States had conceded that a pass-through analysis was required for transactions between independent harvesters and downstream sawmills. In making these findings, the Panel and the Appellate Body had confirmed a fundamental principle of the SCM Agreement; i.e. an investigating authority might not presume the pass-through of a subsidy: it must establish it. In this instance, having been found to have imposed countervailing duties in respect of practices that it had not properly established to be subsidies, the United States should bring itself into compliance. Doing so would significantly reduce the countervailing duty being applied to Canadian imports.

46. He noted that Canada welcomed certain findings of the Appellate Body concerning the "benefit" analysis under Article 14(d) of the SCM Agreement. These included the Appellate Body's finding that countervailing measures could not be used to offset differences in comparative advantages between countries – the precise purpose of the US cross-border comparison in this case. Moreover, it had been concluded that an investigating authority should only be permitted to use a benchmark other than in-country private market prices in "very limited" circumstances. In particular, the Appellate Body had indicated that such a benchmark could only be used where it had been

established first, that private prices of the goods in question in the country of provision were distorted, because of the predominant role of the government in the market as a provider of the same or similar goods and that the benchmark was representative of prevailing market conditions in the country of provision. In Canada's view, based on the Appellate Body's guidance, trade in Canadian softwood lumber with the United States was not one of these "very limited" circumstances. Canada noted the US comments and respected the findings by the Department of Commerce. However, evidence filed by Canada demonstrated that the Department of Commerce had not established that private stumpage prices in Canada were distorted. Moreover, the benchmark used bore no relationship with prevailing market conditions in Canada. However, the Appellate Body had been unable to find that the use by the United States of cross-border comparisons was inconsistent with Article 14(d) of the SCM Agreement. The Appellate Body had found that it could not complete the Panel's analysis because the Panel had not made factual findings with respect to whether the prices in the country of provision were distorted or whether the benchmark used by the United States was representative of prevailing market conditions in Canada. Furthermore, there were no undisputed facts on the record that the Appellate Body could rely on.

47. With regard to remand authority, he said that despite a proceeding that had lasted well over a year and the very considerable time and resources that had been expended on it, if Canada wished to pursue this matter in dispute settlement, the only recourse available to it under the current DSU rules would be to launch a whole new case. This was by no means a unique or anomalous case. He recalled that the same problem had arisen just two months ago in the Sunset Review case brought by Japan, when the Appellate Body had found that it lacked the factual basis to complete its analysis of the measure at issue. These results, or more accurately, the lack of results, illustrated clearly the need for a remand authority for the Appellate Body. Article 3 of the DSU emphasized that the prompt settlement of disputes was essential to the effective functioning of the WTO system. In cases like these, unless the Appellate Body had the authority to remand issues back to the panel for additional factual findings, the prompt settlement of the dispute would become unachievable and the functioning of the WTO system would be compromised. The creation of a remand authority for the Appellate Body was one of the initiatives being considered in the negotiations of the DSB in Special Session to clarify and improve the DSU. This initiative had the unquestionable potential to significantly improve the functioning of the WTO dispute settlement system. Canada, therefore, encouraged all Members to make it a priority in these negotiations. Finally, he said that Canada requested that the DSB adopt the Appellate Body Report and the related Panel Report in this matter and that it recommend that the United States bring its measures into conformity.

48. The representative of the European Communities said that the EC welcomed the clarifications provided by the Appellate Body on important terms of the SCM Agreement. The EC particularly welcomed the clarification that the expression "goods or services other than general infrastructure" in Article 1.1(a)(1)(iii) of the SCM Agreement covered any in-kind payments. The EC also welcomed the fact that the Appellate Body had referred to the French and Spanish language versions of the Agreement to interpret the term "goods" and considered that this interpretative source should be adhered to systematically according to Article 33 of the Vienna Convention. Moreover, the Appellate Body had provided important guidance regarding the benchmark to be used when determining the existence of a benefit resulting from the provision of goods by a government. The EC agreed with the Appellate Body that in exceptional circumstances, Article 14(d) of the SCM Agreement, did not require the use of the domestic private prices; i.e. when such private prices were themselves distorted by the predominant role of the government in providing the goods concerned. The EC also agreed that the decision to disregard the existing private prices as the benchmark should be the result of a thorough investigation of the market in question and that the alternative benchmark should be determined cautiously and with due account of the market conditions of the country of provision.

49. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS257/AB/R and the Panel Report contained in WT/DS257/R and Corr.1, as modified by the Appellate Body Report.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/251)

50. The Chairperson drew attention to document WT/DSB/W/251 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the names contained in document WT/DSB/W/251.

51. The DSB so agreed.

6. Mexico – Measures affecting the import of matches

(a) Statement by Mexico

52. The representative of Mexico, speaking under "Other Business", said that his country thanked Chile for withdrawing its request for consultations concerning Mexico's measures affecting the import of matches (WT/DS232/3). This withdrawal demonstrated that some problems in the day-to-day functioning of the DSU could be resolved with the requisite political will and without the need of amending the DSU. This was also a further demonstration of Mexico's interest in resolving issues in a satisfactory and expeditious manner. Mexico hoped to be able to notify shortly mutually agreed solutions with regard to its disputes with Nicaragua and Guatemala so that these matters could also be considered as terminated.

53. The DSB took note of the statement.

7. Election of Chairperson

54. The Chairperson said that, as Members were aware, the outgoing DSB Chairman, Amb. Shotaro Oshima, was unavoidably absent from Geneva and had asked her to propose that the meeting be suspended on this agenda item with a view to be reconvened at an appropriate and convenient time, probably just in advance of the next regular DSB meeting on 19 March, if no special DSB meeting were to be held before that date. Delegations would be informed by fax as to when the meeting would be reconvened.

55. The DSB agreed that the meeting be suspended on this agenda item.

56. Upon the resumption of the DSB meeting on 19 March 2004, the outgoing Chairman recalled that on 17 February 2004, the DSB had suspended its meeting and had agreed to reconvene in order to proceed with the election of Chairperson. In light of this, he proposed to take up this agenda item. He then said that first he wished to say a few words of thanks as this was his last meeting as Chairman of the DSB. In this regard, he wished to thank all delegations for their support throughout the year. He also wished to thank the members of the Secretariat who had supported him throughout the process, in particular the Director of the Council & TNC Division and his staff as well as the Director of the Legal Affairs Division and his staff. He also thanked the interpreters for their job. He also wished to take this opportunity to express his gratitude to Ambassador Mary Whelan of Ireland for her willingness to come to stand in for him when was not able to chair meetings for various reasons, not only once but twice, despite her strenuous duties as Ambassador of the EC presidency. Looking back at the past year, he said that he felt very fortunate for having been provided with the firsthand knowledge of this important pillar of the WTO, namely the dispute settlement mechanism. Currently, Members were in the process of negotiations and focused on trade liberalizing elements of the WTO.

However, the Dispute Settlement Body was a very important part of the WTO, which was the rules based organization. He, therefore, felt very fortunate to have been able to contribute to the dispute settlement process and was now more aware of the importance of this WTO pillar. He said that the new Chairperson to be elected at the present meeting was his good friend and a very able and committed person. He was, therefore, very happy to be able to hand over the job to her.

57. The outgoing Chairman recalled that at its meeting on 11 February 2004[1], the General Council had taken note of the consensus on a slate of names of Chairpersons to a number of WTO bodies, including the DSB. On the basis of the understanding reached by the General Council, he wished to propose that the DSB elect, by acclamation, Ambassador Amina Mohamed (Kenya) as Chairperson of the DSB.

58. The DSB so agreed.

59. The newly-elected Chairperson thanked Members for the confidence bestowed on her by electing her to this high post. Her election was not only an honour and privilege for her and her delegation, but also a proud moment for her country - Kenya. She expressed a very personal gratitude to the outgoing Chairman of the DSB and the new Chairman of the General Council, Ambassador Shotaro Oshima, for his dynamic and elegant leadership over the past year. She thanked him for presiding over her election and believed that she could not have received the torch from a better and more able friend. She said that she was conscious of the heavy responsibility that she was assuming as Chairperson of the DSB and pledged to carry it out to the best of her ability, all the time aware of the central role of the DSB as a custodian of the rights and obligations of the membership of the WTO and the backbone of the multilateral trading system. She asked for Members' support and cooperation in carrying out this important task. She thanked and acknowledged the excellent support already provided to her by the Secretariat. She said that she felt fortunate to have such high quality professional support and was hopeful to have a stimulating and productive year.

60. The representatives of Argentina, Canada, Chile, Cuba, Djibouti, the European Communities, India, Japan, Korea and the United States expressed appreciation for the work done by the outgoing Chairman of the DSB and welcomed the newly-elected Chairperson of the DSB.

61. The DSB took note of the statements.

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[1] WT/GC/M/85.