WORLD TRADE ORGANIZATION

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Dispute Settlement Body
19 May 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 May 2003

Chairman: Mr. Shotaro Oshima (Japan)

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.15)

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.15 - WT/DS162/17/Add.15)

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.8)

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.8)

(e) Egypt – Definitive anti-dumping measures on steel rebar from Turkey: Status report by Egypt (WT/DS211/7)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the five 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.15)

2. The Chairman drew attention to document WT/DS160/18/Add.15 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 8 May 2003, in accordance with Article 21.6 of the DSU. As noted in the report, the United States and the EC had been seeking a positive and mutually acceptable resolution of the dispute. The US administration had made good progress with the US Congress on this issue with a view to concluding a mutually acceptable arrangement consistent with WTO rules. The United States looked forward to notifying the DSB of additional information in the near future.

4. The representative of the European Communities said that the EC appreciated the efforts of the United States and hoped that it would be possible to make progress in this dispute in the short term.

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.15 – WT/DS162/17/Add.15)

6. The Chairman drew attention to document WT/DS136/14/Add.15 – WT/DS162/17/Add.15 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 8 May 2003, in accordance with Article 21.6 of the DSU. As noted in the report, legislation repealing the 1916 Act had been introduced in the US House of Representatives on

4 March 2003 (H.R. 1073). The US administration would continue to work with the US Congress to achieve further progress in resolving this dispute with the EC and Japan.

8. The representative of the European Communities said that the EC wished to recall its position concerning the effect of the repeal of the 1916 Anti-Dumping Act on the on-going court cases. The EC had agreed to give extra time for implementation and then to suspend the arbitration on its demand for retaliation on the express understanding that the repeal legislation would terminate the pending litigation. The US failure to comply had allowed the re-activation of a first proceeding and the initiation of two new cases against EC companies. The claims had been brought under a legislation that was clearly condemned and should have been repealed long ago. It was clearly not acceptable that EC companies were bearing substantial litigation costs and might ultimately be condemned. The EC urged, once again, the United States to put a definitive end to this dispute by repealing the 1916 Anti-Dumping Act and terminating the on-going court cases.

9. The representative of Japan said that her country had noted the status report and the statement made by the United States. Japan was, once again, disappointed at the lack of detailed explanation by the United States of how soon and how exactly it intended to fully implement the DSB's recommendations and ruling in this proceeding. The legislation introduced to the House of Representatives on 4 March 2003, which was referred to in the status report, would not terminate the pending cases. Given the serious damages, including substantive legal costs that the respondent Japanese companies had been forced to bear because of this WTO-inconsistent Act, Japan had repeatedly stated that the repealing bills must have retroactive effects to terminate the pending cases. Japan strongly urged the United States to ensure that the bills repealing the 1916 Act with proper retroactive effects had been introduced and passed in the two Houses before the summer recess of the current session of the 108th Congress. As stated at the 15 April DSB meeting, Japan demanded that the US administration coordinate much better with the US Congress and also specifically report to the DSB on the status of its efforts to ensure the introduction and passage of the repealing bills with proper retroactive effects. Japan retained its 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.8)

11. The Chairman drew attention to document WT/DS176/11/Add.8 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 8 May 2003, in accordance with Article 21.6 of the DSU. The US administration was continuing to consult and work with the US Congress to resolve this dispute.

13. The representative of the European Communities said that the status report provided by the United States was very disturbing. The EC noted that the new deadline for implementation would expire at the end of next month and yet the status report did not show any sign of concrete action towards implementation. At the 15 April DSB meeting, the EC had been informed that two bills that would repeal Section 211 were pending in Congress. Since then, the EC had learned that a third repealing bill had been introduced in April. He also wished to recall that the EC could not accept the US administration's position that there was no need to clarify that Section 211 did not apply in cases where the trademark had been abandoned by the original owner. 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.

14. The representative of Cuba said that her delegation had noted the statement by the United States introducing its brief status report as well as the statement made by the EC at the present meeting. Cuba was concerned that shortly before the expiry of the extended time-period for implementation, the consultations held by the US administration with the US Congress still did not bring any results in relation to the measures to be taken in order to comply with the DSB's recommendations. Once again, Cuba wished to urge the United States to respect its obligations as well as the time-frame for implementation which had been set by the DSB.

15. 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.8)

16. The Chairman drew attention to document WT/DS184/15/Add.8 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.

17. The representative of the United States said that her country had provided a status report in this dispute on 8 May 2003, in accordance with Article 21.6 of the DSU. With respect to the DSB's recommendations and rulings that had not been addressed in the 22 November 2002 antidumping duty determination of the US Department of Commerce, the United States continued to work with the US Congress to resolve this dispute. For instance, as reported at the 15 April DSB meeting, Ambassador Zoellick and Secretary of Commerce Evans wrote to Congress on 14 April supporting specific amendments to Section 735(c)(5) of the Tariff Act of 1930 to implement the DSB's recommendations and rulings. The US administration was working for passage of these amendments.

18. The representative of Japan said that her delegation was aware of the letter sent to the US Congress by Ambassador Zoellick and Secretary Evans on 14 April 2003. It was regrettable that no bill had since been introduced to either House of the Congress. As Japan had stated on many occasions, the persistent non-implementation by the United States was undermining the credibility of the WTO as a whole. Japan urged the United States to implement the DSB's recommendations and rulings as early as possible, including securing the introduction and passage of the relevant legislation in the US Congress before the summer recess of the current session of the 108th Congress. Japan also expected the United States to closely consult with Japan on the status and contents of the implementation.

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

(e) Egypt – Definitive anti-dumping measures on steel rebar from Turkey: Status report by Egypt (WT/DS211/7)

20. The Chairman drew attention to document WT/DS211/7, which contained the status report by Egypt on progress in the implementation of the DSB's recommendations in the case concerning definitive anti-dumping measures on steel rebar from Turkey.

21. The representative of Egypt recalled that, on 23 October 2002, Egypt had informed the DSB that it intended to implement the DSB's recommendations and rulings in the case on "Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey". The investigating authorities were currently re-examining the dumping calculations of the two following Turkish companies, "IZMIR" and "ICDAS" and the general injury assessment in light of the Panel's recommendations. Egypt would submit its revised injury assessment and revised dumping assessment to the interested parties.

Egypt's investigating authorities would continue to work with the Turkish authorities to implement the DSB's recommendations and rulings in this regard.

22. The representative of Turkey said that his country wished to thank Egypt for its concise statement regarding the status on implementation of the DSB's recommendations with respect to the anti-dumping measures having been applied on Turkish steel rebars. Turkey was glad to see Egypt's constructive approach to this matter. Since Turkey had not received the revised disclosure of findings of the Egyptian investigating authorities, his delegation was not in a position to comment on the substance. However, he wished to reiterate Turkey's expectation that the Egyptian authorities revise their findings in line with the Panel's recommendations and make the necessary adjustments to the anti-dumping duties, which had been found inconsistent with the provisions of Article 6.8 and paragraph 6 of Annex 11 of the Anti-Dumping Agreement. Turkey believed that Egypt would implement the Panel's recommendations in good faith and in a timely manner. Turkey hoped that both parties would soon be able to notify to the DSB that the issue was resolved with good faith.

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

2. Uruguay – Tax treatment on certain products

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

24. The Chairman recalled that the DSB had considered this matter at its meeting on 15 April 2003 and had agreed to revert to it. He drew attention to the communication from Chile contained in document WT/DS261/4.

25. The representative of Chile recalled that at the 15 April DSB meeting, his country had expressed its contentions with regard to the Specific Internal Tax (*Impuesto Especifico Interno* – IMESI) which was applied by Uruguay on certain consumer goods and which, in Chile's opinion, was inconsistent with Uruguay's obligations under the GATT 1994 with regard to national and most-favoured-nation treatment. Since that meeting, Uruguay had endeavoured to eliminate tax discrimination, but the proposed solution was only limited and partial. Chile, therefore, had to repeat its panel request, as circulated in document WT/DS261/4, so that a panel could confirm that the IMESI, established by the statutory provisions mentioned in its previous request and other complementary provisions and/or amendments, was contrary to Articles I and III of the GATT 1994. Finally, Chile wished to reiterate its interest in continuing to seek a satisfactory bilateral solution which would be consistent with the WTO Agreements.

26. The representative of Uruguay said that as his delegation had already stated at the 15 April DSB meeting, the consultations held in Montevideo on 23 July 2002 and the bilateral contacts between Uruguay and Chile constituted the appropriate framework for settling this dispute, given the readiness for dialogue shown by both parties. In view of the foregoing, Uruguay deeply regretted that Chile had decided to request the establishment of a panel to examine this issue, thus putting an end to the dialogue which his country preferred. Uruguay considered that Chile's request for the establishment of a panel was general and in many respects confused. With regard to tobacco and cigarettes, Uruguay wished to draw attention to Decree No. E/574, which had amended the previous relevant legislation. Decree No. E/574 had come into effect on 1 May 2003, as mentioned by Chile in its statement at the 15 April DSB meeting. Therefore, from the point of view of the procedure, the new measure concerning tobacco and cigarettes was Decree No. E/574, which was a separate measure and was not the subject of the consultations between Uruguay and Chile which had been held on 23 July 2002. Uruguay, therefore, considered that there were no grounds for Chile's request for the establishment of a panel as the measure in question had not been the subject of the consultations nor was it mentioned in Chile's request for the establishment of a panel.

27. With regard to the products in question as well as the other products mentioned by Chile in its panel request, Uruguay considered that the applicable regime was the Specific Internal Tax (IMESI), which was consistent with the WTO's rules and obligations. Uruguay, therefore, wished to stress that it considered the reasons and arguments put forward by Chile with regard to the IMESI to be inadmissible because they were not duly substantiated. In view of the foregoing, Uruguay would defend its rights within the framework of the WTO dispute settlement system. At the same time, Uruguay was ready to continue examining with Chile its concerns and hoped that a mutually satisfactory solution of this issue would be found.

28. 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.

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

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

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

30. The Chairman recalled that the DSB had considered this matter at its meeting on 15 April 2003 and had agreed to revert to it. He drew attention to the communication from Argentina contained in document WT/DS268/2.

31. The representative of Argentina said that his country wished to reiterate its request for a panel to consider the claims set forth in its panel request, dated 3 April 2003. In accordance with Article 6.1 of the DSU, Argentina was requesting that a panel be established at the present meeting. He recalled that at the 15 April DSB meeting, the United States had expressed disappointment that Argentina had chosen to resort to a panel in order to resolve this matter. Argentina was also disappointed that it was obliged to resort to a panel, as it had expressed throughout the consultations the desire to reach a mutually agreeable solution. In the end, the United States had clearly indicated that the two governments had different views regarding the substantive obligations of the Anti-Dumping Agreement. Argentina was not pursuing this matter for the sake of litigation, but rather because it believed firmly that its WTO rights had been nullified and impaired by the US measures at issue.

32. He said that Argentina had carefully analyzed the concerns raised by the United States during the 15 April DSB meeting in relation to its panel request and had come to the conclusion that the objections raised by the United States were not founded and that its panel request was fully consistent with Article 6.2 of the DSU. At the present meeting, Argentina wished to explain the reasons in this regard. First, the United States identified as the "principal problem" the section of the request following the detailed statement of claims in Sections A and B. Argentina interpreted that comment to be due to the misunderstanding of the request by the United States. It was Argentina's intention (as the panel request clearly provided) to set forth the particular claims in the paragraphs contained in Sections A and B of the document. Argentina noted that the United States conceded that Sections A and B of Argentina's request set forth adequately most of the claims at issue in this case. Therefore, to that extent, Argentina's panel request fully met the requirements set forth in Article 6.2 of the DSU and was properly before the DSB.

33. With respect to Sections A and B contained in the panel request, the United States complained about the general references to Articles 6 and 3 of the Anti-Dumping Agreement in Section B. The United States complained that Argentina did not refer to any specific paragraphs of those Articles and, therefore, argued that the claim was too general under the requirements of Article 6.2 of the DSU. Incidentally, it was difficult to reconcile US assertions regarding alleged inconsistencies of Argentina in terms of Article 6.2 in light of US practice in previous WTO cases.

Specifically, Argentina believed that the current US objections ran counter to what this country had argued in the case against Mexico regarding the high fructose corn syrup where the United States had requested terms of reference (WT/DS132/2) exclusively referring to general Articles of the Anti-Dumping Agreement, did not even identify a single paragraph of the AD Agreement and did not make any links between claims and the provisions of the Anti-Dumping Agreement or between the identified measures and claims. Notwithstanding, the panel request had been accepted by the DSB and endorsed as fully compatible with the DSU by the Panel Report[1]

34. Second, at the US request, Argentina had provided to the United States during the consultation process two sets of written questions. Fifty-two written questions had been provided before the 14 November 2002 consultations and additional 34 questions (based on the discussions in the first consultation meeting) had been provided in advance of the second consultation meeting on 17 December 2002. In total, 86 detailed questions had been provided in writing to the United States during the consultation period. The United States had not provided a written response to even a single question nor had it taken the opportunity to express in writing any concerns or confusion as to the nature of the claims subject to the consultations. Argentina could not accept that the United States now take the position that the general references to Articles 6 and 3 in Section B of the panel request had somehow surprised the United States or that it was not otherwise able to discern the meaning of those references in the panel request. US laws, regulations, and policy guidelines had been clearly identified in Argentina's panel request. Document WT/DS268/2 provided notice that certain provisions of these measures would be challenged "as such". This was reflected in the claim spelled out in Section A1. Argentina had also noted in its panel request that the application of the laws, regulations and policy guidelines (identified in document WT/DS268/2) in the sunset review of OCTG from Argentina conducted by the Department of Commerce, including the decision in the instant case to expedite the review were WTO inconsistent. This particular claim has been developed in Section A2. Additionally, the application by the Commission of laws, regulations and policy guidelines in the case at hand, had also led to a WTO inconsistent behaviour, subject to challenge under the claims developed in Section B. Besides, the resulting sunset determinations of the Department and the Commission had also been identified in Argentina's panel request like measures challenged in these proceedings. The paragraphs in Sections A and B of the panel request provided a detailed narrative amplification of the particular claims with respect to these measures that sufficiently identified the legal basis for Argentina's complaint.

35. Finally, Argentina found serious flaws with respect to the US assertion that the Department's Determination to conduct an expedited sunset review (Determination to Expedite) was not subject to WTO challenge because it was not a "measure". The United States disputed that its Determination to Expedite was a "measure", referring to it instead as one of "hundreds, perhaps thousands of discrete preliminary decisions" in an anti-dumping case. However, Argentina would demonstrate in this case that it was much more than that, it was decisive and determinative. The United States could not insulate this decision from scrutiny in this case where it had replaced the substantive analysis required by Article 11.3 of the Antidumping Agreement. Ultimately, whether Argentina decided to present arguments to the panel that the Determination to Expedite was a separate measure or constituted a critical component of the Department's Sunset Determination, the Department's decision to conduct an expedited review (claims in Section A 2 and 3) would not escape scrutiny. The same could be said of those portions of the US Statement of Administrative Action and the Department's Sunset Policy Bulletin, which replaced the substantive analysis required by Article 11.3 of the Anti-Dumping Agreement.

36. On the final point regarding the terms of reference for the panel, Argentina confirmed that it had requested standard terms of reference. Argentina's panel request was unambiguous in this regard, as it had requested that a "panel with standard terms of reference be established" at the next DSB meeting. Given the clarity of this statement, and the fact that Article 6.2 of the DSU clearly required

[1] WT/DS132/R paragraph 7.18.

a specific statement if a party wished to request different terms of reference, it was difficult to understand the United States' criticism on this point. Argentina was confident that its request complied with the letter and spirit of Article 6.2 of the DSU, and reiterated its request for the establishment of a panel to consider this matter.

37. The representative of the United States noted the statement made by Argentina. The United States did not wish to repeat the points made at the 15 April DSB meeting other than to note that it continued to believe that Argentina's panel request had failed to conform to the DSB's requirements for the reasons set forth in the statement made by the United States on 15 April.

38. 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.

39. The representatives of the European Communities, Japan, Korea, Mexico and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

4. Argentina – Definitive anti-dumping duties on poultry from Brazil

(a) Report of the Panel (WT/DS241/R)

40. The Chairman recalled that at its meeting on 17 April 2002, the DSB had established a panel to examine the complaint by Brazil pertaining to this matter. The Report of the Panel contained in WT/DS241/R had been circulated on 22 April 2003 as an unrestricted document, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. He noted that the Panel Report was before the DSB for adoption at the request of Brazil. He said that this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

41. The representative of Brazil recalled that, on 22 April 2003, the Panel Report in the case on "Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil" had been circulated to Members, one year after the establishment of a panel in which Brazil had challenged the consistency of the anti-dumping measures on imports of poultry from Brazil, imposed by Argentina by Resolution No. 574 of 21 July 2000. These measures had significantly impacted upon Brazil's exports of poultry to Argentina during almost three years. Brazil welcomed the adoption of the Panel Report and wished to thank the panellists and the Secretariat for their work in this case. Brazil was pleased that the Panel had confirmed most of its claims. The Panel had found that Argentina acted inconsistently with its obligations under the Anti-Dumping Agreement by, among others: (i) determining that there was sufficient evidence of dumping to initiate an investigation (Article 5.3); (ii) by failing to reject the application and promptly terminate the investigation (Article 5.8); (iii) by failing to notify several exporters known to the investigating authority (Article 12.1); (iv) by not providing the text of the written application to the known exporters and to Brazil (Article 6.1.3); (v) by disregarding the export price data submitted by certain exporters (Article 6.8 and Annex II of the Anti-Dumping Agreement); (vi) by not making due allowance for several exporters as required in Article 2.4; (vii) by failing to make an objective examination of injury when using different periods to evaluate the relevant economic factors and indices listed in Article 3.4 (Article 3.1); (viii) by including non-dumped imports from two exporters in its injury analysis (Article 3.1, 3.2, 3.4 and 3.5); and (ix) by failing to evaluate all the relevant economic factors and indices listed in Article 3.4 (Article 3.1 and 3.4).

42. With regard to Article 6.1.3 and the definition of the words "provide" in the English version and "facilitar" in the Spanish version, he noted the Panel's finding - with which Brazil fully agreed - that "the term provide would require a positive action on the part of the investigating authority akin to that of furnishing or supplying something to someone" (paragraph 7.169) and "with the use of different verbs in the first sentence of Article 6.1.3, 'provide' on the one hand and 'make available' on

the other, the drafters intended to impose different obligations on investigating authorities depending on the party concerned" (paragraph 7.170). With relation to the inclusion of non-dumped imports in the injury determination, equally important was the Panel's finding that "if a particular producer/exporter has been found not to have dumped, then we see no basis for including that producer/exporter's imports in the category of 'dumped imports' (paragraph 7.300)". The Panel found that Argentina's violations under the Anti-Dumping Agreement in the present investigation were of a "fundamental nature and pervasive" and had recommended that Argentina revoke the anti-dumping measure and repeal Resolution 574/2000. Brazil was pleased with the fact that Argentina had complied with this recommendation and had repealed the measure after the issuance of the interim Report.

43. The representative of Argentina said that his country first wished to thank the Panel that had examined this case and the Secretariat for their work. Even though the Panel had found that the measure imposed by Argentina was inconsistent with certain aspects of the Anti-Dumping Agreement, the Panel had also found that Argentina's investigating authority had acted consistently with certain claims made, some of which were particularly important for the authorities responsible for administering and applying the WTO Agreements at the domestic level. In this connection, Argentina noted with satisfaction the Panel's finding that the system for applying and collecting anti-dumping duties in Argentina, consisted of fixing variable anti-dumping duties (the difference between the f.o.b. price invoiced and a minimum export value) was not inconsistent with either the provisions or the spirit of the Anti-Dumping Agreement. Finally, Argentina wished to inform the DSB that, following revision of the measure, initiated *ex officio* by the Argentine Department of Unfair Competition in September 2002, the Argentine Government had eliminated the anti-dumping duties imposed under resolution ME 574/2000, which had been the subject of this dispute, by means of resolution MP 79/03 of the Ministry of Production, dated 26 March 2003. Argentina, therefore, considered that it had fully implemented the Panel's recommendations.

44. The representative of the United States said that her country believed that the Panel Report in this dispute was, on the whole, a good document, reflecting the care and effort which the Panel and the Secretariat had obviously devoted to their task. There was much in it with which the United States agreed. The United States did, however, wish to comment on one aspect of this Report which was of systemic importance to the dispute settlement system, that is, the Panel's statement in paragraphs 7.35-7.36 of its Report that there were circumstances in which a panel could find that a Member had failed to act in good faith, separate and beyond a finding that the Member's measure was inconsistent with a WTO Agreement provision. The Panel had cited no provision of a covered agreement in support of this proposition, instead relying only on a statement of *dictum* by the Appellate Body in the US – CDSOA dispute. Moreover, the Appellate Body had not provided any basis in the text of any covered agreement for that statement. Indeed, the Appellate Body statement had no grounding in any agreed WTO text. It was difficult to conceive of a scenario which more clearly implicated the prohibition in Articles 3.2 and 19.2 of the DSU that panels and the Appellate Body not add to or diminish the rights and obligations of Members provided in the covered agreements. Article 7 of the DSU reinforced Articles 3.2 and 19.2 by confining the scope of a panel and the Appellate Body's task to reviewing the relevant provisions of the covered agreements. Any review of a Member's so-called "good faith" outside a relevant provision of the covered agreements was outside the scope of WTO dispute settlement and panels and the Appellate Body's lacked the authority to make any such findings.

45. The only support the Appellate Body had offered for its *dictum* was to refer to its earlier reports. Not only had the Appellate Body gone beyond what was said in those reports, but the phrase "adopted panel and Appellate Body reports" was not even found in the list of covered agreements set forth in Appendix 1 to the DSU. Prior reports did not "create" rights or obligations and might not be relied on by panels and the Appellate Body, as if they were covered agreements. Similarly, as the United States noted at the 27 January 2003 DSB meeting where the CDSOA reports had been adopted, Appendix 1 did not list an international law principle of good faith. A statement of the

Appellate Body could no more authorize a panel to enforce a public international law principle of good faith than it could authorize a panel *not* to enforce a Member's national treatment obligations under Article III of GATT 1994. Members had expressed their agreed-to rights and obligations in the text of the WTO Agreement, and the dispute settlement system might not add to or diminish these rights and obligations. The Panel had correctly noted in paragraph 7.41 of its Report that it was "not even bound to follow rulings contained in adopted WTO panel reports." It would have done well in this case not to follow the *dictum* of the CDSOA Appellate Body Report.

46. On a separate topic, the United States was pleased that the Panel had concluded that a principle of estoppel was not applicable in this dispute. The United States agreed with the Panel's ultimate conclusion, but was troubled by the Panel's analysis. It noted that, given the principle's inapplicability, there was no need for the Panel to engage in its extensive discussion of this issue. Having offered these comments, the United States wished to reiterate that it believed this was, on the whole, a good report.

47. The representative of Malaysia said that his delegation wished to be associated with the statement made by the United States.

48. The DSB took note of the statements and adopted the Panel Report contained in WT/DS241/R.

5. United States – Subsidies on upland cotton

(a) Procedures for developing information under Annex V of the SCM Agreement

49. The Chairman said that as Members were aware this item was on the agenda of the present meeting at the request of Brazil and he invited the representative of Brazil to take the floor.

50. The representative of Brazil said that two months ago, on 18 March, at the request of Brazil, the DSB had established a panel concerning subsidies granted by the United States to upland cotton. The massive subsidies granted by the United States for the production, use and export of upland cotton amounted to over US$4 billion in 2001, which maintained and increased the production and export of US upland cotton as from 1999. The staggering size of subsidization had permitted US cotton producers, whose production costs were among the highest in the world, to expand acreage, production and exports, while world prices had fallen. This illegal subsidization had a significant negative impact on Brazil and on other lower-cost producers in Africa and elsewhere. Sixty days after the Panel had been established, its composition would be known on this very day after designation by the Director-General. Thereafter, the panel procedures would take its normal course. The 60 days foreseen for the procedures under Annex V had also elapsed. He recalled that already in its first panel request, dated 7 February 2003, Brazil had also requested that the DSB initiate the procedures provided in Annex V of the SCM Agreement. The only requirement for the development of evidence under the procedures of Annex V was the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement. The procedures under Annex V had thus been initiated as of the establishment of a panel on 18 March 2003. Having the matter referred to it and, consequently, having the Annex V procedures started, the DSB was required, pursuant to paragraph 4 of the same Annex, to designate a representative to facilitate the information-gathering process, which should be completed within 60 days of the referral of the matter to the DSB. Brazil had made all possible efforts to have this designation at the 18 March DSB meeting, then at the special DSB meeting requested by Brazil on 31 March and again at the DSB meeting on 15 April. Brazil had also requested that the suspended special DSB meeting be reconvened, but that had not been done by the Chairman. On all occasions, Brazil had been faced with the lack of cooperation by the United States and unexpected procedural hurdles incompatible with the WTO dispute settlement system's spirit and aim to secure a positive solution to the disputes.

51. The 60-day period for the collection of information had passed and the representative of the DSB could not be designated. On 1 April, Brazil, although regretting that the information-gathering process could not benefit from the presence of the facilitator, had sent a list of questions to the United States and to the third-country markets listed by Brazil. The questions to the United States included questions that Brazil had first asked the United States in consultations on 22 November 2002, six months ago. Brazil noted with satisfaction that most of those countries had cooperated in the process, as required by paragraph 1 of Annex V, and had provided answers to the questions asked by Brazil. His country, therefore, wished to thank Argentina, Colombia, the EC, India, Indonesia, Philippines, Switzerland and South Africa for their cooperation in the orderly course of these procedures. Thus far, Brazil had not received replies to the 1 April questions addressed to the United States and was still waiting six months after the first request for questions for information relating to issues regarding export credit guarantees, among other issues. This absence of cooperation on the part of the United States remained strikingly telling, especially in light of the cooperation of other Members and of the communication sent by the United States to the DSB (WT/DS267/8) on 19 March – one day after the panel had been established – in which the United States had requested Brazil to identify the third-country markets mentioned in paragraph 1 of Annex V and had stated that "we consider such information to be indispensable for the proper functioning of the Annex V process". Brazil had fully cooperated with the US request and had provided that information one-day later, on 20 March. The United States, in the same 19 March communication had also informed the DSB that "any requests for information pursuant to the Annex V procedures might be provided in writing to the US Mission to the WTO. The United States would gather the information to respond to any such requests and provide the responses through the US Mission". Brazil was still waiting for those responses. Brazil would address the implications of the US refusal to provide this information to the Panel, but would very much like to hear from the United States why it had refused to cooperate in the Annex V procedures.

52. The representative of the United States said that Brazil had once again raised the issue of the information-gathering procedures under Annex V of the Subsidies Agreement. The US position on this issue should be well known to Brazil and other delegations as the United States had previously spoken on this issue at the 31 March DSB meeting and then yet again at the 15 April DSB meeting. The United States did not wish to reiterate those points at length at the present meeting. Instead, it simply noted that it was Brazil's decision to invoke the Subsidies Agreement prior to the expiration of the Peace Clause of the Agriculture Agreement. As such, the United States had hoped that Brazil would have been open to reaching agreement on a way through the procedural issues raised. Brazil was simply not entitled to have recourse to the Annex V process since the measures at issue were covered by the Peace Clause. Since the measures at issue were exempted from Annex V by virtue of the Peace Clause, there could be no Annex V process and, therefore, there could not be a 60-day period.

53. Brazil had also stated that the Annex V process had begun. The United States disagreed. Paragraph 1 of Annex V required notification "as soon as the provisions of paragraph 4 of Article 7 have been invoked." The United States agreed that Brazil had invoked these procedures. However paragraph 2 separately provided for the DSB to initiate the information-gathering procedures of Annex V. This required a consensus decision – it was not automatic. However, the United States had, in good faith, offered that, in the unlikely event the panel were to determine that the Peace Clause did not preclude Brazil's claims, the parties could then engage in the Annex V process. However, Brazil had not accepted this proposal, instead submitting questions as though it did not need to wait for a multilateral determination that the Peace Clause did not apply. In so doing, Brazil failed to respect the multilateral dispute settlement process.

54. The representative of the European Communities said that the DSB had already decided to establish a panel in this case, on the basis of a request pursuant to Article 7 paragraph 4 of the SCM Agreement and with terms of reference that included Articles 5 and 6 of the SCM Agreement. Therefore, the DSB should have taken a decision on Brazil's request to appoint a facilitator.

Furthermore, the EC continued to insist that questions asked in the information provided under the Annex V procedure should be available to third parties, as it could become key elements for the Panel to make its judgement on the case.

55. The representative of Argentina said that, like Brazil and other countries, Argentina would also like to underscore its concern about the scope of the domestic support granted by the United States for the production of cotton, export subsidies for cotton, and export credit guarantees for cotton and other products. Argentina had already expressed its concern at the harmful effects of these policies on the global market, particularly for developing countries. In addition, Argentina would like to express its concern at the negative precedent set in this case regarding use of the procedures under Annex V to the SCM Agreement. First of all, Argentina wished to emphasize that paragraph 4 of Annex V was clearly mandatory. It determined that the DSB shall designate a representative to collect the relevant information. Argentina understood that it was the right of the complaining party to invoke Annex V. Consequently, it could be assumed that the intention of those negotiating Annex V could not have been to give the defendant a right to oppose the procedures or to make them dependant on consensus in the DSB.

56. Regarding the objection to the effect that the Panel should first establish the applicability of the Peace Clause in this particular case and then, if it was determined that the measures in question were not covered by this clause, it should be noted that recourse to the Annex V procedures was an unconditional right of Members and was only subject to the provisions of Article 7.4 of the SCM Agreement. The interpretation given by the United States made Annex V useless. In fact, recourse to this Annex, as mentioned above, was a right that would be nullified because the wording of Annex V made it clear that the procedures laid down therein came before any determination by a panel as to whether or not the Peace Clause had been properly invoked.

57. The representative of India said that US subsidies on cotton growers totaled about US$4 billion last year. This depressed the world cotton prices and hurt farmers in various parts of the world, including India. India expressed concern at the continued subsidization of its cotton growers by the United States.

58. The DSB took note of the statements.

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

(a) Statement by Argentina

59. The representative of Argentina, speaking under "Other Business", said that his country wished to draw Members' attention to the communication, dated 14 May 2003, contained in WT/DS238/6. In that communication, pursuant to Article 21.3 of the DSU, Argentina had informed the DSB of its intention to comply with the DSB's recommendations and rulings pertaining to this dispute, as adopted at the 15 April DSB meeting and would request a reasonable period of time in which to do so.

60. The representative of Chile said that his country noted Argentina's communication, dated 14 May 2003, and its intention to comply with the DSB's recommendations and rulings in this dispute as well as the need for a reasonable period of time in order to comply. As Chile had pointed out at the 15 April DSB meeting, in the light of the Panel's findings, the only possible way for Argentina to comply with the DSB's recommendations and rulings was to remove the safeguard measure in question. In this respect, Chile was open to determining by mutual agreement the shortest possible period of time required for Argentina to repeal the safeguard measure on preserved peaches. Finally, it was Chile's understanding that, by way of the communication circulated in WT/DS238/6, Argentina had complied with the obligation provided for in Article 21.3 of the DSU.

61. The DSB took note of the statements.