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Dispute Settlement Body
18 August 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 August 2003

Chairman: Mr. Shotaro Oshima (Japan)

Subjects discussed: Page

1. United States – Anti-dumping measures on cement from Mexico

(a) Request for the establishment of a panel by Mexico (WT/DS281/2)

1. The Chairman drew attention to the communication from Mexico contained in document WT/DS281/2.

2. The representative of Mexico said that 13 years ago, in August 1990, the United States had imposed an anti-dumping measure on imports of Gray Portland Cement and Cement Clinker from Mexico. Since then, this measure had been considered to be in violation of the provisions of the Tokyo Round Code on Anti-Dumping Measures. Mexico had successfully challenged this measure in

accordance with the GATT rules and had been able to demonstrate that the investigation had been fundamentally flawed since it had failed to meet the standing requirement; i.e. the requirement that it should have been conducted by the US domestic industry. The Panel had appropriately recommended that the United States should revoke its anti-dumping measure and reimburse the duties collected to-date. However, the United States, instead of assuming its responsibilities towards Mexico, had taken advantage of the weak rules that existed at the time to block the adoption of the Report and to avoid compliance with the Panel's findings. In due course, the United States had promised the GATT Contracting Parties that it would seek a mutually satisfactory solution with Mexico in order to fulfil its international obligations. To-date, all of Mexico's efforts to find a mutually acceptable alternative had proved futile. In fact, the United States had still not taken action and had maintained an anti-dumping duty that had not even met the most basic requirement for its imposition, given that it had not been endorsed by the domestic industry.

3. Mexico wished to assure Members that it was not its intention to dispute once again the GATT Panel Report that was favourable to Mexico. Indeed, however incredible it might seem, the United States had continued for 13 years to apply a measure that, in principle, should have never existed. Not satisfied with the "fundamental flaw" in the investigation, the United States had turned the investigation into a "catalogue" of violations of the WTO Anti-Dumping Agreement. Therefore, Mexico was now challenging a significant number of fundamental violations of the United States' obligations as *a WTO Member*. These included the various violations committed throughout the administrative and sunset reviews and the dismissal of the request to initiate a changed circumstances review. The "catalogue" included numerous violations which were set forth in its request for the establishment of a panel. He wished to refer to some of them: (i) the failure of the United States to bring its laws, regulations and procedures into conformity with its obligations as a WTO Member, as regards measures adopted before the entry into force of the above-mentioned Agreement; (ii) the illegal use of the "likely" standard in determining whether the termination of the anti-dumping measure would be likely to lead to continuation or recurrence of dumping and injury; (iii) the failure to comply with the obligation to conduct an "objective examination" of the record based on "positive evidence" when examining the injury; (iv) the rejection by the International Trade Commission of a changed circumstances review, even when information had been provided that made clear the need for such a review; (v) the use of illegal methodologies to calculate margins of dumping; and (vi) the failure of the United States to apply its laws, regulations and rulings in a uniform, impartial and reasonable manner, as required by Article X.3(a) of the GATT 1994.

4. He stressed that Mexico would not settle for the withdrawal by the United States of its anti-dumping measure. It was, once again, seeking reimbursement of the duties that had been deposited, as this was the only commercially meaningful way of safeguarding the legitimate interests of Mexico after more than a decade of illegality and losses amounting to millions. The DSU rules provided for this eventuality and the only thing that was needed was a panel with sufficient vision to do justice. Finally, Mexico asked the United States to accept the establishment of a panel at the present meeting in order to begin to discuss the merits of Mexico's arguments as soon as possible.

5. The representative of the United States said that her country was disappointed that Mexico had chosen to pursue this matter further by requesting the establishment of a panel. The United States was confident that US law – as such and as applied in the anti-dumping determinations and in the sunset review concerning Gray Portland Cement and Clinker from Mexico – would be found to be consistent with the United States' WTO obligations. Unfortunately, there were some claims the nature of which the United States could not discern from Mexico's panel request. The United States noted that it had similar concerns over another of Mexico's panel requests, which it would discuss under item 2 of the agenda of the present meeting. Because the Appellate Body had suggested that a Member should raise its concerns over deficiencies in a panel request when the DSB considered that request, the United States would at this time comment in some detail on the deficiencies it had identified in Mexico's panel request.

6. Mexico claimed that several measures were inconsistent with the WTO obligations of the United States, but some of the measures complained of were not measures at all, while others were identified so generally that it was impossible to know precisely what was being challenged. Among the "measures" alleged to be inconsistent with WTO obligations, Mexico listed the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act (URAA), as well as a Sunset Policy Bulletin that had been issued by the Department of Commerce in 1998. Neither document had the status of a "measure", and thus all claims pertaining to these documents should be rejected.

7. Although in most instances Mexico had adequately identified the measure in question and the particular sub-paragraphs of articles that had allegedly been violated by the measure, several of the claims articulated in Sections A through H of Mexico's request were insufficiently specific to present clearly the legal problem that was alleged to be at issue. These claims involved Anti-Dumping Agreement articles containing multiple and discrete obligations. Section A alleged a violation of Articles 4 and 5 of the Anti-Dumping Agreement, in their entirety. Such a claim seemed implausible, and the lack of precision seemed unjustified given that elsewhere Mexico had been able to identify the particular paragraphs of Articles which it considered to have been violated. Several other Sections made similarly sweeping allegations that were equally implausible, including Section C.3, which alleged three violations of Article 2 and 6, and Section F, which alleged violations of Article 10 of the Anti-Dumping Agreement.

8. The net result was that with respect to a large portion of Mexico's panel request, the United States simply could not discern the legal basis of Mexico's complaint, and it believed that a panel would so agree, if a panel was established on the basis of the current panel request. Accordingly, an appropriate course of action would be for Mexico to withdraw its current panel request and submit a new request which would enable the United States and all other Members to adequately discern the legal basis of Mexico's complaint. In summary, Mexico's panel request was deficient because it was not sufficient to present the problems clearly, and because it purported to challenge things that were not "measures". Therefore, the United States could not go along with the establishment of a panel.

9. The representative of Mexico said that the United States had identified various aspects of Mexico's panel request which in the US view were confusing. Mexico said that one of the functions of a panel request was to inform third parties of the claims raised by the parties to the dispute. Therefore, he wished to see if any other Member considered that Mexico's panel request was confusing and vague.

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

2. United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico

(a) Request for the establishment of a panel by Mexico (WT/DS282/2)

11. The Chairman drew attention to the communication from Mexico contained in document WT/DS282/2.

12. The representative of Mexico said that his country was requesting the establishment of a panel to condemn the anti-dumping measures imposed by the United States on oil country tubular goods (OCTG) from Mexico, in particular because they were inconsistent with the disciplines relating to the sunset and administrative reviews. The Anti-Dumping Agreement clearly established that anti-dumping duties "shall" be terminated after five years. The only exception to this obligation was given when the authorities had sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of injury and dumping. It was difficult, in particular, to understand how an

anti-dumping duty could not be eliminated when, as in the case at issue, the Mexican company had exported with a zero dumping margin for three consecutive years. Indeed, rather than applying the Agreement correctly, the United States had completely ignored it. He then pointed out some of the infringements of the United States in this regard: (i) the illegal use of the "likely" standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping; (ii) the illegal use of the "likely" standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury; (iii) the failure to comply with the obligation to conduct an "objective examination" of the record and to focus on "positive evidence" when examining the injury; (iv) the illegal use of a "cumulative" injury analysis for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury; (v) the Department of Commerce's determination not to terminate the anti-dumping duty, even when it was evident that the continued application of the duty was not necessary to offset dumping; and (vi) the failure of the United States to apply laws, regulations and provisions in a uniform, impartial, and reasonable manner, as required by Article X.3(a) of the GATT 1994. The negotiators of the Anti-Dumping Agreement had clearly established that these measures should have a limited duration. The measures could not be maintained indefinitely simply because the authorities "assume" that their termination would result in the continuation or recurrence of dumping and injury. Mexico urged the United States to accept the establishment of a panel at the present meeting.

13. The representative of the United States said that her country could not agree to the establishment of a panel at this time. Mexico's panel request set forth numerous claims concerning the US Department of Commerce and the US International Trade Commission's sunset determinations, as well as Commerce's final determination in the 4th administrative review involving OCTG from Mexico. Unfortunately, as was the case with the previous agenda item, the specifics of each of these claims were difficult to discern because of the lack of details provided in Mexico's panel request.

14. Once again, Mexico claimed that several measures were inconsistent with the WTO obligations of the United States, but some of the measures complained of were not measures at all, while others were identified so generally that it was impossible to know precisely what was being challenged. And, once again, among the "measures" alleged to be inconsistent with WTO obligations, Mexico listed the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act (URAA), as well as a Sunset Policy Bulletin that had been issued by the Department of Commerce in 1998. Neither document had the status of a "measure", and thus all claims pertaining to these documents should be rejected.

15. Mexico alleged breaches of a number of articles of the Antidumping Agreement, the GATT 1994, and the WTO Agreement, most of which contained multiple and discrete obligations. This, despite that fact that many of the measures complained of were too vaguely defined to identify precisely, while some were not, in fact, measures at all. For example, Section A.2 alleged a violation of Article 2 in its entirety. Such a claim seemed implausible, and the lack of precision seemed unjustified given that elsewhere Mexico had been able to identify the particular paragraphs of Articles which it considered to have been violated. The net result was that the United States simply could not discern the legal basis of Mexico's complaint, and it believed that a panel would so agree, if a panel was established on the basis of the current panel request. Accordingly, an appropriate course of action would be for Mexico to withdraw its current panel request and submit a new request which would enable the United States and all other Members to adequately discern the legal basis of Mexico's complaint. In summary, Mexico's panel request was deficient because it was not sufficient to present the problems clearly, and because it purported to challenge things that were not "measures". Therefore, the United States could not go along with the establishment of a panel.

16. The representative of Mexico said that, like under the previous agenda item, the United States had stated that Mexico's request was not sufficiently clear. He, therefore, asked if any other Member considered that Mexico's request was not sufficiently clear.

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

3. United States – Countervailing duties on steel plate from Mexico

(a) Request for the establishment of a panel by Mexico (WT/DS280/2)

18. The Chairman drew attention to the communication from Mexico contained in document WT/DS280/2.

19. The representative of Mexico said that on 7 June 2000, the DSB had ruled that the methodology used by the United States to apply countervailing duties to privatized companies was inconsistent with the SCM Agreement. This methodology was known as the "Gamma" methodology. The United States, instead of revoking this methodology, had merely closed the investigation on leaded bars and had continued to apply the methodology as if nothing had happened. It was not until the United States courts had confirmed the illegality of the said measure that the United States withdrew it, only to replace it with another, equally illegal, measure: the so-called "the Same Person" methodology. Once again, this methodology was condemned "as such" by the Appellate Body in the case known as "Countervailing Measures Concerning Certain Products from the European Communities". During the consultations, Mexico had believed that the United States would have the good judgement not to apply the "Same Person" methodology to the reviews on steel plate from Mexico. However, his country was wrong. The United States continued to invent methodologies which required, *a priori*, the existence of a benefit for privatized firms. Thus, in June 2003, the United States had introduced yet another new methodology. Without commenting on the consistency of this methodology, Mexico could say that the United States had indicated that it would continue to apply the illegal methodology to investigations or reviews initiated before 30 June 2003. Therefore, Mexico was obliged to request the establishment of a new panel to confirm, once again, the illegality of this methodology. He also wished to briefly refer to another issue and said that Mexico's proposal to amend the DSU was aimed at preventing precisely this type of abuses. If one were to remove the incentives for countries to continue to apply measures, such as this one, that were clearly WTO-inconsistent, it would be possible to lighten the burden on the dispute settlement mechanism and focus on cases involving legitimate differences in interpretation.

20. The representative of the United States said that her country was disappointed that Mexico had chosen to pursue a panel request with respect to a measure which was in most respects no longer in effect. Liquidation instructions had been issued in 2002 for countervailing duties in connection with the 1998 administrative review which Mexico was challenging, and liquidation should now be complete. Further, a new administrative review was already underway, and when that review had been completed, no later than 26 February 2004, the cash deposit rate for new entries established in the 1998 administrative review would also change. At that point, the 1998 review would cease to have any effect. Given this situation, it seemed to the United States that the resources of all involved, including those of the parties, the Secretariat, and any panel which might be established, would be better served if Mexico were to assess the results of the soon-to-be completed administrative review, and to determine at that time whether it wished to pursue WTO dispute settlement proceedings. The United States could not accept establishment of a panel at the present meeting, and hoped that Mexico would reassess its decision to pursue panel proceedings.

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

4. European Communities – Measures affecting the approval and marketing of biotech products

(a) Request for the establishment of a panel by the United States (WT/DS291/23)

(b) Request for the establishment of a panel by Canada (WT/DS292/17)

(c) Request for the establishment of a panel by Argentina (WT/DS293/17)

22. The Chairman proposed that the three sub-items to which he had just referred be considered together. First, he drew attention to the communication from the United States contained in document WT/DS291/23.

23. The representative of the United States said that her country was gravely concerned with the EC's application of its measures governing the approval of the products of agricultural biotechnology. The SPS Agreement recognized that Members might adopt approval procedures for crops and food products, including biotech products, in order to protect health and the environment. EC legislation set out such procedures, and those procedures, as written, were not the focus of the US complaint. The United States only asked that those procedures be permitted to proceed to their normal conclusion. Rather, the United States was concerned that the EC and its member States, in implementing the EC legislation, had adopted measures that were inconsistent with the EC's obligations under the WTO Agreement. First, since October 1998, the EC had applied a moratorium on the approval of all biotech products. The existence of the moratorium was indisputable: the EC had not considered a biotech product for approval in nearly five years, and high-level EC officials had acknowledged its existence in public statements. Under this moratorium, the EC had blocked all applications for placing biotech products on the market, and had not considered any application for final approval. The US panel request detailed over 30 specific biotech products affected by this moratorium. Second, six EC member States maintained marketing and import bans on certain biotech products, even though these products had actually been approved by the EC prior to the imposition of the moratorium. As the EC's own scientists had stated, there was no scientific basis for either the approval moratorium or the member State bans. As a result, the United States maintained that these measures were inconsistent with the EC's obligations under various provisions of the SPS Agreement, the GATT 1994, the Agreement on Agriculture, and the TBT Agreement, as specified in the US panel request. The EC approval moratorium and the member State bans restricted imports of agricultural and food products from the United States. More broadly, the United States was concerned that the EC's measures were hindering the worldwide development and application of agricultural biotechnology. This technology had great promise for raising farmer productivity, reducing hunger and improving health in the developing world and improving the environment. On 19 June 2003, the United States and Argentina had jointly consulted with the EC concerning the approval moratorium and the member State bans. Canada had held separate consultations with the EC on the same measures. At the consultations, the EC had neither agreed to lift its moratorium or the member State bans, nor had it offered any scientific justification for its measures. Accordingly, the United States requested that the DSB establish a panel pursuant to Article 6 of the DSU with standard terms of reference to examine these matters. The United States also submitted that under Article 9.1 of the DSU, a single panel should be established to consider the matters raised by the United States, Argentina, and Canada.

24. The Chairman drew attention to the communication from Canada contained in document WT/DS292/17.

25. The representative of Canada said that since October 1998, the EC had maintained a moratorium on the approval of products of agricultural biotechnology. The EC had effectively suspended the consideration of applications for approval of biotech products, and the granting of

approvals for those products, under the relevant EC approvals processes. In addition to the moratorium, France, Greece, Austria and Italy maintained national measures prohibiting the importation, marketing or sale of biotech products that had already been approved under the relevant EC approvals processes, prior to October 1998, for importation, marketing or sale in the EC. Canada was of the view that these measures were inconsistent with the obligations of the EC under the SPS Agreement, the TBT Agreement, the Agreement on Agriculture and the GATT 1994. These violations nullified or impaired the benefits accruing to Canada under these Agreements. In addition, the measures nullified and impaired the benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994. On 13 May 2003, Canada had requested consultations with the EC regarding these measures. The consultations had subsequently been held in Brussels on 25 June 2003. Unfortunately, they had failed to settle the dispute. Canada, therefore, respectfully requested, pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994, Article 11 of the SPS Agreement, Article 19 of the Agreement on Agriculture and Article 14 of the TBT Agreement, that a panel be established to settle this dispute.

26. The Chairman drew attention to the communication from Argentina contained in document WT/DS293/17.

27. The representative of Argentina said that his delegation wished to make a statement regarding its request for the establishment of a panel concerning the actions and measures taken by the EC that affected the approval and marketing of agricultural biotechnology products. For five years, the EC had imposed a *de facto* moratorium preventing the approval and processing of applications relating to agricultural biotechnology products, without scientific evidence to justify it. Furthermore, several EC member States had banned a number of agricultural biotechnology products which had already been approved at the EC's level. The measures at issue included, depending on the case, failure to consider or the suspension of consideration of applications for the endorsement or approval of agricultural biotechnology products; undue delays in finalizing consideration of various applications for approval; and bans introduced by EC member States.

28. Argentina considered that the conduct of the EC was an infringement of the WTO Agreements and had adversely affected its interests by causing injury to agricultural exports to the EC's market. Indeed, agricultural exports accounted for over half of the total exports of Argentina, which, moreover, was the second global producer and exporter of biotechnology products. For Argentina the development of biotechnology was crucial to achieving greater competitiveness in terms of agricultural production. Therefore, any measure that involved a barrier to trade in biotechnology products undermined the potential development of Argentina's export sector which had more room for expansion. Argentina was of the view that its prospects of increasing competitiveness in international markets had been adversely affected by the fact that it had been prevented from improving its agricultural productivity. In fact, the EC's action was reducing the likelihood of Argentina incorporating biotechnological innovations into a series of agricultural products which, at present, were unable to access the common market because of the above-mentioned *de facto* moratorium. This was proving to be particularly damaging to an agricultural exporter that also happened to be a developing country.

29. The EC's action was even more damaging, not only because it involved a Member with an important market in terms of international trade, but also because it could also influence the measures that might be taken by other Members afraid of suffering restrictions on the access of their own agricultural products to the EC's market. These circumstances had led Argentina to request consultations with the EC on 14 May 2003, which proved insufficient to provide a predictable platform in terms of the EC's schedule for approving the said agricultural biotechnology products or for lifting the bans imposed by member States. Within the context of these consultations, the EC had failed to respond to Argentina's requirements, notwithstanding their commitment to provide written replies to the questions they received in advance. Subsequent exchanges had also failed to provide

Argentina with satisfactory answers. Finally, as the issue had been brought before the DSB, his delegation would like to point out that the adoption of the EC's legislation on the traceability and labelling of biotechnology products would not only do nothing to settle the present issue of the *de facto* moratorium and the bans by member States, but could also bring about new restrictions in terms of access to the EC's market. To sum up and in view of Argentina's futile efforts to find a tangible solution to the problems that had arisen, Argentina had no alternative, but to request the establishment of a panel to settle this issue. In this context, and, as requested by the United States, his delegation considered that a single panel should be established in accordance with Article 9.1 of the DSU.

30. The representative of the European Communities said that on behalf of the EC he wished to express surprise and disappointment with regard to the panel requests by Argentina, Canada and the United States. The reasons for the EC's surprise was twofold. On the one hand, in spite of the extensive explanations given by the EC, the requesting Members continued to insist that the EC applied measures to prevent the entry and the marketing of GMOs in the EC. The EC had repeatedly made clear that the approval of genetically-modified organisms and genetically-modified food was perfectly possible in the EC, that a number of applications were being examined at present, and that decisions on pending applications would be taken within a short time-frame, in accordance with the relevant procedures. 18 GMOs and 15 food products derived from GMOs had been approved in the EC. These GM products were imported each year by the EC. He wished to make it very clear that, if the goal of the requesting Members was that the EC's authorities apply less rigorous standards in the examination of the pending applications, their action was doomed to fail. On the other hand, the EC had been willing to cooperate constructively with the requesting Members in the context of the consultations. The EC had offered ample information and explanations on its legislative system and the current state of play in terms of approvals of GM products. It had provided additional explanations as requested. The EC was, therefore, surprised to get a panel request as a response. The EC had serious doubts that the complaining Members were really interested in seeking a satisfactory outcome to the consultations. The EC was particularly puzzled by the US attitude during the consultations period, which cast doubts about its willingness to engage in a meaningful dialogue in good faith, as required by the DSU provisions. The EC was also extremely disappointed that the Members requesting a panel at the present meeting had not chosen the path of international co-operation as a means to build an appropriate framework for the successful development of biotechnology, while seriously addressing any potential risks and social concerns. The EC could not avoid suspecting that their ultimate goal was to influence the sovereign decisions of all Members in this sensitive field. The EC was of the view that every country should be free to make its own decisions and to determine the appropriate level of protection for its citizens. The EC would stand firm to defend those principles, which were consistent with international law. For the reasons he had explained, the EC could not agree to the establishment of a panel at the present meeting.

31. The DSB took note of the statements and agreed to revert to these matters.

5. European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil

(a) Report of the Appellate Body (WT/DS219/AB/R) and Report of the Panel (WT/DS219/R)

32. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS219/9 transmitting the Appellate Body Report on "European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil", which had been circulated on 22 July 2003 in document WT/DS219/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall

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

33. The representative of Brazil said that on 22 July 2003, the Appellate Body had circulated its Report on "European Communities – Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil" to Members, four months after the Panel had issued its Report on 7 March 2003. In that dispute, Brazil had challenged the consistency of anti-dumping measures imposed by the EC on imports of tube or pipe fittings from Brazil which had severely impacted Brazil's exports of that product into the EC. Brazil welcomed the adoption of the Appellate Body Report in that the Appellate Body found that the EC had breached Articles 6.2 and 6.4 of the Anti-Dumping Agreement in not disclosing to the Brazilian exporter during the investigation all the available information relating to the injury factors listed in Article 3.4, hence preventing the Brazilian exporter from the full defence of its interests throughout the investigation. As underlined by the Appellate Body, Article 6 established a framework of procedural and due process obligations which was central in anti-dumping proceedings and had to be consistently applied by investigating authorities throughout the investigation. The findings of the Appellate Body confirmed that the analysis of all injury factors listed in Article 3.4 must not only appear in the Provisional or Definitive Regulation in accordance with Article 12, as already found by the Panel, but also be disclosed to the parties during the investigation in order to allow the interested parties to have the full opportunity to present their defence as required by Article 6.

34. Brazil noted that, in this particular case, it had been faced with non-confidential documents during the dispute settlement proceedings that had never been disclosed to the parties during the investigation. As the Appellate Body had put it, "[o]ne of the stated objectives of the disclosure information required under Article 6.4 is to allow interested parties 'to prepare presentations on the basis of this information. The presentations referred to in Article 6.4 [...] logically are the principal mechanism through which an exporter subject to an anti-dumping investigation can defend its interests.".[1]' (emphasis added) Articles 6.2 and 6.4 were aimed at protecting fundamental procedural rights. Their violation consequently undermined the entire investigative process and could not be cured retroactively. These findings by the Appellate Body were additional to the findings by the Panel that the EC had acted inconsistently with Article 2.4.2 of the Anti-dumping Agreement in "zeroing" negative dumping margins in its dumping determination and that the EC had breached Article 12.2 in that it was not discernible from the Provisional or Definitive Determination that the EC had addressed or explained the lack of significance of certain injury factors listed in Article 3.4. In view of the nature of these violations – found both on the dumping side and at the core of the injury side of the anti-dumping investigation at issue – Brazil submitted that any meaningful implementation of the Panel and the Appellate Body rulings could not be "expected to have only a very limited impact on the existing measures", as the EC assumed in a press release dated 22 July 2003.

35. Brazil was pleased that the EC – as announced on the very same day the Appellate Body Report had been circulated – would comply with the DSB's recommendations. In this respect, Brazil considered that the violations found could not be rectified by a mere re-calculation of the dumping margins and by a simple post facto disclosure of the analysis of the injury factors listed in Article 3.4, because this would not cure the impairment of the Brazilian exporter's right for a full defence during the investigation. Brazil hoped that the findings of the Panel and the Appellate Body would now encourage the EC to conduct anti-dumping proceedings in a fully transparent and due-process compliant manner.

[1] At paragraph 149.

36. The representative of the European Communities said that the EC wished to thank both the Panel and the Appellate Body members for the excellent Reports they had produced. In spite of the highly technical and complex issues raised in these proceedings, the final result was very satisfactory. The EC also wished to express its satisfaction over the fact that both these Reports represented an additional important step in the further development and consolidation of the WTO jurisprudence regarding the Anti-Dumping Agreement. It was for these reasons that both Reports deserved unanimous support. Their adoption at the present meeting would also put an end to a long and in the EC's view rather unnecessary dispute between the EC and Brazil and would allow its trade relations to strengthen further. At the same time, the EC wished to indicate that the findings of both Reports reflected, once again, the high standards followed by the EC in imposing anti-dumping measures in conformity with the GATT/WTO commitments. Needless to say that the EC would continue this path of ensuring the WTO conformity of its trade defence measures. In due course, the EC would be in the position to inform the DSB in detail on the specific steps it intended to take to implement the DSB recommendations of concern to it.

37. The representative of Chile said that, as a third party to this dispute, his country wished to comment briefly on some of the points raised in the Report of the Appellate Body that would be adopted at the present meeting. First of all, Chile shared the view put forward at paragraph 80 of the Report that introducing "a significant level of subjectivity on the part of the investigating authority" was not consistent with the detailed nature of the rules and obligations of the Anti-Dumping Agreement. In this case in particular this "broad judgmental role", as the EC put it, had not obliged the authority to favour certain months of the investigation period, in other words, the months subsequent to devaluation of the Brazilian Real. Nevertheless, and as the Appellate Body had correctly pointed out, Article 11.1 of the Anti-Dumping Agreement was categorical that an anti-dumping duty shall remain in force only as long as there was dumping that caused injury. This, in Chile's view should compel the investigating authority to re-examine the final ruling, even on its own initiative.

38. Second, Chile agreed with the decision of the Appellate Body that had reversed one of the Panel's findings and had determined that the EC had acted inconsistently with Articles 6.2 and 6.4 of the Anti-Dumping Agreement, as indicated in paragraph 150 of its Report. In fact, the Appellate Body had rightly maintained that the concept of relevant information in Article 6.4 should not only be understood from the perspective of the investigating authority, but also from the broader viewpoint of the interested parties to the investigation. An interpretation of the standard of relevance that was focused on the discretion of the investigating authority and not on the interested parties to the investigation as suggested by the Panel would not only imply giving that authority the possibility to restrict arbitrarily the parties' access to the information – which was what had happened in this case - but would also place a significant limitation on the rights of due process and defence, as parties would not be able to prepare their cases with all the "relevant" information used by the authority in its investigation.

39. Despite these findings, which confirmed the fact that the investigating authorities were subject to a framework that did not allow for the exercise of discretion that might lead to abuse of anti-dumping measures, one of the Panel's conclusions was a cause of great concern to Chile (Paragraphs 151 to 166 of the Report). It could even be argued that the Appellate Body, by not requesting a specific and separate analysis of each of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement, was contradicting the above-mentioned findings as well as the position it had maintained in other Reports. In Chile's view, the authority should not only analyse each and every one of the 15 factors listed in the aforementioned Article 3.4, as the Appellate Body had repeatedly maintained, but this analysis should also be adequately reflected in the authority's report. Accepting that the evaluation of one or more of these factors could be inferred from the analysis of other factors or other sections of the report seriously limited the rights of process and defence. Worse still, the obligation to analyse each and every one of these factors would turn into a dead letter. This obligation

was not fulfilled by an implicit analysis or an *ex post* explanation by the authority that the evaluation of one factor should be understood to include the analysis of other factors as well. This finding of the Panel had, once again, opened the door to discretion on the part of the investigating authorities to carry out a non-exhaustive analysis of the factors and indicators having a bearing on the state of the domestic industry. Such an analysis could lead to a determination of injury based on implicit cross references that were, therefore, contrary to the spirit and the letter of the Anti-Dumping Agreement.

40. The representative of the United States said that her country welcomed the opportunity to comment on what it considered a generally well-reasoned report. In particular, the United States commended the careful textual analysis by the Appellate Body, as well as the Panel, of Article 3 of the Anti-Dumping Agreement concerning the application of the cumulation provision. The United States was also pleased that the Appellate Body had recognized that the Agreement did not prescribe any particular manner by which investigating authorities were to evaluate injury and causation. Given the absence of specific methodologies in Articles 3.4 and 3.5 of the Anti-Dumping Agreement, the Appellate Body had properly found that the Agreement did not as a rule impose a requirement to conduct an examination of the collective effects of other known causal factors in addition to examining the factors' individual effects.

41. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS219/AB/R and the Panel Report contained in WT/DS219/R, as modified by the Appellate Body Report.

6. Appointment of Appellate Body members

42. The Chairman recalled that, at its meeting on 21 and 23 July 2003, the DSB had agreed that he should conduct consultations with delegations regarding the positions on the Appellate Body currently held by Messrs. Abi-Saab, Ganesan and Taniguchi. Accordingly, he had invited delegations with an interest in this matter to contact him and, between 23 July and 14 August, he had communicated with all such delegations. On Friday, 15 August, he had informed Members, by fax, of the results of his consultations, and he wished to do the same, orally, at the present meeting. He said that no delegation had indicated that it wished to nominate candidates to replace Messrs. Abi-Saab, Ganesan, and Taniguchi, while there were those delegations that had indicated their wish to reappoint them. These delegations he had contacted were also all of the view that a decision on reappointment of these three individuals should be taken by the DSB at its meeting on 7 November 2003. In light of the views of Members, he would, therefore, like to propose at the present meeting that a decision on reappointment of Messrs. Abi-Saab, Ganesan and Taniguchi be taken by the DSB on 7 November 2003.

43. The DSB took note of the statement and agreed that a decision on reappointment of Messrs. Abi-Saab, Ganesan and Taniguchi be taken by the DSB at its meeting on 7 November 2003.

44. The Chairman further stated that he also wished to remind delegations that, according to the decision taken by the DSB at its meeting on 21 and 23 July 2003, the process for selecting a new member of the Appellate Body to replace Mr. Bacchus was underway. At that meeting, the DSB had decided that this process would be conducted in accordance with the procedures set out in the decision of the DSB dated 10 February 1995 (WT/DSB/1). In this context, he wished to remind delegations that nominations, together with the curricula vitae of candidates, should be submitted to the Director-General and copied to the Chairman of the DSB. As agreed, the deadline for nominations of candidates was 5 September 2003. Following the 5 September deadline, he would inform Members of the candidates who had been nominated. As it had been done in the past, the curricula vitae of the candidates would be circulated as JOB documents to all Members. The Selection Committee – consisting of the Director-General and the 2003 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB – would begin its work after the

deadline of 5 September 2003. The selection process would, as in the past, include an opportunity for delegations to share their views on candidates with the Selection Committee. As decided by the DSB at its meeting on 21 and 23 July 2003, the Selection Committee would complete its work and make its recommendation to the DSB by 24 October 2003; and a decision on a replacement for Mr. Bacchus would be taken by the DSB at its meeting on 7 November 2003.

45. The DSB took note of the statement.