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Dispute Settlement Body
1 December 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 December 2003

Chairman: Mr. Shotaro Oshima (Japan)

Prior to the adoption of the agenda, the Chairman recalled that, as he had informed Members by fax on 28 November 2003, the item concerning the adoption of the Appellate Body Report and the Panel Reports in the case on "United States – Definitive Safeguard Measures on Imports of Certain Steel Products" had been removed from the proposed agenda.

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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.21 - WT/DS162/17/Add.21)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.14)

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.14)

(d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.2)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.21 - WT/DS162/17/Add.21)

2. The Chairman drew attention to document WT/DS136/14/Add.21 – WT/DS162/17/Add.21 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 20 November 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 was continuing to work with Congress to achieve further progress in resolving this dispute with the EC and Japan.

4. The representative of the European Communities said that, by the end of December 2003, it would be two years since the expiry of the time-period for implementation in this dispute. During the period in question, the 1916 Anti-Dumping Act was being used against EC companies, which had to face substantial costs as a direct consequence of the failure by the United States to stand by its obligations. The EC had always considered that retaliation should be a last resort, but the persisting inaction of the United States had left the EC no other option. The lack of compliance in this straightforward case sent a worrying signal regarding the readiness of the United States to modify its domestic law to comply with its WTO obligations.

5. The representative of Japan said that her delegation had taken note of the US status report and the statement made by the United States at the present meeting. It was another great disappointment to Japan that the implementation of the DSB's recommendations and rulings in this proceeding had not yet taken place. Japan had repeatedly requested the United States to have the legislation repealing the 1916 Act passed during the first session of the 108th Congress. It was also imperative that the repealing legislation had the proper retroactive effect to terminate the pending cases, since the 1916 Act caused substantial damages to the respondent Japanese companies, including significant legal costs. Without any sign of progress, however, the end of the current Congressional session was near. Prompt and proper implementation of the DSB's recommendations and rulings was critical for the credibility of the WTO dispute settlement system. Japan sincerely hoped that the United States would agree on this. The United States must report to the DSB in more detail how soon and in what manner it intended to comply with the DSB's recommendations and rulings, and must fulfill its obligation by

promptly repealing the 1916 Act with proper retroactive effect. Finally, while Japan was still contemplating whether to reactivate the DSU Article 22 arbitration, it also wished to remind the United States of its right to suspend concessions or other obligations.

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

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.14)

7. The Chairman drew attention to document WT/DS176/11/Add.14 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

8. The representative of the United States said that her country had provided a status report in this dispute on 20 November 2003, in accordance with Article 21.6 of the DSU. The US administration was continuing to work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

9. The representative of the European Communities said that the deadline for implementation in this case would expire at the end of the month, but it appeared that, once again, the United States would not respect its obligation to comply. The bill introduced in June 2003 offered a basis for resolving this dispute to the benefit of all. This bill would not only remove damaging special interest legislation, but 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. This bill reaffirmed the US attachment to ensure adequate protection of intellectual property rights, which should not be affected by special interest legislation.

10. The representative of Cuba said that on 2 February 2002 the DSB had adopted the rulings and recommendations in the dispute between the United States and the EC relating to Section 211. Although the United States had informed the DSB, at its meeting on 19 February 2002, that it had intended to implement the recommendations and rulings contained in the Appellate Body Report and had indicated that it would need a reasonable period of time for implementation, the fact was that one year and nine months had passed since then without any effective solution. Cuba – a WTO Member with a significant commercial interest in this case – had, throughout this period, shown patience with regard to the two additional extensions of the implementation period initially established by mutual agreement between the EC and the United States. It should be pointed out that despite the policy of strengthening the economic, commercial and financial blockade of Cuba pursued by the United States for over 40 years, the intellectual property rights of US owners had been respected and duly protected in Cuba, in the same way as the rights of national owners of other WTO Member had been protected without discrimination. This was illustrated by 4,930 US trademarks that were registered and protected by Cuba and more than 250 trademarks, which were in the process of being registered. Furthermore, in fulfilment of the obligations imposed by international law with regard to trademarks, Cuba maintained the protection of 15 trademarks belonging to the Bacardi company, the promoter of the Helms-Burton Act and of Section 211, the purpose of which was to steal the Havana Club trademark from its legitimate owners.

11. Although the United States claimed that it attached particular importance to matters relating to intellectual property rights and sought to present itself as its greatest defender, repeatedly demanding the strict application of the provisions of the TRIPS Agreement, it was very far from maintaining an attitude of reciprocity and respect for the rights of Cuban nationals. Section 211 of the Omnibus Appropriations Act of 1998, as an extension of the policy of United States of maintaining a blockade against Cuba with regard to intellectual property, violated the m.f.n. and national treatment principles, by establishing, on a discriminatory basis, that only Cuban nationals and the successors to

the interests of Cuban nationals who were not US citizens were subject to this provision. This view had been endorsed by the findings of the Appellate Body in 2002. Section 211 was not only inconsistent with the intellectual property commitments accepted by the United States, but also with US legislation for the protection of trademarks and trade names, since it conferred the additional power, which was not recognized in that legislation, of giving the original owner of a trademark who had legally relinquished it, the right to agree or not to the registration or renewal of a trademark by another. Cuba called, once again, upon the United States to implement the DSB's recommendations before 31 December 2003 and to do so effectively: i.e. by repealing Section 211. In this regard, she referred to what had been stated by Cuba's Foreign Minister, Felipe Pérez Roque, in his statement to the UN General Assembly on 4 November 2003, namely that: "a dispute over trademarks and patents with Cuba should be of no interest to the Government of the United States of America".

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.14)

13. The Chairman drew attention to document WT/DS184/15/Add.14 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 20 November 2003, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress to address the recommendations and rulings of the DSB that had not been addressed by the original deadline of 23 November 2002, and was working in support of specific legislative amendments that would do so. She noted that Members might be aware that the United States had proposed that the reasonable period for implementation be modified to end on 31 July 2004, and had requested a DSB meeting for 10 December 2003 in this connection.

15. The representative of Japan said that her country regretted and expressed its serious concern that the United States had reported no specific action towards full implementation in this case. In April 2003, the US administration pledged to support specific statutory changes necessary for compliance. This fact notwithstanding, the first session of the 108th Congress would be over very soon without any bills actually introduced. Japan, once again, strongly urged the United States to make every effort to implement the DSB's recommendations and rulings as soon as possible. Japan looked forward to being further consulted by the United States on its concrete 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.2)

17. The Chairman drew attention to document WT/DS207/15/Add.2, 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 had submitted its third status report on its progress in the implementation of the DSB's recommendations and rulings in this dispute. As stated in the written report, a range of measures had been adopted to date by Chile, which reflected the DSB's recommendations or rulings in both the form and the

content. With regard to two of the products at issue in this dispute, wheat and wheat flour, these measures would enter into force on 16 December 2003. The other products at issue, namely, edible vegetable oils, had been excluded from the price band system as from 25 September 2003.

19. The representative of Argentina said that, in its third status report on progress in the implementation of the DSB's recommendations in this dispute, Chile had, once again, stated that its price band system had been brought into line with the DSB's recommendations by way of Law 19,897, supplemented by Supreme Decree No. 831 of the Ministry of Finance. Chile had also stated that these measures reflected the DSB's recommendations both in the form and the content. In the light of the above, Argentina could not but reiterate that this legislation – Law 19,897, supplemented by Supreme Decree No. 831 of the Ministry of Finance – had failed to bring the measure found to be inconsistent into conformity with the DSB's recommendations. The reason being that, as Argentina had stated at the DSB meetings on 2 October and 7 November 2003, the inconsistency was in the very fact of maintaining such a system. For this reason, Argentina, once again, wished to express its dissatisfaction with the measures adopted by Chile and reserved its rights under the DSU, in particular the possibility of requesting the initiation of negotiations with a view to developing mutually acceptable compensation. In this respect, Argentina hereby reiterated the importance that it had accorded to the search for alternative solutions before the end of the reasonable period of time for compliance to which Chile was entitled pursuant to Article 21.3(c) of the DSU. As indicated in previous statements, it was Argentina's intention to ensure that this search for alternative solutions was conducted in the spirit of cooperation which had always characterized a bilateral relationship between the two countries.

20. The representative of Brazil said that his country had participated as a third party in this dispute. He said that it seemed that a new measure taken by Chile maintained the elements found by the Appellate Body to be inconsistent with Article 4.2 of the Agreement on Agriculture. Brazil was closely following Chile's implementation and hoped that its measures would not maintain certain specific characteristics such as a lack of transparency of the price band system, the unpredictability of the level of duties and automaticity, the frequency and the extent to which duties fluctuated. Brazil hoped that these elements would not be maintained in any implementing measures to be taken by Chile.

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

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

(a) Statement by the European Communities

22. The Chairman said that this item was on the agenda of the present meeting at the request of the European Communities.

23. The representative of the European Communities said that at the 7 November DSB meeting, the United States and Canada had declared that they considered that the measures taken by the EC to comply with the Hormones rulings were still not WTO-consistent. Moreover, they had officially stated their intentions to maintain the suspension of concessions in relation to the EC's exports. In the EC's view, this was a patent case of "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB", as described in Article 21.5 of the DSU. It was clear that an adjudicatory procedure would have to decide on this disagreement. The EC considered that Canada and the United States should initiate multilateral procedures to determine whether the EC was in compliance. The EC was ready to discuss with them more in detail on how to address this matter appropriately.

24. The representative of Canada said that, at the 7 November DSB meeting, Canada had put forward a suggestion for bilateral discussions concerning the justification for the EC's position that it had complied with the WTO ruling. However, the EC had not responded to Canada's suggestion for further bilateral discussions. Canada said that it was for the EC to establish that it had complied with the WTO rulings and continued to be open to discussions with the EC regarding its justification for its position. At this point, however, Canada did not see any basis for the removal of its retaliation measures nor for taking any other action.

25. The representative of the United States said that she would transmit the statement made by the EC at the present meeting to her authorities for their consideration. As had been explained at the 7 November DSB meeting, 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. The United States had always been ready to discuss with the EC any matters regarding its compliance with the DSB's recommendations and rulings. The United States would be pleased to discuss with EC officials any outstanding issues regarding the EC's ban on certain beef produced in the United States, including their reactions to the detailed points that the United States had raised in its statement at the 7 November DSB meeting. With regard to the suggestion made by the EC at the present meeting that multilateral proceedings be initiated, the United States would be happy to discuss this suggestion with the EC along with other procedural options.

26. The DSB took note of the statements.

3. United States – Countervailing measures concerning certain products from the European Communities

(a) Statement by the European Communities

27. The Chairman said that this item was on the agenda of the present meeting at the request of the European Communities.

28. The representative of the European Communities said that the EC would like to reiterate its concern with the treatment of the four "sunset review" cases where the US Department of Commerce, despite the clear WTO ruling, had refused to examine the nature of the privatizations which meant that measures would remain in force. More generally and more importantly, the EC noted that in the case under dispute, the Department of Commerce had taken the position that once a privatization had been found to take place for a price below market value, the whole of the subsidy passed through to the privatized firm, and not just an amount in proportion to the under-pricing of the firm. This basically assumed that the firm in question had been given away for free. The EC had serious doubts on the WTO compatibility of this aspect of the US methodology. Discussions were ongoing between DG Trade and the Department of Commerce to explore the possibility for a mutually acceptable solution. However, the EC reserved its rights to initiate compliance proceedings.

29. The representative of the United States said that, as her delegation had indicated at the 7 November DSB meeting, the United States had complied with the DSB's recommendations and rulings in this dispute. The United States was disappointed to hear that the EC had some concerns regarding some of the revised determinations. The United States would be happy to discuss with the EC possible approaches to the EC's concerns. In this, as in all disputes, the United States was always open to discussions aimed at solving, rather than litigating, problems.

30. The representative of Brazil said that his country had participated as a third party in this dispute. Brazil's companies were also "victims" of the application of the inconsistent methodology. They now had to wait for the legal opportunity to request a revision of this methodology, a delay which entailed further export losses and additional costs to demonstrate before the Department of Commerce what the Appellate Body had already declared to be WTO-inconsistent. Brazil was also

concerned that some of the new factors established by the Department of Commerce to determine whether market distortions existed at the time of privatization might be overly broad and might unfairly influence the presumption of a fair market value.

31. The DSB took note of the statements.

4. United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea

(a) Request for the establishment of a panel by Korea (WT/DS296/2)

32. The Chairman drew attention to the communication from Korea contained in document WT/DS296/2.

33. The representative of Korea said that his country had serious concerns regarding the provisional countervailing duties and final countervailing duty order imposed by the United States on 7 April and 11 August 2003, respectively, against dynamic random access memory semiconductors (DRAMS) originating in Korea. Since Korea considered these measures by the US Department of Commerce and the ITC to be inconsistent with the United States' obligations under the relevant provisions of the GATT 1994 and the SCM Agreement, Korea had requested consultations with the United States regarding these determinations pursuant to Article 4 of the DSU, Article 30 of the SCM Agreement and Article XXII of the GATT 1994. These consultations had been held with the United States on 20 August 2003 and on 1 October 2003, but had been unable to resolve the dispute between the parties. Korea believed that the panel would find that the United States had acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Accordingly, Korea requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement regarding the Department of Commerce and ITC determinations and the resulting countervailing duty order imposed on DRAMS from Korea with the standard terms of reference under Article 7 of the DSU.

34. The representative of the United States said that her country was disappointed that Korea had chosen to pursue this matter further by requesting the establishment of a panel. The United States was also surprised that Korea had chosen to pursue this matter in light of the overwhelming evidence regarding the Korean Government's subsidization of the troubled Korean DRAMS producer, Hynix. Specifically, the Korean Government directed banks and other institutions to provide financing to Hynix on non-commercial terms. For example, Woori Finance Holdings Co. Ltd. was a Korean financial institution whose affiliated companies were involved in the Hynix bail-out. Korea would have the United States believe that those companies made their financing choices wholly on the basis of commercial considerations. However, in the prospectus that Woori had filed with the US Securities and Exchange Commission pursuant to the filing requirements of the US Securities Exchange Act of 1934, Woori explained to investors how the Korean Government could distort a company's investment decisions: "Through its policy guidelines and recommendations, the Korean government has promoted and, as a matter of policy, may continue to attempt to promote lending by the Korean financial industry to particular types of borrowers. For example, the Korean government has in the past announced policy guidelines requesting financial institutions to participate in remedial programs for troubled corporate borrowers ... . [T]hese or any future government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of that policy." Essentially, what Woori was telling potential investors who read that prospectus was that in the past, the Korean Government had pressured financial institutions like Woori to provide support to particular companies on non-commercial terms, and that the Government might direct Woori do so again in the future. In light of statements like these, claims by the Korean Government that it had not directed financing to Hynix rang hollow. The United States firmly believed that the

determinations Korea sought to challenge were supported by evidence and were otherwise fully consistent with the WTO obligations of the United States.

35. Turning from substance to procedure, the United States believed that Korea's panel request was deficient in that it sought to cover matters on which the parties had not consulted. Specifically, with respect to the preliminary injury determination by the US International Trade Commission and the US Department of Commerce's countervailing duty order, Korea had never identified the provisions of the SCM Agreement (or any other WTO Agreement, for that matter) with which these actions had been allegedly inconsistent. As a result, with respect to these two actions, Korea's consultation request failed to indicate the "legal basis for the complaint", as it was required to do by Article 4.4 of the DSU. The United States had pointed out these problems to Korea in a timely manner. Korea could have fixed the problems and made consultations possible simply by submitting a new request for consultations identifying the WTO provisions with which the two US actions were asserted to be inconsistent. However, Korea had refused to do so. For the foregoing reasons, the United States was not in a position to agree to the establishment of a panel.

36. The representative of Korea said that first he wished respond to the procedural aspects raised by the United States at the present meeting. He noted that any procedural objections that the United States might have with regard to Korea's panel request, could be addressed before the Panel. Nothing in the DSU required the identity between a request for consultations and a request for panel establishment. To the extent that parties had actually consulted a claim or a measure, the claim or measure was legitimately the subject of a request for panel establishment even if it was not included in the request for consultations. With regard to the legal basis of Korea’s request for panel establishment, the DSU required Korea's request for establishment to be in writing, to identify the specific measures at issue, and to provide a brief summary of the legal basis of its complaint. Korea had met all of these requirements. With respect to the measures at issue, Korea’s request identified "determinations" by the Department of Commerce and the ITC. These determinations made up the order. The request specifically offered citations for those determinations. It provided specific citations to the Department of Commerce's provisional and final determinations in the Federal Register, as well as to its decision memorandum. The request also provided a specific citation to the ITC's material injury determination in the Federal Register, and to the ITC's report.

37. With regard to the substantive aspects of the US statement, it was true that the stakes of the Korean Government in the financial institutions had increased as a result of the Asian financial crisis and the consequent financial restructuring. As discussed in the course of the consultations, however, the financial institutions had acted in accordance with commercial considerations or calculations. His delegation did not believe that Korea's arguments in this regard would sound hollow to the panel.

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

5. European Communities – Countervailing measures on dynamic random access memory chips from Korea

(a) Request for the establishment of a panel by Korea (WT/DS299/2)

39. The Chairman drew attention to the communication from Korea contained in document WT/DS299/2.

40. The representative of Korea said that his country, once again, had similar serious concerns to those raised under the previous agenda item regarding the provisional and definitive countervailing duties on imports of dynamic random access memory semiconductors (DRAMS) originating in Korea imposed in this instance by the EC on 24 April and 22 August 2003 respectively. Since Korea considered the provisional and definitive countervailing duties imposed by the EC against DRAMS from Korea to be inconsistent with the EC's obligations under the relevant provisions of the

GATT 1994, and the SCM Agreement, it had requested consultations with the EC regarding these measures pursuant to Article 4 of the DSU, Article 30 of the SCM Agreement, and Article XXII of the GATT 1994. Consultations had been held with the EC on 21 August and 8 October 2003. These consultations, however, had failed to resolve the dispute between the parties. The Government of Korea believed that the panel would find that the EC had acted inconsistently with its obligations under Articles 1, 2, 10, 12, 14, 15, 19, 22 and 32 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Accordingly, Korea was requesting the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement regarding the EC's provisional and definitive countervailing measures against DRAMS from Korea with the standard terms of reference pursuant to Article 7 of the DSU.

41. The representative of the European Communities said that the issue of the Korean subsidies and their impact on the semiconductor market had been discussed almost exhaustively between the EC and Korea in the context of the countervailing duty investigation. Moreover, the EC had supplied to Korea further explanations of its measures in the context of two rounds of consultations in Geneva. The EC regretted to see that Korea still wished to pursue this dispute in the WTO. In the light of the above, the EC did not agree to the establishment of the panel requested by Korea at the present meeting.

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

6. Adoption of the 2003 draft Annual Report of the DSB (WT/DSB/W/244 and Add.1)

43. The Chairman said that in pursuance of the procedures for an annual overview of WTO activities and for reporting under the WTO contained in document WT/L/105, he was submitting for adoption a draft text of the 2003 Annual Report of the DSB contained in document WT/DSB/W/244 and Add.1. This report covered the work of the DSB since the previous Annual Report contained in WT/DSB/29 and Add.1 and Corr.1, which had subsequently been updated in document WT/DSB/34 to cover work in the first half of 2003 until 24 June. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2003, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He said that at the present meeting, he wished to propose that following the adoption of the Annual Report, the Secretariat be authorized to update this Report under its own responsibility in order to include actions taken by the DSB at the 21 November meeting as well as at the present meeting. The updated Annual Report of the DSB would then be submitted for consideration by the General Council at its meeting on 15 December. Finally, it was his understanding that the Secretariat had received some comments of a typographical nature on the draft Annual Report, which would be taken into account in the final version of the Annual Report.

44. The DSB took note of the statement and adopted the draft Annual Report contained in WT/DSB/W/244 and Add.1 on the understanding that it would be further updated by the Secretariat. [1]

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[1] The Annual Report was subsequently circulated in document WT/DSB/35 and Add.1.