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28 – 30 January 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 28 – 30 January 2003

Chairman: Mr. Péter Balás (Hungary)

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Prior to the adoption of the agenda, the Chairman said that that the proposed agenda reflected participants' agreement reached at the December meeting, that a new phase of work would be initiated at the present meeting, namely, that participants would focus on the discussion of specific draft texts for clarifications and improvements to the DSU. He said that this was the fourth stage of the discussions. He recalled that under track I, there had been a general discussion of the changes that participants wished to see introduced in the DSU. Under track II, the discussions had focussed on specific proposals introduced by participants. Discussions were facilitated by the Checklist of Issues issued under the Secretariat's responsibility. However, this process had come to an end at the December meeting. He recalled that at that meeting due to the limited time available, he had made a proposal, which was supported by participants, to enter into a new fourth phase of the negotiations: i.e. a discussion on the basis of draft legal texts put forward by participants. In this respect, he expressed appreciation to participants for their efforts in submitting specific texts for consideration at the present meeting, as reflected in the large number of new proposals circulated since the DSB meeting.

He then drew attention to documents which had been circulated since the previous meeting. He said that the proposal introduced informally in December by Chile and the United States had now been circulated as TN/DS/W/28. Fourteen new contributions, most of them containing draft text elaborating on prior proposals had been submitted: a proposal by China, circulated as TN/DS/W/29; two proposals by Thailand, circulated as TN/DS/W/30 and 31; a proposal by Japan, circulated as TN/DS/W/32; a proposal by Ecuador, circulated as TN/DS/W/33; a proposal by Australia, circulated as TN/DS/W/34; a proposal by Korea, circulated as TN/DS/W/35; a proposal by Chinese Taipei, circulated as TN/DS/W/36; a proposal by the LDC Group, circulated as TN/DS/W/37; a proposal by the European Communities, circulated as TN/DS/W/38; a proposal by Mexico, circulated as TN/DS/W/40; a proposal by Canada, circulated as TN/DS/W/41; a proposal by the African Group, circulated as TN/DS/W/42; and, most recently, a proposal by Jordan, circulated as TN/DS/W/43. In addition, two documents had been circulated under Job(03)1 and Job(03)2, in response to the suggestion made at the December meeting that model drafting conventions be made available to participants. These documents had been submitted by the United States and Canada, respectively, for information to delegations. Also, a first compilation of draft texts had been circulated as Job(03)10 and Job(03)10/Add.1 on the basis of contributions received by the Secretariat as of 22 January 2003.

Due to the fact that the proposal by Jordan had been made available only recently, it was not possible to include it in the new compilation of draft texts. However, there would be a chance to take this text into consideration as the proposal was on the table in the mentioned document. He then turned into more details regarding the organization of work under this item, but for the purposes of adopting the agenda, he wished to give a broad outline of how he intended to proceed. He said that under agenda item 1, the main objective of the discussion would be to provide an opportunity to discuss various specific text proposals, in the order in which they were reflected in the informal compilation of draft text (Job(03)10 and Job(03)10/Add.1): i.e. in the order of the DSU provisions. He said that he would propose to conduct most of this discussion in an informal mode. During the informal discussion, he wished to address each issue in turn, and delegations who had put forward specific text proposals would be invited to present the text in due course when specific issues would be discussed. If delegations wished to make formal statements with respect to any of these textual proposals, he would invite them to do so at the end of the agenda item 1. Any delegations wishing to announce any new draft text proposals would also be invited to do so under agenda item 1. However, as agreed, the discussion on any specific proposal would be without prejudice to delegations' acceptance of the underlying ideas in proposals. Therefore, he said at the end of item 1, there would be a chance for delegations to make statements for the record. On the other hand, if any delegation wished to make any statements of a more general or conceptual nature, he would invite them to do so under "Other Business". With regard to some of the recent proposals, including the proposal by China and other proposals which related to the previous stage of negotiations, he said that delegations would have the opportunity to introduce statements under "Other Business" for the record together with any comments to be made by other delegations. He said that due to the time constraints, he would not envisage further lengthy conceptual discussions and proposed to start the new phase of negotiations based on specific draft texts. Under "Other Business", he also wished to briefly refer to two issues following up on earlier discussions: (i) the provision of technical assistance to developing-country Members, and (ii) proposals that had possible budgetary implications. It was agreed that the discussion under "Other Business" on the two mentioned issues would be held in an informal mode.

The representative of Chile said that he wished to refer to the Chairman's statement concerning the organization of the present meeting. As stated by the Chairman, the discussion would focus on the new compilation which had been circulated very recently and which his delegation had not yet been in a position to review. He, therefore, proposed to concentrate on the proposals rather than on the compilation.

The Chairman said that he was aware that the new compilation had been circulated relatively late, but this was due to the fact that it had taken a lot of time for delegations to prepare their papers. He said that the compilation was not much different than the proposals themselves. Therefore, the discussion would, in fact, be based on the proposals which were reflected in the compilation in the order of the DSU provisions. Proposals would be taken in the order of the compilation and he would provide delegations with the opportunity to introduce and explain their specific proposals.

The representative of Uruguay said that his delegation did not have a problem with the Chairman's proposal on how to proceed at the present meeting. However, in response to what had been stated by Chile, he suggested that those participants who had recently made proposals could introduce them at the present meeting. After brief introductions, participants could provide comments on the presented proposals. Thus delegations would be able to present their proposals and then they could move to the examination of the new compilation. This approach would take into account what had been stated by Chile and would give the possibility to other delegations to present the main elements of their proposals.

The representative of India said that his delegation understood the time constraints, but believed that it would be better, as suggested by Uruguay, to give the opportunity to delegations who had submitted proposals to make brief presentations and to enable other delegations to comment on them. He recalled that at the December Special Session, some delegations had made only preliminary

comments on the US-Chile proposal and had reserved their right to make further comments at a later stage. He, therefore, thought that delegations should be given the opportunity to comment on that proposal at the present meeting.

The Chairman recalled that participants had agreed not to continue with general conceptual type of negotiations. He recognized that some delegations might wish to make short presentations on their proposals and he would enable them to do so, if they so wished. However, there would be a possibility in the context of the examination of the compilation to introduce proposals and to provide basic rationales for the proposals. With regard to previous proposals, he said that he would provide opportunities for those delegations who wished to make statements for the record, under agenda item 2 ("Other Business"). However, he stressed that a more conceptual discussion required more time, but at this stage not much time was left. He believed that if this conceptual discussion were to continue it would endanger the process and its success. He, therefore, proposed that if delegations wished to make general introductions of their proposals they could do so, but he would ask delegations not to comment on them directly after those introductions, but to make specific comments in the context of specific issues to be discussed in the context of the compilation in an informal mode.

The representative of Jordan supported the statements made by Chile, Uruguay and India and said that his delegation wished to introduce its proposal and to be able to receive comments from other delegations on its proposal.

The representative of Canada said that delegations had known for some time that they would be moving on to the examination of the compilation at the present meeting. His delegation was encouraged that participants were moving away from the general discussion to discussions of specific legal texts. It was true that the compilation had only been recently circulated, but this was due to the fact that delegations had been late with their submissions. Canada believed that it would be a step backward if one had to go back to the general discussions. Canada, therefore, supported the Chairman's approach that delegations should focus on the texts as soon as possible. His country had submitted a proposal, but would be prepared to waive any general introduction and would speak to it once the relevant section of the compilation were to be discussed. This would be a more efficient way of proceedings.

The representative of Australia said that his delegation supported the statement made by Canada and said that Australia would wish to follow the suggestion to go through the compilation and to refer to its proposal once the relevant section of the compilation was discussed. Australia considered that participants had passed the stage of general comments and statements and that there was a need to focus on the new compilation as it had been expected to do. In this regard, the Chairman had made clear that this approach had been agreed at the December meeting.

The Chairman said that, in response to the desire of some delegations, he would provide the opportunity for a more general discussion. In light of this, he proposed that an item under "Other Business" be included in order enable delegations to have a conceptual discussion, to introduce proposals and to make comments on them.

It was so agreed.

1. Discussion of draft legal texts submitted by participants on the basis of the compilation of draft legal texts (Job (03)10 and Add.1)

1. The Chairman said that as he had proposed prior to the adoption of the agenda the following statements, at the request of the respective delegations, would be reflected in the minutes under agenda item 1 as they were directly related to the informal part of the discussion which was devoted to the specific proposals contained in the compilation.

2. The representative of Jordan said that his country had never been a party to a dispute before panels or the Appellate Body, not even as a third party, but was well aware of the vitality of the dispute settlement mechanism's role as a corner stone of the multilateral trading system. Dispute settlement was an integral part of the WTO system, as it provided the mechanism for the enforcement of rights and the observance of obligations prescribed in the WTO Agreements. The system created for settlement of disputes in the WTO revealed the fundamental nature of law in achieving economic objectives. At the outset, it should be emphasized that WTO Members should always endeavour to solve their disputes at the earliest possible stage, whether at the consultation stage or even through the recourse to an effective mediation or conciliation system. He said that there were a number of practical steps to improve and clarify the DSU and given the rapidly shifting global context in which the WTO now functioned, adaptability, predictability and flexibility within the DSU would be essential to meet the challenges of this increasingly integrated world. It should be stressed as well that proposals considered for the development of the DSU should aim at the overall goal of facilitating the amicable resolution of disputes.

3. An analysis of the legal functioning of the system could necessitate the consideration of a broad range of questions from general to specific, from theoretical to practical. It could examine the essential nature of international law and could consider the degree of conflict between notions of globalization and sovereignty. In this respect, he wished to go through some suggestions on the improvement and clarification of the DSU, which aimed at ensuring the effective functioning of the dispute settlement mechanism. First, conciliation and mediation. The primary aim of the WTO dispute settlement was to encourage mutually agreed solutions. Article 5 of the DSU indicated that good offices, conciliation and mediation were additional procedures that were available on a voluntary basis. In the WTO context, a major impediment towards achieving the goals of such alternative dispute resolution procedures was the need for consistency with WTO rules, which should always support the ongoing rights and obligations of the interdependent Members. The DSU, in this respect, acknowledged in Article 3.6 of the DSU the right of WTO Members to ensure that any mutually agreed solutions reached by such means be notified to the DSB where other Members would be able to raise their concerns and queries. To enhance this approach, Jordan suggested that recourse to conciliation and mediation should also be made mandatory in cases where a developing or a least-developed country Member was involved and should be subject to agreed upon terms of reference and specific time-frames. Moreover, to supplement the conciliation provision in the DSU, consideration should also be given to the potential of having a comprehensive mediation system, to operate alongside the panel procedure. The standards stipulated within the TBT and the SPS Agreements might be considered a tool that would assist in determining the procedures of such a system, which would, in turn, be administered by the DSB. Second withdrawal of requests for consultation and requests for establishment of panels. He said that the DSU should include a provision enabling a Member to formally withdraw a request for consultations, and that should address the issue of consultations which had not been followed by a request for the establishment of a panel within a certain time-frame whereby it should be considered formally withdrawn upon the lapse of a specified period. The DSU should also include a provision enabling a complaining party in a dispute to formally withdraw a request for establishment of a panel. This right should be exercised within a specific time-frame.

4. Third, disputes involving developing and least-developed country Members. He said that the participation of developing and least-developed country Members was increasingly evident in the dispute settlement process and, therefore, representation of panelists from such countries would provide a further assurance and incentive for effective participation in the process. Fourth, working procedures for panels. Detailed standard working procedures should be developed for panels similar to the working procedures established by the Appellate Body for its proceedings. Currently, panels had only very general guidelines set out in Appendix 3 to the DSU. As disputes became more complex, both in terms of the number of parties and third parties involved and the number of issues to be examined under the relevant WTO Agreements, the fairness and efficiency of the panel process would be greatly facilitated by having standard working procedures. This had been reiterated by the

Appellate Body in a number of its recent reports whereby it had recommended that panels should develop standard working procedures. In the meantime and for the purposes of the current mandate of negotiations, there were a number of additional working procedures that should be addressed, among which were the following: (i) Jordan agreed with Costa Rica that Article 12.1 should be amended to include consultation with third-party rights, on the issue of deciding on the application of the working procedures as specified in Appendix 3; (ii) Jordan agreed with Japan and the EC on the need to amend paragraph 3 of Appendix 3 with respect to the issue of the provision of non-confidential summaries of the information contained in the submissions of the parties and third parties; and (iii) Effective participation of third parties would enrich the dispute settlement process by allowing parties to a dispute, and Members with interest in the outcome of a certain disputes, to fully participate in the proceedings. Fifth, time-frame for third-party participation. In accordance with past practice that the time-frame available for a third party to notify the DSB of its interest to make written submissions in a dispute before a panel was 10 days. This practice should be explicitly provided within the ambit of Article 10.2 of the DSU. It should be noted that this short time-frame was necessary since the notification of third-party interests was a prerequisite for the composition of a panel since nationals of third parties to a dispute should not be appointed as panelists in that particular case.

5. Sixth, the relationship between Articles 21.5 and 22 of the DSU. Perplexities had emerged in terms of the relationship between Article 21.5 and Article 22.6 of the DSU. The main question was whether Article 21.5 proceedings had to precede Article 22 proceedings. The current drafting of the two provisions created some uncertainty. Article 21.5 of the DSU required a reconvened Panel to complete its work within 90 days of the referral of the matter to it. It did not, however, specify when such proceedings should be initiated. Nothing in the express wording of the provision prevented initiation of such a proceeding before or after the expiry of a reasonable period of time for implementation of recommendations and rulings. Article 22.6, on the other hand, stated that the DSB shall grant authorization to suspend concessions and other obligations "within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request" or an objection to such request is raised and referred to arbitration. Article 22 thus provided an express time-limit for DSB authorization to be requested and granted, while Article 21.5 did not have any timetable that could ensure that the analysis was completed by that time. In this respect, Jordan agreed with the conclusion that Article 22 could only be utilized when Article 21.5 procedures had been completed. This argument proceeded on the basis that Article 21.5 stated that "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including ..." in addition Article 22.6 is limited to cases where "the situation described in paragraph 2 occurs". The latter was a reference to cases where the Member concerned failed to bring the measure found to be inconsistent with the covered agreement into compliance. Where an Article 21.5 procedure was thus pending, the argument was that the conditions for a request for suspension under Article 22.6 could not be fulfilled. Therefore, where there was disagreement on implementation, it was Article 21.5 that had to be involved not Article 22, the contrary would deprive Article 21.5 of its *raison d'étre*. Jordan would be reviewing the legal texts proposed to this effect and looked forward to working with delegations in order to reach a common understanding in this connection.

6. Seventh, a time-frame for arbitration under Article 21.3(c) of the DSU. The time-frame for the completion of arbitration under Article 21.3(c) of the DSU should commence from the date of the appointment of the arbitrator and not from the date of the adoption of the report. Eighth, remand authority. Granting the Appellate Body the power to remand findings or conclusions of facts to the panel was necessary to ensure the efficacy of the two-tier system of the dispute settlement, thus preserving one of the main principles that distinguished the WTO dispute settlement mechanism from that of other bodies and tribunals in the international arena. Due to the Appellate Body's limited jurisdiction to questions of law, it was sometimes difficult, in situations where it had reversed a legal conclusion of a panel, to decide how to modify the panel's conclusions without remanding a claim to

the original panel. Introducing the remand concept, however, would require the extension of the overall time-frames for dispute settlement, and procedures would have to be developed allowing for further consideration by the panel. Thus, in the absence of clear guidelines that would regulate the remand power, the Appellate Body would be placed in an invidious position. Moreover, giving the Appellate Body a power to remand would raise certain shortcomings in the WTO system. This might be evidenced by the fact that panelists were not currently permanent judicial officers, thus it would be difficult to reconstitute the initial panel to hear the remanded report and that should be taken into consideration in reviewing the issue of the Appellate Body's remand authority. Ninth, unsolicited *amicus curiae* submissions. The WTO system had now reached a stage in its development where it made sense to recognize non-state interests in disputes between Members. Article 17 of the DSU, on its face did not allow *amicus curiae*, but he asked whether the Appellate Body or panels were bound by what was explicitly stated in the DSU. If this was indeed the case, one could end up with rather conflicting outcomes. For example, nowhere in the DSU was it mentioned that the Appellate Body had to make an objective assessment of the "issue" before it. The term "issue" comprised, in any dispute, issues of facts and law, as the unambiguous wording of Article 11 of the DSU made clear. Such an obligation of objective assessment was imposed only on panels pursuant to Article 11, but he wondered whether this precluded the Appellate Body from making an objective assessment of the matter before it. This was certainly not the case. The Appellate Body, hence, should have some discretion to conduct procedures before it.

7. The key was that, when exercising their discretion, the panel or the Appellate Body should not undo their implicit duty to respect due process and should ensure that unsolicited briefs did not extend to factual issues and that the parties to a dispute had ample time to react. It should always be taken into consideration that the unsolicited *amicus curiae* briefs would only be used to evaluate arguments made by the parties to the dispute and not to make the case for the complainant or the respondent. Therefore, a provision that clearly regulated the submission of unsolicited *amicus curiae*, or non-state interventions, within the ambit of the DSU would be of assistance to the dispute settlement process. This right of intervention would allow an interested person or group (such as environmental organizations, competing private sector firms, and citizens) to present evidence and arguments (legal or otherwise) to the panel or the Appellate Body, which would provide for increased transparency and expert information that would not be presented in Member's submissions. Again, this privilege might be misused in certain circumstances should there not be a clear framework for its application especially when a dispute involved a developing or a least-developed country Member, taking into consideration the financial burdens that might face them in addressing such submissions. Tenth, questions of interpretation. There was nothing in the DSU that prevented interpretations from being provided within the scope of the WTO whether through the Ministerial Conference or the DSB. Nevertheless, in keeping with the notion that the WTO was one body in the domain of public international law, Jordan suggested that panels, Appellate Body and/or DSB be granted the power to "seek" advisory opinions from the International Court of Justice (ICJ) on matters of international law. This would entail extending the advisory function of the ICJ to the WTO, as had been done with other specialized bodies. Reference to an independent panel such as the ICJ would attest to the impartiality of the WTO in the resolution of disputes that might emerge as a result of the application and implementation of the WTO Agreements. Advisory opinions should be considered as an instrument of interpretation that aimed at assisting the relevant bodies in recommending or adopting a report. The said opinion should be subject to adoption by the Ministerial Conference or the General Council pursuant to Article IX(2) of the Marrakesh Agreement Establishing the WTO. In the meantime and for the purposes of the current mandate of negotiation, Jordan agreed with the African Group's proposal with regard to the need to address the issue of interpretations through the organs of the WTO.

8. Eleventh, the role of the Secretariat. Pursuant to Article 27 of the DSU, the Secretariat had the responsibility of assisting panelists in a number of aspects. In practice, they did provide legal expertise and assisted panelists in a number of ways including drafting certain parts of their recommendations. This might have a diverse impact on transparency of the process of dispute

settlement should there not be a system that ensured that all documents, notes, information or any sort of contribution made available by the Secretariat were promptly provided to the parties and third parties to the dispute. Finally, the ability of the DSU to balance trade and legal objectives would continue to be one of its most significant tasks that could be achieved, with some innovation and willingness to change. The focus of this change should be toward greater integration of WTO law and practice with public international law and other trade policy issues. For the development of a more viable international trade regime, it was fundamental to have a dispute settlement mechanism that was fair and just and provided genuine redress for the weak against the strong. Developing countries would need to be prepared to face the challenges in improving and clarifying the dispute settlement mechanism. However, it should always be kept in mind that a legal system that did not encourage the participation of all its Members eventually lacked credibility and became unsustainable. Jordan welcomed Members' comments and questions on any of the above and was ready to work with other delegations towards reaching a common understanding on all points of concern in the on-going negotiations on the DSU.

9. The representative of Thailand said that his country's contribution focussed on the panel system. Thailand had examined the proposal made by the EC and its member States for the establishment of a permanent panel body and noted that a number of Members were not prepared to proceed in that direction, due to various reasons. One of the reasons included an increase of financial costs. It should be noted that no delegation to date had indicated that such a proposal had no merit. With that in mind and other factors, particularly the indication from the EC that it was prepared to consider any contribution from Members regarding the panel system, Thailand had formulated some ideas which it wanted to share with Members. Under the current system, if agreement was not reached on the panelists within 20 days after the establishment of a panel, the Director-General could be requested by either party to appoint the panelists in consultation with the Chairman of the DSB and the Chairman of the relevant Council. It was Thailand's proposal that notwithstanding the existence of the indicative list of panelists maintained by the Secretariat, which was regularly updated, the Director-General should also maintain an indicative list of candidates with the requisite qualifications stipulated in Article 8 of the DSU. This list, after approval by the DSB, shall be referred to as a "Roster of Panel Chairs" comprised of individuals who might be appointed by lot as Chairs of Panels. As indicated in part III.1 of Thailand's contribution (TN/DS/W/31), the number of individuals on the Roster shall be adjusted as and when necessary. Members might request the Director-General to appoint the Chair of the Panel, by drawing lot, from the Roster of Panel Chairs or determine determining the composition of the panel as provided for under Article 8.7 of the DSU. In the latter case, full effect had to be given to the prior appointment of a Panel Chair and/or any agreement between the parties on a panellist nominated by the Secretariat. In case where there were concurrent requests from the parties to a dispute for the appointment of a Panel Chair and the composition of the panel, the Director-General shall, in consultation with the parties, determine the composition of the panel as provided for under Article 8.7 of the DSU, including, where appropriate, through the selection, by drawing lot, of a Panel Chair from the Roster of Panel Chairs. He said that further details about the proposal by Thailand and the benefits that Members could gain from the proposed system were reflected in document TN/DS/W/31. He stressed that the proposed system would certainly facilitate work of the Director-General when he had to determine the composition of panels. It appeared, more often than not, that once a Panel Chair was appointed, it would be much easier for parties to a dispute to agree on the composition of a panel. Furthermore, should this system be adopted, it would not be necessary to amend the DSU. A decision by the DSB would be sufficient. It would in that context be worthwhile to have a compilation of all DSB decisions in a single document.

10. The representative of India welcomed Thailand's proposals on a roster of Panel Chairs and said that it appeared to be an improvement over the EC's proposal on the same matter. The main advantage appeared to be its flexibility; it would not do away with the current system, but strengthen it. He said, however, that his delegation had a number of questions which it would like to receive responses from Thailand. He wondered whether the roster of Panel Chairs be broadly representative of the WTO membership, as had been provided for in Article 17.3 of the DSU in respect of Appellate

Body members. Given that the appointment of the chair of the panel would be by drawing lots from the roster of panel chairs, he wondered whether it would not effectively reduce to inutility the provisions of Article 8.3 of the DSU. He also wondered whether it would not be useful if certain safeguards were provided, whereby citizens of Members whose governments were parties to the dispute or third parties shall not chair a panel in charge of that dispute. He asked what should be the duration for which an individual might remain on the roster of panel chairs. He further asked how frequently would the roster of panel chairs be revised.

11. The representative of Mexico said that since Members were now reaching the second phase of the negotiations and had the legal texts before them, it was important for the following issues to be addressed: (i) what was the problem that a particular proposal would solve? (ii) was there some sort of symmetry between the identified problem and the proposed solution or amendment to the DSU? He recalled that Mexico had raised these same questions when it introduced its own proposal. It was with this in mind that Mexico was submitting its legal text. Mexico was seeking to solve what it considered to be the greatest problem confronting the dispute settlement system. Mexico's proposed solution had taken into account a number of factors, including the need to achieve prompt and effective settlement of the dispute between the parties. Another merit of the Mexican proposal was that it made minimum changes to the existing text and was couched in simple language.

2. Other Business

12. The representative of India recalled that at the December Special Session of the DSB, his country had made certain preliminary comments on the joint proposal by Chile and the United States (TN/DS/W28) indicating support for some of its elements and said that they wanted to provide further comments on some elements of the proposal. With respect to the introduction of an interim review phase in Appellate proceedings, he said that notwithstanding the support expressed by India for this proposal, it did not share the view that the parties should be able to use this procedure to delete by mutual agreement certain parts of the report which they deemed to be unhelpful or unnecessary to resolve the dispute between them. This was not the practice nor purpose of the interim review stage in panel proceedings. The purpose had been, and ought to be, to point out any factual errors and make an assessment of the relevant legal issues. With respect to the proposal on "partial" adoption of panel and Appellate Body reports, he recalled that India had argued strongly in favour of such a procedure during a DSB meeting in April 2002, when the panel report in "*India - Automotive Sector*" was being considered for adoption by the DSB. In that case, the Panel had made findings on issues, which were beyond its jurisdiction, and the United States in its statement had agreed with India. However, India wished to know which procedures should be put in place and who would decide which portions of reports should be adopted.

13. He said that his delegation would like to get clarification from the proponents why they had invented two layers of protection – the interim review and the Appellate Body stages – to ensure control over the dispute settlement process by Members. With respect to the proposal relating to the suspension of panel and Appellate Body proceedings upon the mutual agreement of the parties, he recalled that under Rule 30(1) of the *Working Procedures for Appellate Review*, provision was only made for the withdrawal of appeals and not for suspension of the proceedings. He wondered whether the parties could suspend the proceedings at the interim stage, i.e., after the issuance of interim report to parties. If this was the case, there was the real possibility of abuse by Members. With respect to the proposal on ensuring that panelists had the requisite knowledge and expertise, he said that his delegation would like to know the motive behind it. He referred to the statement contained in the proposal that "Members may wish to consider whether the current DSU provides sufficient assurance that members of panels have the appropriate expertise to appreciate the issues presented" and asked whether the proponents favoured a system of permanent panelists along the lines advocated by the EC or whether they were proposing strict qualifications criteria for individuals to be included in the indicative list of governmental and non-governmental panelists. With regard to the proposal on providing additional guidance to the WTO adjudicative bodies, he said that his delegation would be

interested in knowing from the proponents what sort of "additional guidance" that they had in mind. He wondered if these new rules would complement the existing rules of interpretation. He asked whether the introduction of these new rules would not compromise the independence of the adjudicative bodies. The proposal was quite significant from India's view given the increasing resort by panels/Appellate Body to other international instruments to interpret the covered agreements. In *US - Gasoline*, for example, the Appellate Body held that by virtue of Article 3.2 of the DSU, the WTO system, like any other sub-system, could not be construed in "clinical isolation" of the widespread sources of public international law. This brought to an end to the belief that the GATT/WTO was a "self-contained" system. In the *US – Shrimp* case, the Appellate Body, for the first time, ruled that Article 31(3)(c) of the Vienna Convention on the Law of Treaties was the key to finding "additional interpretative guidance" from public international law. The Panel in *the Korea - Government Procurement* case even went one step further and employed rules and principles of customary international law to fill the unintended gaps in the WTO agreements. It stated that customary international law applied "to the extent that the WTO treaty agreements did not 'contract out' from it".

14. He said that these cases testified to the growing influence of public international law on the WTO dispute settlement process. He asked the proponents whether they could react to the following questions: (i) When confronted with a gap in any of the covered agreements, should the panel/Appellate Body distinguish between principles in universal/multilateral treaties as opposed to regional or simply bilateral treaties; (ii) In the *US – Shrimp* case, the Appellate Body had extensively referred to principles laid down in multilateral environmental agreements like the UNCLOS, the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals to interpret Article XX of GATT 1994. This was despite the fact that not all of parties to that dispute were parties to the agreements. What should be the guidelines for a panel/Appellate Body in such situations? Should it rely only on the principles contained in those treaties to which the parties to the dispute were both signatories? Under what circumstances could principles stipulated in a bilateral treaty be resorted to in a dispute initiated under the WTO dispute settlement system? He said that his delegation was ready to engage in constructive discussions with the proponents and would appreciate if they could clarify their concerns.

15. The representative of Jordan welcomed the joint Chile-US proposal and said that it contained many interesting elements which his delegation could probably support. These included the introduction of an interim phase in Appellate Body proceedings; permitting the parties by mutual agreement to "suspend" panel and Appellate Body proceedings and authorising the partial adoption of reports. He said that his delegation looked forward to receiving the legal texts of the proponents on these proposals.

16. The representative of China said that the paper by China circulated in document TN/DS/W/29 was not a proposal as such. Almost all the points in the paper had been raised by many developing-country Members during the negotiations. The communication reflected China's support for some of the proposals put forward with a view to strengthening S&D provisions in the DSU. China was of the view that a number of developing-country Members lacked sufficient understanding of many of the WTO Agreements and did not have the requisite human resources to defend their rights under the DSU. It was imperative for developing countries to be assisted so that they could make greater use of the dispute settlement system. She said that China was willing to work closely with other participants, in order to come up with language that would be acceptable to all.

17. The representative of the United States thanked India and Jordan for expressing support for certain elements of the US-Chile proposal. He said that his delegation had taken note of the very thoughtful comments and questions and would refer them to capital and consider them as the co-sponsors worked on developing the legal text of the proposal. He assured both delegations that the co-sponsors were open to discussing further their proposal with them.

18. The representative of Chile thanked China for its conceptual paper and said that Chile shared many of the ideas contained therein. He, however, asked if China could clarify paragraph 8 of Section 3 of its paper. It was stated in this paragraph that China supported the shortening of the time-frame for dispute settlement, particularly as regards disputes involving abusive trade remedy measures. He wondered why a distinction had been made between developed and developing countries regarding abusive trade remedy measures and whether there was any justification for granting special treatment to developing countries. From Chile's point of view, such measures were equally abusive for developed and developing countries alike. He recalled that it was already mandated that the special situation of developing countries should be taken into consideration by panels and the Appellate Body. He suggested that it would be useful in an informal mode to take up the issue whether or not developing countries should be granted differential treatment when considering abusive trade measures.

19. The representative of China said that her delegation would refer the question back to capital, but its preliminary response was that it would be reasonable to give developing countries special and differential treatment, given the fact that they had limited resources and lacked the same expertise as developed countries in using to the full the dispute settlement system.

20. The representative of India welcomed China's contribution and said that it contained several positive elements which India would like to study in detail before providing its comments formally later.

21. The representative of Thailand thanked China for its proposal and asked whether China intended to submit any legal text covering these proposals. He also asked whether China would like to see paragraph 2 of its proposal included in any DSU provision.

22. The representative of China said that she would contact her authorities to find out whether China would be submitting a legal text. However, since it was a conceptual paper, China would continue to work with other participants on specific issues. With regard to the question raised by Thailand, she said that she would provide her response in the near future.

23. The Chairman informed participants that the next meeting of the Special Session would take place on 17 and 18 February and that the discussion of the draft legal texts would continue. He asked if any delegation intended to submit any draft legal text before the next meeting. If so, he would invite them to do so by 7 February, in order for these new proposals be included in a revised compilation of draft legal texts.