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on 7 November 2003

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.20 – WT/DS162/17/Add.20)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.13)

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.13)

(d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.1)

(e) United States – Countervailing measures concerning certain products from the European Communities: Status report by the Untied States (WT/DS212/13)

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 – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.20 - WT/DS162/17/Add.20)

2. The Chairman drew attention to document WT/DS136/14/Add.20 – WT/DS162/17/Add.20 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 her country had provided an additional status report in this dispute on 27 October 2003, 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. The US administration would continue to work with Congress to achieve further progress in resolving this dispute.

4. The representative of the European Communities said that the US status report again did not show any progress. It was now more than three years after the condemnation of the 1916 Anti-Dumping Act. Three repealing bills had been pending for several months. And yet, the US Congress had not even started to discuss any of these bills. In the meantime, EC companies were facing substantial litigation costs to defend themselves against a law that should have been repealed long ago, actually even before some of these court actions had started. The persisting lack of compliance by the United States in this straightforward case sent a worrying signal on the readiness of the United States to modify domestic law to comply with WTO obligations. The EC wished to draw the attention of the DSB to the fact that the United States would, at the present meeting, request the establishment of a panel to examine Mexico's definitive anti-dumping measures on beef and rice. This request included a challenge to the application of fines on importers that entered products subject to anti-dumping or countervailing duty investigations.[1] Such challenge was strikingly similar to the

[1] Point 2(e) of the panel request: "Article 93V of the Foreign Trade Act appears to provide for the application of fines on importers that enter products subject to anti-dumping and countervailing duty investigations while such investigation are underway. This provision appears to be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement".

case brought successfully by the EC against the US Anti-Dumping Act of 1916. The EC hoped that this signalled a renewed determination by the United States to proceed to the immediate repeal of the 1916 Anti-Dumping Act and the termination of the pending cases.

5. The representative of Japan said that it was truly frustrating to have to repeat the same statement of regret, disappointment and concern every time the two proceedings concerning Japan were on the agenda of the DSB under the item: "Surveillance of Implementation of Recommendations Adopted by the DSB". Japan had strongly urged the United States to secure, as soon as possible, the passage of the legislation repealing the WTO-inconsistent 1916 Act with proper retroactive effect. Once again, however, there had been no progress while the respondent Japanese companies continued to suffer real, unjustifiable damages, such as legal costs. Japan, one more time, noted with great concern and dismay that the end of the first session of the 108th US Congress was imminent. Japan was left wondering if and when the correct implementation of the recommendations and rulings in this proceeding, namely, the repeal of the Act that secured the termination of the pending cases, would take place. The US status report and the statement needed much more improvement, as they failed to specify how exactly and how soon the United States intended to comply. Japan was still contemplating the question of reactivation of the DSU Article 22 arbitration. Japan reminded the United States of its right to suspend concessions or other obligations.

6. The representative of Mexico said that his country had participated as a third party to this dispute and wished to place on record its interest in the implementation by the United States of the DSB's recommendations and rulings. He noted that, in its statement, the EC had referred to the modifications regarding Mexico's foreign trade legislation. He underlined that Mexico's legislation had nothing in common with the Anti-Dumping Act of 1916.

7. 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.13)

8. The Chairman drew attention to document WT/DS176/11/Add.13 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

9. The representative of the United States said that her country had provided a status report in this dispute on 27 October 2003, 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.

10. The representative of the European Communities said that the EC welcomed the introduction of a bill last June in Congress that would, *inter alia*, repeal Section 211. This bill would not only remove a damaging special interest legislation. It would also provide a whole scheme of measures that would ensure an effective protection of intellectual property rights both in Cuba and in the United States. Moreover, it would be a sign of the US attachment to ensuring adequate protection of intellectual property rights. The EC stressed that the deadline for implementation was approaching and hoped that this bill would offer a solution to this dispute to the benefit of all.

11. The representative of Cuba said that her delegation had noted the status report provided by the United States and the statement made by the EC at the present meeting. Cuba was compelled, once again, to reiterate its concern at the lack of compliance on the part of the United States for several months now. The US administration was carrying out consultations with the US Congress in order to

adopt the requisite legislative measures, which would solve this dispute. Cuba, therefore, once again urged the United States to comply with the DSB's recommendations and rulings.

12. 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.13)

13. The Chairman drew attention to document WT/DS184/15/Add.13 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

14. The representative of the United States said that her country had provided a status report in this dispute on 27 October 2003, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress to address the DSB's recommendations and rulings that had not been addressed by the original deadline of 23 November 2002.

15. The representative of Japan said that, in this instance again, Japan had no choice but to express its bewilderment. The end of the extended reasonable period of time, the end of the first session of the 108th Congress, was very near, without even the introduction of the necessary statutory changes into the US Congress, the very changes that Ambassador Zoellick and Secretary Evans had stated the US administration would support more than half a year ago. This situation was extremely troubling to Japan, as there might not be enough time left before the expiry of the reasonable period of time for the United States to implement the DSB's recommendations and rulings. The US administration must do its utmost to ensure compliance before the end of the reasonable period of time. Japan wished to remind the United States of its right to suspend concessions or other obligations, should the United States fail to do so by the expiry of the reasonable period of time. Japan expected the United States to consult urgently with Japan on its detailed and specific plan for implementation.

16. 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.1)

17. The Chairman drew attention to document WT/DS207/15/Add.1, 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.

18. The representative of Chile said that, pursuant to Article 21.6 of the DSU, his country was submitting to the DSB its second status report on progress in the implementation of the DSB's recommendations or rulings in this dispute. As stated in Chile's written report, Supreme Decree No. 831 of the Ministry of Finance regulating the application of new Article 12 of Law 18.525, as substituted by Article 1 of Law 19.897, had been published in the Chilean Official Journal on 4 October 2003. This Decree regulated structural and operational aspects of the new price band system which would enter into force for two of the products at issue in this dispute, namely wheat and wheat flour, on 16 December 2003. He recalled that at the previous regular DSB meeting, Argentina had asked a number of questions and had made assertions concerning the inconsistency of the implementation measure. As far as the questions were concerned, Chile believed that many of the doubts raised had been answered by the Regulation which had been published subsequently to that meeting. Chile did not, however, agree with the statement made by Argentina and considered that the

implementation measures, which were currently being adopted, reflected the DSB's recommendations or rulings in both the form and the content.

19. The representative of Argentina said that his country had taken note of the information provided by Chile regarding the so-called "progress" in the implementation of DSB recommendations and rulings in this dispute. Argentina considered that Supreme Decree No. 831 of the Ministry of Finance regulating the application of Article 12 of Law 18.525, as substituted by Article 1 of Law 19.897, establishing rules on the importation of goods into Chile did not bring the measure that had been declared WTO-inconsistent into conformity with the WTO Agreements. In this regard, Argentina regretted that Chile had not replied to any of the questions that had been raised in connection with this matter at the 2 October DSB meeting. For this reason, Argentina wished to reaffirm its opposition to the "new" price band system, as referred to it by Chile. Argentina believed that the inconsistency was, essentially, in preserving such a system. The "new" system had failed to implement the recommendations adopted by the DSB since, *inter alia*: (i) it reserved the reference price mechanism; (ii) it maintained the same floor and ceiling levels under the price band until 2007; and (iii) it added to the distortion, given that, as of 2007, parameters for the price band floor and ceiling levels would be set on the basis of fairly meaningless fixed coefficients, thereby further accentuating the system's isolation from market fluctuations for an additional seven-year period. In this regard, Argentina wished to recall that both the Panel Report and the Appellate Body Report had validated Argentina's allegations regarding the inconsistency of the Chilean Price Band system with Article 4.2 of the Agreement on Agriculture. The same Reports indicated that the only form of implementation allowed by the DSB's recommendations that was consistent with Chile's WTO obligations was the application of ordinary customs duties. Furthermore, Chile's most recent status report indicated that the "new" system would enter into force on 16 December 2003 for wheat and flour, but once again had failed to mention the date on which edible vegetable oils would cease to be subject to the system. Chile's assertion that edible vegetable oils and oilseeds "will no longer be subject to the said price band system" as of some unspecified date in the future raised doubts. Argentina considered this matter to be important and regretted that Chile had given no reply in this respect, despite the formal request made at the previous DSB meeting. Finally, in the light of the aforementioned points, Argentina wished to reserve its rights under the DSU, in particular the possibility of requesting the initiation of negotiations with a view to agreeing on a mutually acceptable compensation. Argentina reiterated the importance of seeking alternatives, in the spirit of cooperation that characterized relations between the two countries, before the end of the reasonable period of time to which Chile was entitled under Article 21.3 of the DSU.

20. The representative of Chile said that he wished to refer to the last point raised by Argentina with regard to the exclusion of edible vegetable oils and oil seeds from the price band system. The products in question; i.e. vegetable oils and oil seeds had been excluded as from the date of publication of the law in the official journal, namely, on 29 September 2003. This was confirmed by a Resolution of the national customs service, a copy of which would be provided to Argentina later in the day.

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

(e) United States – Countervailing measures concerning certain products from the European Communities: Status report by the Untied States (WT/DS212/13)

22. The Chairman drew attention to document WT/DS212/13, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case on US countervailing measures concerning certain products from the European Communities.

23. The representative of the United States said that her country had provided its first and final status report in this dispute on 27 October 2003, in accordance with Article 21.6 of the DSU. As noted in the status report, on 23 June 2003, the US Department of Commerce had published a notice announcing a modification of the manner in which the Department would analyze the question of whether a subsidized, government-owned company remained subsidized after it was "privatized". As also noted in the status report, on 24 October 2003, the Department of Commerce had issued final revised determinations for each of the twelve countervailing determinations that were at issue. Each of those determinations was consistent with the rulings and recommendations that the DSB had adopted in this dispute. With respect to the six revised determinations involving original countervailing duty investigations, in two cases the countervailing duty orders would be revoked, in one case the privatized company would be excluded from the order, and in three cases the cash deposit rate for estimated duties would be reduced. With respect to the two revised determinations involving administrative reviews of outstanding countervailing duty orders, the cash deposit rates would be reduced - in one case to zero. The determinations involving original investigations and administrative reviews were being given effect on 7 November 2003. With respect to the four revised determinations involving sunset reviews of outstanding countervailing duty orders, none of the orders would be revoked, because the Department of Commerce had found that the application of its new, WTO-consistent analysis would not change its original conclusions that continued subsidization was likely. Additional details concerning these determinations could be found in the 27 October status report, and the determinations themselves would be available on the Department of Commerce website mentioned in the final paragraph of the US status report. With these actions, the United States would have now implemented the recommendations and rulings of the DSB in this dispute.

24. The representative of the European Communities said that since 1998 the EC had been challenging the US procedures to evaluate the impact of a privatization when assessing the existence of subsidies for countervailing purposes. After five years and two almost identical cases lost by the United States (DS138 and DS212), the EC hoped that this saga was now coming to a close. The Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act had eventually established, in principle, the presumption that a company did not benefit from prior subsidies if it had been privatized in an arm's length, fair market value transaction. On the other hand, the Notice also set forth a list of factors which US Department of Commerce (DOC) should take into consideration when examining whether the above presumption could be rebutted. This list was very broad and could, if extensively interpreted, cover factors that went beyond the "governmental economic and other policies" which, in the Appellate Body's view, would be able to influence the circumstances and the conditions of the sale. This having been said, it would appear that in eight of the 12 cases at issue the US Department of Commerce's (DOC) re-examination of the privatizations had led to satisfactory results. Unfortunately, the DOC had not considered that an analysis of the privatization was necessary to implement the DSB's rulings in relation to the other four cases. The EC was still evaluating the reasons of such omission and its consequences on the implementation process.

25. The representative of Mexico said that his country had participated in this case as a third party and had followed with much interest both the matter and the status report presented by the United States. Mexico could not pronounce itself upon the new methodology and was evaluating the elements of the proposal. However, it did not agree that the United States should have continued to apply the illegal methodology. Even after publication of its new methodology, the United States continued to apply the same methodology, which was not correct and Mexico would continue to consider its options in this regard.

26. The DSB took note of the statements.

2. European Communities – Measures concerning meat and meat products (hormones)

(a) Communication from the European Communities (WT/DS26/22 – WT/DS48/20)

27. The Chairman said that this item was on the agenda of the present meeting at the request of the European Communities. He drew attention to the communication from the EC contained in document WT/DS26/22-WT/DS48/20 and invited the representative of the EC to speak.

28. The representative of the European Communities said that as stated in the EC's communication, on 14 October 2003 a new Directive (2003/74/EC) concerning the prohibition on the use in stock farming of certain hormones had entered into force. The Appellate Body had found that the EC did not proceed to an assessment, within the meaning of Articles 5.1 and 5.2 of the SPS Agreement, of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion purposes. The absence of such a risk assessment had led the Appellate Body and the Panel to the conclusion that the EC import prohibition was not based on a risk assessment within the meaning of Articles 5.1 and 5.2 of the SPS Agreement and was, therefore, inconsistent with the requirements of Article 5.1 and, by consequence, with Article 3.3 of the SPS Agreement. The new EC Directive was based on a risk assessment performed by an independent scientific committee. In this Committee's opinion, a risk had been identified for consumers for each of the hormones of which the use for growth promoting purposes was banned in the EC. Accordingly, the EC considered that with the entry into force of the directive, it was in conformity with the recommendations and rulings made by the DSB in the "Hormones case". Given the above, the EC expected that the United States and Canada should terminate their suspension of concessions to the EC in relation with the above-mentioned dispute, in line with the proviso of Article 22.8 of the DSU.

29. The representative of the United States said that her country had reviewed the communication placed by the EC on the agenda of the present meeting and had listened to the statement that the EC had just made. The United States failed to see how the revised EC measure could be considered to implement the DSB's recommendations and rulings in this matter. For nearly 15 years, the EC had banned the importation of nearly all meat and meat products from the United States. The purported basis of the EC ban was that the consumption of meat from cattle raised in the United States with growth-promoting hormones posed a risk to human health. It was a bedrock principle of the SPS Agreement, however, that banning a product for purported health reasons had to be based on science. The EC measure was not based on science. To the contrary, after repeated study, no increased health risk had ever been associated with the consumption of meat from animals treated with growth-promoting hormones. The Joint FAO/WHO Expert Committee on Food Additives had found that there was a wide margin of safety for these products. For example, it had determined that consumption of beef from treated animals resulted in amounts of estradiol that were 300 times lower than the acceptable daily intake level. Moreover, hormones such as estradiol were already produced in abundance by both the human body and cattle, and were naturally present in many everyday foods. For example, each person daily produced amounts of estradiol ranging from 2,000 to 30,000 times more, or higher, than the amount consumed from eating a 250-gram serving of meat from treated animals. Due to high levels of naturally-occurring hormones in cattle, it was not even possible to distinguish any residues of such hormones administered for purposes of growth promotion. A single chicken egg contained many times more estradiol equivalents than the estradiol contained in a 250 gram serving of meat from a treated animal. A litre of milk from an untreated cow contained approximately 18 times as much estradiol as a 250 gram serving of meat from a treated animal.

30. In February 1998, the DSB had adopted findings that the EC ban was not based on an appropriate risk assessment, as required by Article 5.1 of the SPS Agreement, and had recommended that the EC bring its measure into compliance with its WTO obligations. Near the conclusion of the 15-month compliance period, on 30 April 1999, the EC had issued a report by an EC veterinary

committee claiming increased health risks from the use of growth-promoting hormones. However, this claim was not based on science. Just like the reports relied upon by the EC before the panel and the Appellate Body, the April 1999 report consisted of general discussions of types of risks, but had never actually assessed or found any increased risk from the consumption of meat from animals produced with growth-promoting hormones. And, indeed, the EC had never, until now, claimed to the DSB that the April 1999 report was an appropriate basis for adopting a ban on US beef. To the contrary, during the arbitration under Article 22.6 on the level of nullification and impairment suffered by the United States, the EC had acknowledged that – even after the issuance of the April 1999 report – it had not implemented the recommendations and rulings of the DSB. For example, in its opening submission filed on 11 June 1999, the EC had written that it "accepts that it has not taken the required measures to comply with the DSB recommendations". In July 1999, the DSB had authorized the United States and Canada to suspend concessions. Again, the EC had never claimed that its April 1999 report served as an appropriate basis for its ban on meat from treated animals. At the present meeting, the EC had presented Directive 2003/74 to the DSB, and claimed that this directive implemented the DSB's recommendations and rulings. The Directive, however, neither removed the EC's unjustified ban on US beef, nor presented an appropriate risk assessment as a basis for the ban. Further, aside from the ban on estradiol, the directive relabelled its ban on the other five growth-promoting hormones covered in this matter as "provisional measures". A decision by the EC to relabel its measures, however, could not bring it into compliance with its obligations under the SPS Agreement. Nearly six years had passed since the DSB had recommended that the EC bring its ban on US beef into compliance with its obligations. The United States, however, could not understand how this new directive presented now could amount to implementation of the DSB's recommendation.

31. The representative of Canada said that the EC's communication to the DSB noted that the Directive 2003/74/EC "implements the WTO rulings" and the "... suspension of concessions to the EC by United States and Canada in this dispute are no longer justified". Canada had still seen no scientific basis for the ban. Health Canada had conducted a comprehensive review of the 17 new studies and had concluded that they did not provide any new scientific evidence that residues in meat from animals treated with steroid hormones – according to good veterinary practices – posed a threat to human health. Canada did not see any reason for WTO procedures at this time, but would welcome the opportunity for further discussion with the EC concerning the justification for its measures.

32. The representative of the European Communities said that the EC regretted to note that the United States and, to a lesser extent, Canada seemed to have already taken the view that the measures taken by the EC to comply with the DSB's rulings were still not WTO-consistent. The EC also regretted that on this basis, the United States had clearly officially stated and Canada semi-officially, if his understanding was correct, their intentions to maintain the suspension of concessions in relations with the EC's exports. On the basis of this clearly negative positions expressed by both the United States and Canada, the EC would reflect on the appropriate actions that would be necessary in order to preserve its rights under the WTO agreements.

33. The representative of Canada said that he wished to clarify that he had stated officially that Canada was not removing the retaliatory measures.

34. The DSB took note of the statements.

3. Australia – Quarantine regime for imports

(a) Request for the establishment of a panel by the European Communities (WT/DS287/7/Rev.1)

35. The Chairman recalled that the DSB had considered this matter at its meeting on 2 October 2003 and agreed to revert to it. He drew attention to the communication from the European

Communities containing its revised panel request, which was circulated in document WT/DS287/7/Rev.1.

36. The representative of the European Communities said that the EC had explained the reasons for its decision to request a panel in this dispute at the DSB meeting on 2 October 2003. Therefore, at the present meeting, the EC would not repeat its explanations. The EC simply wished to inform the DSB that the panel request had been revised in order to clarify the language regarding the EC's claim that Australia violated Articles 2 and 5 of the SPS Agreement. The EC considered the revision of its panel request to be a minor technical issue, and believed that it was, therefore, entitled to the establishment of the panel at the present meeting.

37. The representative of Australia said that his country was disappointed with the EC's decision to press ahead with this matter. Australia’s quarantine system was entirely WTO-consistent, and Australia believed that this would ultimately be supported by a panel’s findings. Nevertheless, Australia wished to register again its serious concerns about the potential harm which the challenge posed for the carefully negotiated balance reflected in the SPS Agreement and the ability of many Members, not just Australia, to maintain quarantine systems which addressed their particular circumstances while meeting their international obligations. Australia also continued to question the EC’s motivations in bringing this challenge. To a very large extent, it did not appear to be about commercial considerations and securing greater market access for products from member States of the EC. For a number of products referred to in the request, Australia had no record of member States of the EC having previously expressed any interest in exporting to Australia. From Australia's perspective, the most likely reason that there had been no previous expression of interest was because no significant commercial interest existed in relation to those products. Australia would, therefore, be concerned if this challenge formed part of a strategy to alter the central principles of the SPS Agreement or which would threaten to undermine the ability of all Members to design an appropriate quarantine system to protect animal or plant life or health.

38. Implicit in the EC's panel request was the apparent view that the SPS Agreement required all WTO Members to carry out risk assessments for all possible traded plant and animal products from all possible sources, regardless of the existence or expression of any commercial interest. This was an onerous requirement for any government and one which Australia did not believe was contained in the SPS Agreement. Many Members, both developed and developing, would find it extremely difficult to apply the SPS Agreement in such a theoretical and impractical way. As in other areas, the EC seemed to consider that the approach which it had taken to quarantine was the only permitted model for a quarantine system. This ignored the fact that the EC had a vastly different trading history and pest status to many countries, including Australia. It also ignored the fact that the SPS Agreement was intended to establish a framework within which Members could design a quarantine system to meet their particular circumstances. Many Members maintained systems which were similar to that of Australia and which might be affected by this dispute. Australia did maintain a conservative approach to quarantine matters, but it was one which was entirely WTO-consistent and reflected its rights and obligations under the SPS Agreement.

39. Australia noted that the panel request set forth in WT/DS287/7/Rev.1 contained an additional substantive legal claim, which was not part of the original document WT/DS287/7, and that this request was, therefore, effectively a new request for panel establishment, and not merely a revised one. As this was the first DSB consideration of the EC’s new request, Australia would be entitled to prevent the establishment of the panel at the present meeting. However, given the existence of a previously established panel to examine a complaint related to the same matter; i.e. the Panel established by the DSB on 29 August to examine the Philippines' complaint on Australia's quarantine measures (WT/DS270/5/Rev.1), and with a view to facilitating the application of Article 9 of the DSU in a practical manner, Australia was prepared to accept the establishment of this panel at the present meeting. Due to the very broad, unspecific and open-ended nature of the challenge, Australia wished

to recall its previous statement made in this forum indicating that the EC's request for establishment of a Panel in WT/DS287/7 was insufficient to satisfy Article 6.2 of the DSU. These concerns had not been addressed in the new request contained in WT/DS287/7/Rev.1 and Australia reserved its rights to raise these concerns before the panel.

40. 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.

41. The representatives of Canada, Chile, China, India, Philippines, Thailand the United States reserved their third-party rights to participate in the Panel's proceedings.

42. The Chairman said that the DSB had taken note of the statements made earlier by the parties to this dispute regarding certain procedural matters relating to this case. In light of these statements and the different views expressed, he believed that it would be useful for the parties to continue bilateral consultations on these procedural matters. Of course, the Chairman and the Secretariat always stood ready to assist the parties in any way that might be helpful in this regard.

43. The DSB took note of the statement.

4. Mexico – Definitive anti-dumping measures on beef and rice

(a) Request for the establishment of a panel by the United States (WT/DS295/2)

44. The Chairman recalled that the DSB had considered this matter at its meeting on 2 October 2003 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS295/2.

45. The representative of the United States said that, as discussed at the DSB meeting held on 2 October, the United States was concerned that Mexico's definitive anti-dumping measure on long-grain white rice from the United States, published in the Diario Oficial on 5 June 2002, was inconsistent with Mexico's obligations under the GATT 1994 and the Anti-Dumping Agreement. The United States was also concerned that certain provisions of Mexico's Foreign Trade Act, and its Federal Code of Civil Procedure, were inconsistent with the Anti-Dumping Agreement and the SCM Agreement. Therefore, for the reasons discussed at the 2 October meeting, the United States again requested that the DSB establish a panel pursuant to Article 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, with standard terms of reference, to examine the matters set forth in the US panel request. In renewing this request, the United States wished to recall certain comments made by Mexico when this item had been discussed at the 2 October DSB meeting. The United States wished to address briefly two erroneous statements that Mexico had made during that meeting. First, Mexico had mistakenly asserted that the United States had abandoned its claim addressing Article 366 of Mexico's Federal Code of Civil Procedure. In actuality, this claim appeared in section 3 of the panel request. Second, Mexico had asserted that the United States was claiming that certain statements of Mexican officials were "measures". As the request itself made clear, the United States was making no such claim. Rather, it had cited statements of Mexican officials with respect to certain provisions that *are* measures – namely, Article 366 of the Federal Code of Civil Procedure, and Articles 68 and 97 of the Foreign Trade Act. More generally, Mexico had made various statements at the 2 October meeting that questioned the adequacy of the US panel request. The United States considered that its request in fact complied fully with the requirements of Article 6.2 of the DSU. In light of the detailed nature of the request and the two days of detailed consultations held on these topics, Mexico should fully understand the basis for the US claims.

46. The representative of Mexico said that he did not wish to repeat the statement made at the 2 October DSB meeting. The panel would certainly be established at the present meeting and, therefore, he would only wish to inform the DSB that Mexico would defend its position vigorously and would show the errors contained in the US submission.

47. 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.

48. The representatives of China, the European Communities and Turkey reserved their third-party rights to participate in the Panel's proceedings.

5. European Communities – Customs classification of frozen boneless chicken cuts

(a) Request for the establishment of a panel by Brazil (WT/DS269/3)

49. The Chairman recalled that the DSB had considered this matter at its meeting on 2 October 2003 and had agreed to revert to it. He drew attention to the communication from Brazil contained in document WT/DS269/3.

50. The representative of Brazil said that this was the second time that Brazil was requesting the establishment of a panel concerning the reclassification by the EC of the product frozen boneless chicken cuts, which had resulted in the application of tariffs on imports of salted chicken meat in excess of the tariff treatment provided for that product under the EC Schedule of Concession under the GATT 1994. As explained at the 2 October DSB meeting, the measures at issue in this case were the EC Commission Regulation No. 1223/2002 and the EC Commission Decision of 31 January 2003, regarding the definition and classification of frozen boneless chicken cuts under the Combined Nomenclature subheading 0207.14.10 and the validity of binding tariff information. By virtue of these measures, the definition of the product frozen chicken cuts, under heading 0207, had been changed and, consequently, salted chicken meat products of heading 0210 now fell under the scope of heading 0207. The application of these measures had resulted in the imposition of ordinary customs duties of 102.4 €/100kg/net on imports of salted chicken meat in excess of the *ad valorem* duty of 15.4 per cent for that product set forth and provided in Schedule LXXX. This had significantly impacted on Brazil's exports of salted chicken meat to the EC. Brazil considered that these measures were inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 and, as a result, nullified and impaired the benefits accruing to Brazil under that Agreement. Therefore, pursuant to Article XXIII of the GATT 1994 and Article 6 of the DSU, Brazil requested that a panel be established at the present meeting to examine this matter, with standard terms of reference as set out in Article 7 of the DSU.

51. The representative of the European Communities said that his delegation could not but express its deep regret over Brazil's decision to pursue this matter further. While referring to the statement made by the EC at the 2 October DSB meeting, the EC urged Brazil to reconsider its position and withdraw its request. As Brazil insisted with its request for the establishment of a panel, the EC was determined to defend its interests. This was even more so as the EC was convinced that it had acted consistently with its Schedule of commitments and in conformity with its GATT obligations.

52. 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.

53. The representatives of Chile, China, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

6. European Communities – Customs classification of frozen boneless chicken cuts

(a) Request for the establishment of a panel by Thailand (WT/DS286/5)

54. The Chairman drew attention to the communication from Thailand contained in document WT/DS286/5.

55. The representative of Thailand said that on 25 March 2003, her country had requested consultations with the EC concerning the EC's customs classification of frozen boneless chicken cuts. Thailand and the EC had held consultations in Geneva on 21 May 2003. However, those consultations had failed to resolve the dispute. Accordingly, Thailand was requesting that the DSB establish a panel to consider the matter set out in Thailand's request for the establishment of a panel in document WT/DS286/5. The measure at issue was the classification of frozen boneless salted chicken cuts as provided in the EC Regulation No. 1223/2002 of 8 July 2002 (Regulation 1223/2002) concerning the classification of certain goods in the Combined Nomenclature (CN) as elaborated in the EC Commission Decision (Decision) of 31 January 2003 concerning the validity of certain binding tariff information (BTI) issued by Germany. Regulation 1223/2002 established a new description for products falling under CN Code 0207.14.10. By virtue of Regulation 1223/2002, goods with the following description: "[b]oneless chicken cuts impregnated with salt in all parts. They had a salt content by weight of 1.2 to 1.9 per cent. The product was deep-frozen and had to be stored at a temperature lower than minus 18°C to ensure a shelf-life of at least one year" were now classified under CN Code 0207.14. 10. Products under CN Code 0207.14.10 were subject to a tariff of 102.4 Euros per 100 kg/net. Prior to Regulation 1223/2002, frozen boneless chicken cuts impregnated with salt in all parts were classified as salted meat under CN code 0210.99.39. Products under CN Code 0210.99.39 were subject to an *ad valorem* duty of 15.4 per cent. Subsequent to the issuance of Regulation 1223/2002, the EC Commission published a Decision addressed to Germany noting that BTIs previously issued by member States of the EC which classified the products concerned as salted meat under heading 0210, ceased to be valid. The Decision further noted that Germany had subsequently issued BTIs classifying frozen boneless chicken cuts with a salt content of 1.9 to 3 per cent under heading 0210. The Decision stated that "the products also consisting of boneless chicken cuts which have been frozen for long-term preservation and have a salt content of 1.9 to 3 per cent were similar to the products covered by Regulation (EC) 1223/2002. The addition of salt in such quantities was not such as to alter the products' character as frozen poultry meat of heading 0207." Therefore, the Decision instructed Germany to withdraw the BTIs issued on frozen poultry meat with a salt content between 1.9 and 3 per cent. As a result of the measure, the product classified as frozen boneless chicken cuts with a salt content of 1.2 per cent or more, which had previously been classified as salted meat at the *ad valorem* rate of 15.4 per cent was now classified as frozen chicken subject to a tariff rate in excess of the bound rate for salted meat in the EC's Schedule of Concessions under the GATT 1994. In the view of Thailand, its exports of salted meat to the EC were being accorded less favourable treatment than that provided in the EC Schedule and was in contravention of the EC's obligations under Articles II:1(a) and II:I(b) of the GATT 1994. In addition, the EC measure created distortions in trade that nullified or impaired, within the meaning of Article XXIII, the benefits accruing to Thailand under the GATT 1994. Thailand was requesting that a panel be established with standard terms of reference.

56. The representative of the European Communities said that Thailand's decision to request the establishment of a panel could not but cause great disappointment to the EC. His delegation regretted that Thailand, like Brazil, had chosen this course of action. This was even more so as the EC had gone at great length to explain to Thailand – as well as to Brazil – over three rounds of consultation the EC legislation and practice on this matter. It was obvious that Thailand had misunderstood or misinterpreted the EC legislation which it now attacked in the WTO. The EC legislation in question had simply ensured a uniform interpretation of the relevant CN codes throughout the EC and, thus, a uniform classification of the specific products imported under the EC Common Customs Tariff

system. Nothing else and nothing more. The EC was convinced that it had acted consistently with its schedule of commitments, as read in the light of the Harmonized System of product classification. The EC had thus ensured that it had granted Thailand and other Members the concessions which it had undertaken as part of the Uruguay Round negotiations. The EC urged Thailand to reconsider its position. It could be unfortunate to proceed along this path for a matter that was clearly the result of a misunderstanding. To this effect, the EC stood ready to offer additional clarifications and explanations if Thailand thought it was necessary. For all the reasons mentioned above, the EC had no option, but to express its disagreement with the establishment of a panel.

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

7. Appointment of Appellate Body members

58. The Chairman said that this item was on the agenda of the present meeting pursuant to the decisions taken by the DSB at its meetings on 21 and 23 July as well as on 18 August 2003. He recalled that at its meeting on 21 and 23 July, the DSB had agreed to launch the process for selecting a new Appellate Body member to replace Mr. James Bacchus as well as the process leading up to a decision on the positions held by Messrs. Abi-Saab, Ganesan and Taniguchi. At that meeting it had also been agreed that the decision on all four positions should be taken by the DSB at its meeting on 7 November. With regard to the positions held by Messrs. Abi-Saab, Ganesan and Taniguchi, the DSB had agreed that the Chairman should carry out consultations with delegations with the view to informing them by 15 August of the results of these consultations. He had conducted consultations between 23 July and 15 August and had reported on the results of these consultations to Members by fax on 15 August and at the DSB meeting held on 18 August. He recalled that he had reported that no delegation had indicated that they wished to nominate candidates to replace Messrs. Abi-Saab, Ganesan and Taniguchi, while there were those who had indicated their wish to reappoint them. The DSB had agreed at that meeting that a decision on reappointment of Messrs. Abi-Saab, Ganesan and Taniguchi should be taken at the 7 November DSB meeting. At the present meeting, he wished to propose that the DSB first take a decision on the replacement for Mr. James Bacchus and then on reappointments of Messrs. Messrs. Abi-Saab, Ganesan and Taniguchi. Subsequently, he would invite delegations wishing to make statements or comments to take the floor.

59. The DSB so agreed.

60. The Chairman recalled that on 24 October 2003, delegations had received a fax from Ambassador Pérez del Castillo, which had been sent on behalf of the Chairman of the DSB, informing them of the conclusion reached by the Selection Committee, which the Chairman of the DSB had chaired. He recalled that the Selection Committee had been established by the DSB with a view to making a recommendation on replacement for Mr. James Bacchus, whose term of office would expire on 10 December 2003. The Selection Committee had conducted thorough interviews with the two nominated candidates and had made itself available to hear the views of Members. Throughout the process, the Committee had constantly in mind the guidelines, rules and procedures in the DSU and WT/DSB/1 governing the selection and appointment of Appellate Body members. As announced on 24 October, the Selection Committee had reached a firm recommendation that Professor Merit Janow be appointed as a member of the Appellate Body to replace Mr. James Bacchus. The Selection Committee had indicated that Professor Merit Janow was an outstanding individual who was highly qualified for appointment to the Appellate Body. Therefore, in light of this recommendation, he proposed that the DSB agree to appoint Professor Merit Janow as a member of the Appellate Body for a four-year term of office commencing on 11 December 2003.

61. The DSB so agreed.

62. The Chairman then turned to the issue of reappointments of Messrs. Abi-Saab, Ganesan and Taniguchi. He proposed that the DSB agree to the following: (i) to reappoint Mr. Taniguchi for a second four-year term of office commencing on 11 December 2003; (ii) to reappoint Mr. Abi-Saab for a second four-year term commencing on 1 June 2004; and (iii) to reappoint Mr. Ganesan for a second four-year term commencing on 1 June 2004.

63. The DSB so agreed.

64. The representative of the United States said that her country wished to thank the Chairman and the other members of the Selection Committee for their hard work and the recommendation which had aided the DSB in taking its decision at the present meeting. The United States also wished to thank all delegations who had taken the time to meet with the candidates and to express their views to the Committee. The United States also wished to express its appreciation for the efforts of the Secretariat throughout the selection process. The decision taken at the present meeting would contribute to the continuing effectiveness of the Appellate Body as it played its vital role in the WTO system. The United States appreciated the significant contributions which Messrs. Taniguchi, Abi-Saab and Ganesan had made to the work of the Appellate Body during their service to date, and welcomed the decision by the Members to reappoint them so that Members might continue to have the benefit of their learning and wisdom. The United States also welcomed the appointment of Professor Merit Janow to take the seat soon to be vacated by Mr. James Bacchus. As Members were aware, Professor Janow had a distinguished career in both the practical and academic side of trade law and policy. She had been serving for several years as a professor at Columbia University in New York, where she had been actively involved in issues relating to international trade, business and antitrust law. Previously, she worked as a trade negotiator and as a practicing trade lawyer. The United States believed that the depth and breadth of experience she would bring to her work on the Appellate Body would allow her to make a significant and positive contribution. The United States knew that the Appellate Body would be facing many complex and important issues, and knew that these individuals would all rise to the many challenges presented. The United States looked forward to working with them as their new terms were to begin. The United States also wished to take this opportunity to express its gratitude for the extraordinary work done by Mr. Bacchus since the inception of the Appellate Body. He had played a critical role in shaping the Appellate Body into the respected institution it had become, and he had done so with intelligence, diligence, and wit. The foundations he helped to lay would support the successful operation of the Appellate Body for years to come.

65. The representative of Canada recalled that those delegations who had been present at the Appellate Body hearing in the Steel case had witnessed the last participation of Mr. Bacchus in an Appellate Body hearing when tributes had been paid to him at that time. Canada wished simply to echo the sentiments expressed by the United States and to put on the record Canada's appreciation for the contribution of Mr. Bacchus to the dispute settlement process and to the WTO in general. Canada also wished to add its endorsement of the wisdom of the Selection Committee in selecting Professor Janow.

66. The representative of Egypt said that his country wished to thank the Chairman and the members of the Selection Committee for the consultations held in order to select a new member and to reappoint, for the second term, three members of the Appellate Body. All Members recognized the vital role of the Appellate Body as a main pillar of the dispute settlement mechanism. Egypt welcomed the decision of the Selection Committee.

67. The representative of Japan said that her delegation wished to join other delegations in welcoming the two decisions the DSB had just taken and wished to express gratitude to the Chairman and all the members of the Selection Committee who had taken the time to conduct interviews with the two candidates. Japan also wished to express its gratitude to the two candidates put forward by the

United States and to the US delegation for the opportunity to meet with the two candidates in person. These meetings had taken place in Japan's mission with the Deputy Permanent Representative. Japan welcomed the new member of the Appellate Body, Professor Janow who, Japan was convinced, would make a vital contribution to the Appellate Body. Japan also welcomed the reappointment of the three incumbent members who, Japan believed, would continue to contribute to the Appellate Body's work. Her delegation wished to take this opportunity to express its gratitude to Mr. Bacchus for his contribution. She noted that all delegations had benefited from his personality and a very good sense of humour. Finally, her delegation wished to thank the Secretariat for its assistance in arranging the necessary interviews with the two candidates.

68. The representative of the European Communities said that the EC wished to thank the Selection Committee for its work. The EC regarded the Appellate Body as a fundamental pillar of the WTO architecture. Of course, the high quality of the Members of such body was an essential precondition for ensuring that the dispute settlement mechanism performed its role of providing security and predictability to the multilateral trading system. The selection of Ms Janow, as well as the reappointment of Mr. Abi-Saab, Mr. Ganesan and Mr. Taniguchi, was a very encouraging sign in this sense. The EC was convinced of the capacity of these individuals to maintain the highest level of legal expertise and authority necessary to perform the delicate and difficult task that the DSU entrusted to them.

69. The representative of India said that his delegation wished to congratulate the Chairman for the smooth and efficient conduct of the process of appointment and reappointment of Appellate Body members. India also wished to thank the Selection Committee under the Chairmanship of Mr. Shotaro Oshima (Japan) for the successful completion of the task of selection of a candidate to replace Mr. Bacchus who would complete his eight year term as an Appellate Body member later this year. India joined other delegations in its expression of appreciation and gratitude to the excellent work done by Mr. Bacchus in the high responsibility that he had held with such distinction. India wished to congratulate Professor Janow on her appointment to the Appellate Body. It also wished to express its thanks to the US Mission for facilitating meetings with the Indian mission with both the candidates and the Secretariat for its assistance. He wished to place on record India's deep appreciation to the three Appellate Body members, Mr. Abi-Saab, Mr. Ganesan and Mr. Taniguchi who had been reappointed for another term of four years for their eminent contribution in the important office held by them.

70. The representative of Australia said that first, he wished to add Australia's voice to those who had welcomed the Selection Committee's decision to reappoint the three members of the Appellate Body and to appoint Professor Merit Janow. Second, he congratulated the Chairman and the other members of the Selection Committee on an excellent process of the selection procedure and, like others, wished to pay tribute to Mr. Bacchus for his great contribution to the Appellate Body over the past eight years.

71. The DSB took note of the statements.

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