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Special Session of the Dispute Settlement Body
17 – 18 February 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 – 18 February 2003

Chairman: Mr. Péter Balás (Hungary)

Prior to the adoption of the agenda, the Chairman welcomed participants to the ninth meeting of the Special Session and said that as he had stated in his concluding remarks at the Eighth Session, the present meeting would continue with the consideration of draft legal texts submitted by participants. He drew the attention of participants to five new contributions which had been circulated since the previous meeting: a proposal by Jamaica circulated as TN/DS/W/44/Rev.1; a proposal by Brazil circulated as TN/DS/W/45; a proposal by the United States circulated as TN/DS/W/46; a proposal by Cuba, Dominican Republic, Egypt, Honduras, India, Jamaica and Malaysia circulated as TN/DS/W/47 and a proposal by Australia circulated as TN/DS/W/49. He also drew their attention to the revised compilation of draft legal texts, which had been circulated as Job(03)10/Rev.1. This compilation included all the proposals that had just been referred to, except that of Australia which was available at the back of meeting room. He then proceeded to outline how he intended to conduct the meeting. He proposed that like the previous meeting, the discussion of the draft legal texts on the basis of the compilation should take place, whenever possible, in an informal mode. He said that the compilation now included references to the specific provisions of the DSU. Having completed an examination of texts covering Article 1 through to Article 9 of the DSU at the previous session, it was his expectation that there would at least be an examination of texts covering Article 10 through to Article 19 of the DSU at today's meeting. Depending on the progress that was made, there could be an examination of articles covering the implementation phase of the dispute settlement mechanism. It was imperative for progress to be made at this meeting if the objective was to complete an examination of all draft legal texts at the next scheduled meeting of the Special Session. He said that if delegations wished to make formal statements with respect to any of these textual proposals, they could do so at the end of this agenda item.

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 representative of Canada said that his country had long been an advocate of enhanced transparency in the WTO dispute settlement system. The strength of the WTO owed much to the support of the constituencies it served. These constituencies did not consist solely of governments, but included members of the public. Precluding the public from observing the dispute settlement process run the risk of arousing suspicion and courting public resistance where none was warranted. It was Canada's belief that increased transparency would foster a better understanding of the WTO and, in particular, the role played by the dispute settlement system in guaranteeing security and predictability in the multilateral trading system. Given these considerations, Canada wished to enhance transparency of the WTO dispute settlement system in two main ways: first, by facilitating public access to written submissions; and second, by allowing for public observation of panel and Appellate Body hearings. The details of the proposed textual amendments to the DSU were outlined in the proposal. Regarding the first proposal, it was Canada's suggestion that the written submissions of parties and third parties should be made available to the public at the time of filing, subject to

appropriate protection for confidential information. In that context, a registry could be established in the Secretariat to facilitate access to these submissions by the public. Regarding the second proposal, it was the suggestion of Canada that panel and Appellate Body hearings be opened to the public. In recognition of the resource and space constraints of the Secretariat, the proceedings could be telecasted to reach a wider audience. Portions of the hearings where confidential information was discussed would not be transmitted. He said that Canada had reviewed with interest the recent contribution by the United States on transparency. Given the similarities between these two proposals, Canada looked forward to working with the United States and other interested participants to see whether they could submit a joint draft text.

2. The representative of Jordan said that his country was conscious of the sensitivity of the issue relating to unsolicited *amicus curiae* briefs. While it was the view of some participants that this issue could not be addressed in the current negotiations, Jordan was of the view, however, that this issue should not be left drifting. It was still unclear whether or not panels and the Appellate Body had the authority to accept such briefs. There was nothing in paragraph 30 of the mandate given by Ministers at Doha which suggested that this issue could not be discussed with a view to clarifying the status of such submissions. The Appellate Body had in a number of instances adopted principles which it considered to be of assistance to the dispute settlement process, although no provision was made in the DSU for their adoption. One such example had been the recourse by the Appellate Body in a number of disputes to the principle of "objective assessment", which was not mentioned in Article 17 of the DSU. According to Article 11 of the DSU, it was only panels which were required to make an "objective assessment of the matter before it …". The mandate of the Appellate Body was strictly limited to issues of law, but in pursuance of this principle, it had from time to time been able to objectively assess the facts of the claims before it. Leaving this issue unresolved was not in the interests of developing countries, as it would undermine their rights and obligations. It might be necessary to have clear guidelines and procedures aimed at curbing the discretionary power of the Appellate Body. For the purposes of the current negotiations, there were two distinct set of proposals: the first was the proposals from the African Group, India and others which seek to prevent panels and Appellate Body from accepting unsolicited briefs. The second was the proposals by the US and the EC, which want clear procedures and guidelines to be enacted to regulate the admission of unsolicited information. The challenge was to select the option which would ensure efficacy of the dispute settlement system while protecting the rights of Members, particularly developing countries.

3. The representative of Brazil said that his country's proposal focussed on the issue of whether it was necessary for a Member to litigate a case *de novo* through all the established phases and time-frames, even if the same measure nullifying or impairing the benefits of this Member had already been found to be WTO-inconsistent in previous proceedings initiated by a different Member. It would be appropriate in such cases to have an expedited procedure which would ensure that a well-reasoned decision was given as quickly as possible. Such a procedure would be cost-efficient from the perspective of the parties and also the WTO Secretariat. The idea of a fast track or expedited procedure was not new and had already been proposed in other contexts by countries such as Australia in cases involving safeguard measures and recourse to compensation under Article 25 of the DSU and by Japan in cases involving a Member taking inconsistent measures under a discretionary law. The underlying reason behind Brazil's proposal was that whenever a Member considered that it was being affected by a measure that had already been declared inconsistent by an adopted Report, this Member would have the right to request the establishment of a "fast track panel", that would complete its work within 90 days. Should the report be appealed, the Appellate Body has to complete its work within 45 days. The basis for requesting a fast-track panel would be an adopted report. This could either be a panel report, an Appellate Body report or a compliance panel report. The panel request would be granted by the DSB at the meeting at which the matter was put on its agenda by the complaining member. Thus, it would not be necessary to have two meetings before a panel was established. He pointed out that this proposal was not novel, as it had been proposed by a number of Members including Australia and the EC. Regarding the composition of the panel, he suggested that it should be the members of the original panel, if they were available. The time-frames at each stage

of the procedure were merely indicative and Brazil was prepared to consider any suggestions in that regard. It was, however, of the firm view that the whole the process should not take more than 90 days. After the composition of the panel, the complaining Member would be expected to submit its written submission within a stipulated time-frame and the responding Member would also have to submit its written response with a specified time-frame. These submissions could be conveniently divided into two parts. In the first section, the complaining Member would need to demonstrate that that the measures in questions were the same as those measures which had been found to be WTO-inconsistent. The responding Member would then have to prove that the measures in question were different from the earlier measures. The second section would cover other relevant issues specific to the case under consideration. On the basis of these two submissions, the fast-track panel would within a **maximum** period of 15 days give its preliminary decision as to whether or not the contested measures were different from those found to be inconsistent by the DSB. It might not be necessary for the panel to hold a hearing before giving this decision. If the panel were to find that the contested measures were different, the fast-track procedure would be terminated. Should the complaining Member not be satisfied with the decision of the fast-track panel, nothing would stop it from having recourse to the regular procedures in the WTO to challenge the consistency of these new measures. If, on the other hand, the fast-track panel should conclude within a **maximum** period of 15 days that the measures were the same, there would be a hearing within a specified time-frame and the process from that time would be like the regular procedure under the DSU – the parties would meet with the panel and argue their respective cases. The final report would have to be issued within 90 days and where an appeal was lodged, the Appellate Body would have to give its decision within a maximum period of 45 days. The panel or Appellate Body was more likely to take into account its previous decision in the earlier case, particularly as regards possible time-periods proposed in the original report. He said that Brazil would welcome any comments on its proposal and was prepared to work with other participants in order to further refine its elements.

4. The Chairman commended Brazil for its proposal and the explanations it had just provided. The use of the chart indicating the time-frames being suggested was very helpful. He also noted that Brazil had already provided a draft legal text covering the elements outlined in its proposal.

5. The representative of Australia recalled that during the Special Session in January, some participants raised concerns about the legal certainty of DSB decisions for the type of changes that might be made to DSU. In light of those comments, Australia had resubmitted its proposal in the form of textual amendments. In each case, maximum effort had been made to ensure that the proposed amendments were as simple as possible and did not alter the current text of the DSU more than was necessary. Notwithstanding the submission of this text, Australia still believed that DSB decisions offered a simple way of achieving improvements and clarifications to the DSU without having to go through the usually cumbersome treaty ratification process or to undertake complex legal drafting. Turning to the specifics of the proposal, she said that Australia wanted the creation of a new Article 8bis which would provide for accelerated procedures for disputes on safeguard actions. The language of this new Article 8bis was based on the language of the previous proposal but addressed Members' concerns raised at the January Special Session concerning developing-country Members' rights for the application of standard DSU time-frames. With respect to the rights of non-parties to a dispute, she said that Australia had proposed an amendment to Article 22.2 of the DSU with a view to ensuring that the rights of third parties to a dispute whose rights and obligations had also been nullified and impaired by a WTO-inconsistent measure were respected, particularly as regards compensation. The amendment gave third parties the right to seek expedited arbitration under Article 25 to determine their right to compensation. If the arbitrator under Article 25 decided that the third party had a right to compensation, the third party could enforce this right through Articles 21 and 22, considering that Article 25(4) provided that Articles 21 and 22 applied "mutatis mutandis" to arbitration awards.

6. With respect to the level of retaliation imposed, she said that Australia had proposed an amendment to Article 22.7 of the DSU to ensure that once the concessions or other obligations had

been determined as equivalent to the level of nullification or impairment, parties shall not vary such concessions or other obligations. An exception to this general obligation was provided where the variation was to correct a technical error or where the concessions or other obligations were made inutile by subsequent developments. Where concessions or other obligations were varied after a determination had been made that the concessions or other obligations were equal to the level of nullification and impairment, the parties could have recourse to a second arbitration. With respect to possible time savings, she said that Australia had proposed an amendment to Article 6 which allowed for panel establishment at the meeting at which the complaining party's first request appeared as an item on the DSB's agenda. She said that as there was some similarity between the Australian proposal and those of the EC and Japan, Australia was willing to work closely with them and other participants on this particular issue. She further said that Australia had also proposed an amendment to item 12 of Appendix 3 which provided that the complaining party should submit its first written submission within five days of the composition of the Panel. Unlike the original proposal, this new proposal allowed the complaining party to know the panel composition before lodging the first written submission. It also ensured that usefulness of the consultation phase of dispute settlement was not affected by the complaining party's lodgement of first written submissions. The amendment therefore sought to take into account comments made by other delegations on the initial proposal on this issue.

7. Regarding the "sequencing issue" which referred to the order in which Articles 21.5 and 22 apply, she said that Australia had proposed the addition of a new Article 21.5bis so that it was clear that the procedures in Article 21.5 must be completed before the procedures in Article 22. Australia had also proposed an amendment to Article 22.6 so that there was time to complete the procedures in Article 21.5 before commencing the procedures in Article 22.6. The present proposal was based on current practice on the sequencing issue. In other words, the proposed amendments reflect how members currently deal with this is issue in bilateral arrangements. Unlike other proposals, these proposed amendments were very simple and required minimal amendments to the current text of the DSU. They would obviate the need for complex legal drafting and substantial amendments to the current text of the DSU.

8. The representative of the United States said that his country had long advocated greater transparency in the WTO dispute settlement system as a way of improving the system. He underlined that greater transparency could improve public confidence in the fairness of the dispute settlement system at the WTO which, in turn, could improve the operation of the system, as greater public confidence could translate into greater support for the implementation of DSB recommendations and rulings. He said that the legal text in the US proposal addressed these objectives by allowing the public to observe all substantive panel, Appellate Body and arbitration meetings, by making submissions and statements public and by providing for final reports to be made available to the Members and to the public once they had been issued to the parties. He said that the US had taken note with interest of the procedures proposed by the European Communities for handling *amicus curiae* submissions and looked forward to working with the EC and other Members on this issue.

9. The representative of Japan welcomed Brazil's proposal and noted the similarity between it and its own proposal on discretionary law. She said that her delegation would study the Brazilian proposal in greater detail and provide its comments later. She also said that her delegation was willing to work closely with Brazil on this issue.

10. The representative of India welcomed Brazil's paper and said that India understood the rationale and the problem which it sought to address. He said that his delegation would provide its comments when the meeting switched to an informal mode.