WORLD TRADE ORGANIZATION

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Special Session of the Dispute Settlement Body
10 – 11 March 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 10 – 11 March 2003

Chairman: Mr. Péter Balás (Hungary)

Prior to the adoption of the agenda, the Chairman welcomed participants to the tenth meeting of the Special Session and said that the present meeting would continue with the consideration of draft legal texts submitted by participants. He drew the attention of participants to three new contributions which had been circulated since the previous meeting: a revised proposal by Brazil circulated as TN/DS/W/45/Rev.1; a revised proposal by Costa Rica circulated as TN/DS/W/12/Rev.1; and a proposal by China circulated as TN/DS/W/51. He also drew their attention to the revised compilation of draft legal texts containing these new proposals, which had been circulated as Job(03)10/Rev.2. He proposed that like the previous meeting, the discussion of the draft legal texts under agenda item one should take place, whenever possible, in an informal mode using the compilation as a guide. He said that it was his expectation at this meeting that the Special Session would complete a first reading of all the proposals starting with those on Article 17 of the DSU. He said that should this not be possible, it might be necessary for an open-ended informal meeting to be convened in order to continue with the discussions. He proposed that following requests from some delegations, including Brazil and India, it was his intention to defer the discussion of their proposals until when they would be available. He also proposed that the discussion of proposals relating to special and differential treatment be taken up later, so as to allow for the participation of more developing countries. He said that he did not anticipate raising any specific issue under the agenda item "Other Business", apart from discussing the future work programme which, in turn, depended on the progress that was made by the Special Session.

The representative of Egypt said that the African Group would be circulating a document shortly which attempted to respond to the comments and queries that participants had on their proposals. He assured that the African Group would remain engaged in the negotiations and that it was the expectation of the Group that the negotiations would produce balanced results reflecting the interests of all Members.

1. Discussion of draft legal texts submitted by participants – Articles 17 to proposed Article 28 of the DSU (on the basis of the compilation of draft legal texts (Job (03)10 and Add.2)

1. The representative of the United States welcomed the opportunity to discuss the additional contribution of Chile and the United States on improving flexibility and Member control in dispute settlement proceedings. He recalled that at the December 2002 Special Session, when the United States and Chile first presented their proposal, the co-sponsors had stated that the central objective of the dispute settlement system was the prompt resolution of disputes between parties. For that reason, Members had emphasized both the importance of ensuring that the dispute settlement procedures facilitated the resolution of disputes between parties and, as part of this approach, the need for

flexibility in the system to allow parties to resolve disputes in a prompt manner. He said that the joint proposal sought to address concerns that some limitations in the current procedures might have resulted, in some cases, in the adoption of an interpretative approach or legal reasoning by WTO adjudicative bodies that could have benefitted from additional Member review. It also sought to address concerns that the reasoning and findings of reports might at times go beyond what the parties considered necessary to resolve the dispute, or, in some circumstances, might even be counter-productive to resolving the dispute. The proposal also built on the flexibility that was already in the dispute settlement system to ensure that the system did not itself pose obstacles to Members' efforts to find a solution to their disputes. He said in that connection that the co-sponsors had set out several elements in their proposal for achieving this. They had now sought to illustrate how these elements could be reflected in the text of the DSU or in decisions of the DSB. In some instances, the co-sponsors had proposed the adoption of DSB decisions in areas involving DSB procedures where an amendment was either not necessary or desirable. Such decisions would be more flexible and allow the DSB to make refinements as experience was gained. The co-sponsors had also sought to draw on the existing DSU text wherever possible in order to avoid introducing new issues simply as a result of new drafting. The sources of some of the language used in the proposal had been indicated in the footnotes to the text of the proposal.

2. He noted that there were a couple of areas where Members, in commenting on the proposals, had expressed particular sensitivity or creativity. In those areas, the co-sponsors thought it would be appropriate to have fuller discussions with participants before attempting to propose specific language. Those areas were indicated in the document that was submitted at the present meeting. With regard to the proposal for interim reports at the Appellate Body stage, he said that the co-sponsors had duplicated the language from Article 15.2 of the DSU. He recognized that there were proposals on changes to Article 15.2, but the co-sponsors did not want to prejudge those proposals here. On the element that would allow parties to delete by mutual agreement findings in the report that were not necessary or helpful to resolving the dispute, he said that the co-sponsors had drawn from the language of Article 12.7 of the DSU since it was necessary to first describe the contents of the Appellate Body report before being able to describe the parties' ability to delete parts of it. He said that the co-sponsors had referred to the basic rationale behind a finding in addition to the finding itself, and recognized that there might be instances where there were alternative rationales behind a finding. In such circumstances, it might be desirable to delete one of the rationales without altering the finding. On the element for "partial adoption" of reports, he said that the co-sponsors had mirrored the existing language on negative consensus not to adopt a report in order to be clear that partial adoption would also be done by negative consensus. As a result, adoption by negative consensus would be applicable not simply to the report as a whole, but to its parts. The co-sponsors had also provided for a DSB decision to illustrate how this could work procedurally so that all Members would have advance notice that the DSB would be asked to exercise its partial adoption authority at a particular meeting. He said that the co-sponsors had sought to fit that procedure within the existing timeframes. A DSB decision seemed particularly appropriate in this situation, since this was a question of the DSB rules of procedure and might need to be adjusted in light of experience. On the element to provide the parties a right, by mutual agreement, to suspend panel and Appellate Body procedures, he said that the co-sponsors had taken the language in Article 12.12 concerning panels and duplicated it for the Appellate Body. With regard to ensuring that panelists had appropriate expertise to appreciate the issues presented in a dispute, he said that the co-sponsors had drawn from the language in Article 7 of the DSU. The co-sponsors recognized that further discussions with participants might be useful in this area. In relation to the proposal to provide some form of additional guidance to WTO adjudicative bodies on the scope and nature of the task presented to them, he said that the co-sponsors recognized that it would be best to have further discussions with participants on the best form and content for that guidance. He said that the co-sponsors believed that through these elements, Members could strengthen their ability to ensure that the dispute settlement system served them in their efforts to resolve disputes, and to ensure high quality reports which enjoyed the highest level of credibility and support. The co-sponsors looked forward to working with

Members on this proposal and in answering any questions which they might have on the specific language suggested.

3. The representative of Chile endorsed the statement made by the representative of the United States and said that the objective of the co-sponsors was to elaborate on the concepts presented in the proposal. He said that in the preparation of the document which had been distributed, the co-sponsors had made a conscious effort to address the queries raised by participants at previous meetings. He reiterated that the purpose of the WTO dispute settlement system was to resolve in an expedient manner the dispute between the parties. It was therefore imperative for adequate opportunities to be provided so that the parties could achieve this objective. He said that the co-sponsors had taken care to avoid language which would later give rise to problems.