

**Special Session of the Dispute Settlement Body
24 October 2005**

MINUTES OF MEETING

Held in the Centre William Rappard
on 24 October 2005

Chairman: Mr. David Spencer (Australia)

The Chairman welcomed delegations to the thirty-second meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2693 and that the draft agenda (TN/DS/W/81) contained three items, namely: (i) discussion of contributions by delegations; (ii) discussion of Category II special and differential treatment provisions referred to the Special Session of the Dispute Settlement Body (DSB Special Session) by the Special Session of the Committee on Trade and Development (CTD Special Session) and (iii) "Other Business". With respect to the first agenda item, he said that two new contributions had been received since the last meeting of the Special Session. The first was a revision by Australia of its informal contribution on time-savings in the DSU. This document had been circulated as Job(05)/224. The second was an additional contribution by the United States in respect of one of the issues identified in its earlier contribution on additional guidance to WTO adjudicative bodies. This document would be formally circulated today as TN/DS/W/82. Informal copies of the document had been available at the back of room by the United States. He further said that it was his understanding that an addendum to this document would be circulated shortly. With respect to the second agenda item, he said that it was his intention to invite the proponents to introduce their proposals and then open the floor for discussions. With regard to "Other Business", he said that he would be making an announcement about the date and agenda of the next meeting of the Special Session. He asked whether any delegation would like to raise anything under this agenda item. There was no response from the floor and the agenda of the meeting was adopted.

1. Discussion of proposals from delegations

1. Before giving the floor to Australia, the Chairman recalled that the Australian proposal on time-savings had been discussed during informal consultations in September 2005 and said that it was his understanding that the proposal had been revised in light of comments provided by delegations. He then invited Australia to present its revised proposal.

2. The representative of Australia referred to the revised textual proposals on possible time-savings in WTO dispute settlement procedures submitted by her delegation and circulated as JOB(05)/224 on 10 October 2005, and said that the original proposals contained in JOB(05)/65 had been revised following the comments of delegations expressed during consultations. The revised proposal contained a new text on Article 4.7 of the DSU concerning the consultations period. While this issue had been addressed in the earlier proposal, a specific text had not been put forward. The proposed text on Article 6.1 of the DSU concerning panel establishment had also been revised. No changes had been made to the other textual proposals. The revised textual proposals on Articles 4.7 and 6.1 of the DSU had been crafted taking into account the views expressed by delegations. They seek to provide special and differential treatment to developing countries with a view to facilitating

their greater participation in the WTO dispute settlement system. With regard to Article 4.7, Australia was proposing the reduction of the consultations period to 30 days, with a special and differential treatment provision for automatic extension to 60 days upon the request of a developing-country Member. With respect to Article 6.1, Australia was proposing the establishment of a panel upon first request, with a special and differential treatment provision that requests by developing-country Members for deferment to a later date should be accorded sympathetic consideration by the DSB, but not granted automatically. Australia was of the view that the case for automatic special and differential treatment was not strong, as developing countries would have had ample time during the consultations period to prepare for the dispute. Australia was also of the view that other possibilities would interfere with the objective of simplifying the unnecessarily complicated and inefficient current Article 6.1. She said that Australia would welcome any comments from delegations.

3. The representative of India thanked Australia for its revised proposal and said that it was not appropriate to characterize the new proposals as special and differential treatment provisions for developing countries, as the current Articles 4.7 and 6.1 of the DSU already gave all Members those rights. Under the new proposal by Australia developing countries would have to make a request before they could enjoy the rights they currently do under Articles 4.7 and 6.1 of the DSU.

4. The representative of Australia stated that the Australian proposal offered genuine special and differential treatment to developing countries and attempted to address the concerns expressed by developing countries. She said that Article 4.3 of the DSU required Members to hold consultations within 30 days of the request being made and that the Australian proposal would not change anything in this respect.

5. The representative of the United States welcomed the opportunity to introduce the revised proposal on improving flexibility and Member control in WTO dispute settlement. The proposal consisted of six elements. The sixth element was to provide some form of additional guidance to WTO adjudicative bodies concerning the tasks entrusted to them. He recalled that the United States had indicated that the sixth element would be supplied after further discussions with Members. The revision that was discussed at the present meeting consisted mainly of the addition of some parameters as a basis for providing that additional guidance. He noted, as the United States had indicated before, that the central objective of the dispute settlement system should be the prompt resolution of disputes between parties. For that reason, Members had emphasized both the importance of ensuring that dispute settlement procedures facilitated resolution of a dispute and, as part of this approach, the need for flexibility in the system to allow parties to resolve disputes in a prompt manner. The core means for the system to resolve disputes was through the findings made. In turn, it was key to have appropriate, flexible procedures to ensure that the findings made would actually help resolve the dispute. The proposal the United States was pursuing recognized that there were areas where it would be useful for Members to provide their views rather than to leave WTO adjudicative bodies guessing as to Members' desires. Furthermore, the proposal sought to address concerns that some limitations in the current procedures might have resulted, in some cases, in an interpretative approach or legal reasoning applied 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. The United States believed that through the six 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 six elements were as follows. First, provide for interim reports at the Appellate Body stage, as was currently provided for at the panel stage. Inasmuch as there was no appeal from Appellate Body reports, it was particularly important that parties had an opportunity to address the reasoning in these reports and, through their

comments, ensure that they were of the highest quality and credibility. Second, provide a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that were not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference. Again, the purpose of the dispute settlement system was to resolve disputes. Unnecessary or unhelpful findings did not serve that purpose. Third, provide for some form of a "partial adoption" procedure, in which the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute. In effect, adoption by negative consensus would be applicable not simply to the report as a whole, but to its parts. If there was a consensus that part of a report should not be adopted, it would not be. Fourth, provide the parties a right, by mutual agreement, to suspend proceedings to allow time to continue to work on resolving the dispute. Currently for example there was no provision for suspending Appellate Body proceedings once they were commenced, and panel proceedings could only be suspended if the panel accepted the request of the complaining party. If Members wished to seek the preferred result of a mutually agreed solution, the dispute settlement process should not be so rigid as to stand in the way. Fifth, ensure that members of panels had appropriate expertise to appreciate the issues presented in a dispute. Experience to date showed that it could be helpful for the panelists to have the appropriate expertise concerning the particular issues in a dispute, although the current agreement did not speak to this issue. Sixth, provide some form of additional guidance to WTO adjudicative bodies on the scope and nature of the task presented to them. This sixth element had been the main focus of the revision introduced today by the United States. In particular, the United States was proposing at the present meeting parameters to help provide guidance in two areas that Members and bodies had struggled with under the dispute settlement system. The first area was the use of public international law in WTO dispute settlement. The second area was the interpretive approach to be taken by WTO adjudicative bodies. On the question of public international law, the parameters would recognize that public international law had an important role to play in WTO dispute settlement, but that role was not an unlimited one. Rather, the WTO Agreement prescribed particular ways in which public international law could play a role. Members were uniquely qualified to provide guidance in this area since it was Members who had agreed on both the role and the limitations of the role of public international law in WTO dispute settlement. On the question of interpretive approach, the parameters would recognize that the particular nature of the WTO Agreement and how it was developed should be respected when interpreting its provisions. Members were uniquely qualified to provide guidance in this area as well since the WTO Agreement was the product of the Members.

6. The Chairman thanked the United States for its contribution and Members for their constructive comments. He then invited Korea to present its paper on remand authority for the Appellate Body.

7. The representative of Korea recalled that Korea's proposal on remand authority for the Appellate Body had been discussed at the previous meeting of the Special Session and said that at that meeting, delegations had posed a number of questions aimed at clarifying the scope of the proposal. The paper circulated by Korea was an attempt to respond to those questions. He said that Korea would welcome any further comments and stood ready to respond to any questions that delegations might have concerning the proposal.

8. The Chairman thanked Korea for its paper and asked whether any delegation intended to submit a new contribution for the consideration of the Special Session. He stressed that time was of the essence and requested delegations which intended to submit contributions to do so as soon as possible.

9. The representative of Canada said that his delegation would soon be tabling a revised proposal for the protection of confidential information.

10. The representative of India said that in line with the Chairman's directions, India had been working with some delegations on issues of interest to developing countries. The basis of these discussions had been the three contributions submitted by a group of countries and circulated as TN/DS/W/18, TN/DS/W/19 and TN/DS/W/47. India had also met informally with some other developing-country groupings, including the LDC Group and the African Group, which had tabled contributions containing similar proposals. He said that India had also been having discussions with its Group of Seven partners. It was the considered view of the co-sponsors of these documents that the proposals contained therein were realistic, feasible and worthy of acceptance by the entire membership. He said that India would continue to consult with the co-sponsors and also with other delegations. However, given capacity constraints, countries with small delegations could not fully engage in the DSU negotiations while preparing for the Hong Kong Ministerial Conference. It would therefore be preferable if further discussions were deferred until after the Conference. He recalled that India and a number of countries had pointed out that the DSU negotiations were outside the "single undertaking" and would have preferred an early harvest, particularly of the issues of concern to the developing countries. This was yet to happen, but for reasons given, India would like proposals of developing-country Members to be taken up after the Hong Kong Ministerial Conference.

11. The representative of Malaysia expressed support for the statement made by India and said that Malaysia was committed to discussing the proposals tabled by developing countries as well as its own proposal on preventive measures. She thanked Members for their indulgence in accepting to return to consideration of these proposals after the Hong Kong Ministerial Conference.

12. The representative of the United States said that his delegation would continue to work on its proposal on measures under review.

13. The representative of Nigeria, on behalf of the African Group, expressed support for the statement made by India and said that the members of the African Group were reviewing the proposals tabled by them and would like to revert to them at subsequent meetings of the Special Session.

14. The representative of Cuba expressed support the statements made by India, Malaysia and Nigeria. She said that the proposals were still on the table and should be considered after the Hong Kong Ministerial Conference.

15. The representative of the Dominican Republic expressed support for the statements made by previous delegations and said that the proposals tabled by developing countries were of interest to her delegation and that discussions on them should resume after the Hong Kong Ministerial Conference.

16. The Chairman thanked delegations for their active participation and said that delegations needed to redouble their efforts if the DSU negotiations were to be concluded next year. In that connection, he requested delegations which wanted to submit proposals for the consideration of the Special Session to do so as soon as possible.

2. Discussion of Category II Special and Differential Treatment Provisions

17. The Chairman recalled that in May 2003, the Chairman of the General Council referred to the DSB Special Session for its consideration a number of proposals relating to the DSU which were initially submitted by a group of developing countries to the Special Session of the Committee on Trade and Development. He further recalled that the Special Session undertook in July 2005 to report on these proposals at a later date when work on them would have been more advanced. He said that it was his view that it would be appropriate at this stage to provide an opportunity for discussion of these proposals, which had been compiled in document JOB(05)/258. He invited delegations to pick up copies of this document at the back of the room. The nine Category II proposals referred to the

Special Session related to the following aspects of the dispute settlement procedures: SDT in consultations; extended timeframes; various aspects of the implementation phase; special procedures involving LDCs; and legal assistance by the WTO Secretariat. He proposed giving the floor to India and the African Group to elaborate on the proposals contained in TN/CTD/W/2 and 6 and TN/CTD/W/3/Rev.2, respectively and thereafter offer the floor to delegations for their comments. He wondered whether the comments by developing countries under the previous agenda item would mean deferring discussion on these SDT proposals.

18. The representative of India confirmed that India was a co-sponsor of some Category II proposals as reflected in TN/CTD/W/2 and TN/CTD/W/6 and said that for reasons previously given, they would like these proposals to be taken up after the Hong Kong Ministerial Conference.

19. The representative of Nigeria said that the African Group was also a proponent of Category II SDT proposals as reflected in TN/CTD/W/3/Rev.2, but would like these proposals to be taken up at subsequent meetings of the Special Session given the capacity constraints faced by small delegations.

20. The Chairman noted the comments of the proponents and said that he would accordingly inform the Chair of the Special Session of the Committee on Trade and Development. He urged the proponents to pursue further consultations and report back to the Special Session as soon as possible.

3. "Other Business"

21. The Chairman recalled that the Special Session was scheduled to meet on 14 November 2005, but said that it might be necessary to schedule a meeting on short notice depending on the preparatory process for the Hong Kong Ministerial Conference. He said that he would be conferring with the Director-General about developments and would promptly advise delegations if such a meeting would be held.
