WORLD TRADE ORGANIZATION

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Special Session of the Dispute Settlement Body
22 October 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 October 2004

Chairman: Mr. David Spencer (Australia)

Prior to the adoption of the agenda, the Chairman welcomed participants to the twenty-third meeting of the Special Session and recalled that at the last meeting of the Special Session at the end of May 2004, it had been agreed that he would report to the TNC the consensus among participants that work should continue towards clarification and improvement of the DSU, and that, on that basis, the Chairman of the TNC had forwarded to the General Council the TNC's recommendation that work in the Special Session should continue on the basis set out in that report and that this recommendation was adopted by the General Council on 1 August, as part of the July package.[1] Turning to the agenda for this meeting, the Chairman said that it contained three items, namely (i) discussion of the paper circulated as Job 04/52 by Argentina, Brazil, Canada, India, New Zealand and Norway; (ii) future work programme; and (iii) "Other Business". He asked whether any delegation would like to raise any matter under "Other Business". As there was no request from the floor, the item relating to "Other Business" was removed from the agenda. The agenda was subsequently adopted, as amended.

The Chairman noted that in preparation for the present meeting, a number of reference documents had been circulated. This included a checklist of documents, circulated as Job 04/157, which listed all documents made available in this negotiation since the commencement of negotiations. A revised version of the compilation of proposals had also been circulated as Job 03/10/Rev.4. A revised version of the statistical document, updated as of 30 September 2004, had been circulated as Job 03/225/Rev.1. It followed the same format as the previous version circulated last year. The Secretariat would welcome any comments or corrections that delegations might have in respect of this document. Also made available in the room were two informal contributions made by Canada and the United States in respect of treaty drafting conventions which were circulated last year as Job 03/1 and Job 03/2, respectively. Finally, also available was the document circulated as Job 04/52 by Argentina, Brazil, Canada, India, New Zealand and Norway which would be formally presented by participants under the first agenda item. The Chairman recalled that the document was circulated on 19 May 2004 but it had not been possible at the time to engage in a detailed discussion of its contents, as the date foreseen for the conclusion of the work was approaching. He reiterated his appreciation to the proponents for their initiative, recalling that he had encouraged participants to actively engage with one another and noting that this was a very constructive step forward. The opportunity to engage the entire membership in a discussion of the paper at this meeting was also very important.

[1] See document WT/L/579; 2 August 2004.

1. Discussion of the contribution contained in Job(04)/52

1. The representative of Norway recalled that a group of delegations had circulated and briefly introduced a "textual contribution to the negotiations on improvements and clarifications of the Dispute Settlement Understanding" informally to the Special Session in May 2004. At that time, they had also consulted with interested delegations and were prepared to hold further consultations with any interested delegation to discuss any of the elements in their paper. They had also indicated that they would welcome the opportunity to formally present their paper. It was against that backdrop, they were pleased to have the opportunity to present their paper at the present meeting. He said that the proponents had focussed on three issues of systemic importance for the operation of the DSU: sequencing, remand and post-retaliation. They did not believe that these were the only issues to be addressed in the negotiations but believed that these three proposals covered issues that most Members agreed should be dealt with in these negotiations. The group had started its work hoping to come up with a kind of "substantive mini-package", encompassing these and other issues of recognized systemic importance, within the then agreed time-frame. There was now no formal deadline for the negotiations. Regardless of when the next "milestone" would be, the group continued to believe that these three systemic issues would have to figure prominently in any revised DSU, be it in 2005 or later. In their view, any meaningful package to reform the DSU must take as its point of departure substantive changes, and not "cosmetics".

2. When the group originally set out to see what was achievable by the now long-gone May deadline, they chose to concentrate on a few topics selected on the basis of the following criteria: First, any proposed changes had to be of systemic importance, meaning that they would bring real improvements to Members. Second, the issues that to be addressed were those that could not be easily agreed or negotiated on an *ad-hoc* basis between the parties to a particular dispute. Third, the issues had to be "doable" in the short-term, based on the relative level of support and opposition they had perceived during the past couple of years. In drafting the elements of such a package, the group had been inspired by the inputs and the discussions that had led to the so-called "Balás text"[2], but were not necessarily wedded to those texts. The guiding principle was that any changes to the DSU should be kept as simple as possible and as few as possible, as that would make them easier to explain and understand. He said that the proponents had been considering other issues of systemic importance in addition to the three presented at this meeting, but their thinking on these issues was not as advanced. On certain issues, there seemed to be a general sense of how to operationalize the concepts, while other topics were still problematic. The other four topics the group had chosen to work on were "transparency", "third party rights", "compliance" and "developing-country issues". These four issues had also been chosen on the basis of the criteria detailed above. The proponents expected to circulate texts on some or on all four issues for later sessions.

3. The proponents were engaged in consultations with other Members to gauge their reactions to the proposals with a view to making changes to the drafts, as appropriate, and such consultations would continue in the near future. However, the suggestions for changes received so far had not been incorporated into the texts presented in the "non-paper". This did not at all imply that the group did not consider it feasible or desirable to make changes. Rather, time had not permitted such changes in May, and the reactions were also to some extent pointing in opposite directions. It was not for the group to say that the middle ground they had tried to capture in their textual proposal represented the exact correct balance. This would evolve as part of the final negotiations. The proponents were conscious of the fact that with the new time-frame for the conclusion of the negotiations, the pressure to converge rapidly might have evolved, as delegations would want to see the full picture of what a possible package might look like before relinquishing long-held positions on these three issues. The proponents fully appreciated this position and indeed some of them might even wish to revise and re-submit proposals that they had tabled earlier in other areas. At the same time, most would agree that,

[2] TN/DS/9.

while there were also conceptual differences in respect of certain aspects of some topics, including sequencing, most of these concerns related to the mechanics of the earlier proposals. It should be possible to refine the mechanics in light of recent proposals and crystallize areas where there were still political or conceptual differences, so that simple options could be presented to capitals for their consideration.

4. A lesson learned from experience so far was that proposals could benefit from being discussed in small informal groups before being brought to the Special Session. Broad-based discussions as well as broad-based support were essential to presenting ideas that would have a reasonable chance of acceptance in the Special Session. In relation to the as to whether or not delegations forming part of the group were demandeurs or protagonists of DSU reform in the selected areas, he said that when the group set out to see whether there could be a possibility of developing a compromise package on what they perceived as the seven most important substantive issues in the review, it was not because they were "demandeurs" on all or some of these issues. Rather, the group was acting more as friends of the DSU than as "demandeurs" in their own right. If they were demandeurs, it was not for the DSU review as such, but in safeguarding and promoting and furthering the DSU as a tool to ensure application of all the WTO agreements in all WTO Members, and certainly as a dispute settlement system accessible to all Members regardless of their size or economic weight. Their motivation was to see what could be done on the selected issues, trying to limit the changes to what was necessary to serve the three-pronged objective highlighted above. They hoped to receive comments from others on the same basis, and would respond with an open mind. The three issues would now be explained in more detail by other members of the group.

5. The representative of Brazil noted that sequencing was probably one of the longest-standing problems ever encountered with the operation of the DSU. Before proceeding to outline the details of their proposal, it was in order to give a brief overview of the problem and how it arose. The problem was brought to the fore in the *EC - Bananas* case, where the European Communities and Ecuador separately requested the establishment of compliance panels under Article 21.5 to determine the consistency of the new measures implemented by the European Communities with the DSB's recommendations and rulings, and the United States requested authorization under Article 22.6 to suspend concessions to the European Communities. The issue, in a nutshell, was whether a multilateral determination of non-conformity under Article 21.5 was always necessary before recourse to Article 22.6 for authorization to suspend equivalent concessions. In other words, should there be a sequence between Articles 21.5 and 22.6 of the DSU. The problem was made more difficult as there was no cross-references between the two articles. It was further exacerbated by the reference to "these dispute settlement procedures" in Article 21.5. Did it mean that all DSU procedures had been incorporated into this procedure which had to be completed within 90 days? For example, it was not clear whether Article 4 consultations were mandatory and whether compliance panels had to be established upon the first request, or whether Article 6.1 of the DSU was applicable. The rights of third parties were also not clear. Did they have an automatic right to participate in compliance proceedings under Article 21.5? Could Members that had not participated as third parties in the original dispute participate as third parties in the compliance proceedings? It was also not clear whether the findings of the compliance panel could be appealed under Article 17 and whether a new reasonable period of time for implementation of the DSB's recommendations and rulings should be established as a result of Article 21.5 proceedings. All of these questions arose and had no clear answer.

6. Turning to Article 22.6 of the DSU, he said that under this Article, the DSB had to grant authorization to retaliate within thirty days of the expiry of the reasonable period of time. This time-frame was difficult to meet, and a compliance panel took much longer than that. Article 22.2 of the DSU, on the other hand, provided a short period for negotiations on compensation, assuming a request was made by the complaining Member. If no request was made or agreement was not reached within 20 days after the expiry of the reasonable period of time, the complaining Member could request

authorization to retaliate against the responding Member. There was no cross-reference in this provision to Article 21.5 adding to the complexity of the problem. Finally, it was provided in Article 22.6 of the DSU that arbitration on the level of suspension of concessions should be completed within sixty days from the expiry of the reasonable period of time, rather than from the arbitration request. This had proved in practice to be absolutely insufficient for the arbitrators. Reference should also be made to Article 23 of the DSU, which aimed at the strengthening of the multilateral trading system and the prevention of unilateral action. It was debatable whether that provision shed any light on the sequencing issue. While Members had tried to cope with the sequencing issue by entering into bilateral agreements, this had not always worked. Brazil was involved in one dispute where it was not possible for the parties to reach agreement. There were also a number of variations in the agreements being concluded. Having a clearly defined legal procedure was therefore desirable.

7. Turning to the proposal of the group, he noted that the proposal first made it clear that any disputing party could request the establishment of a compliance panel. Currently, it was not clear whether it was only the complaining Member that could request the establishment of a panel. It was also proposed that consultations should not be mandatory. They may be necessary in some cases and not in others, so it would be up to the parties to decide on that. The proposal also made it clear that compliance panel reports could be appealed and that reports would be adopted in accordance with Article 16 of the DSU. It was clarified that the Member concerned would not be entitled to an extension of the reasonable period of time for the implementation of the recommendations and rulings of the DSB after the end of the Article 21.5 procedure.

8. With respect to Article 22.2 on compensation, it was the view of the proponents that the current twenty-day period within which the parties had to agree on compensation was not realistic. It was rare to find an agreement on compensation which was concluded within this tight time-frame. Under the proponents' proposal, if a request for compensation was made, the party to whom it was addressed would have to enter into negotiations within ten days of the request. There would be no deadline regarding when the negotiations for compensation should be completed. Compensation negotiations could therefore last as long as both parties might want. The new Article 22*bis* was very important, as it provided the link to Article 22.6 under which authorization could be sought to suspend equivalent concessions to the responding Member upon the occurrence of any of four events listed in the proposal. The proposal made it clear that the procedure under Article 21.5 should be exhausted before recourse could be made to Article 22.6, when there was disagreement on the consistency of implementing measures.

9. Finally, with respect to Article 22.6, he said that their proposal clearly spelt out the situations which must arise before authorization could be obtained under that provision to suspend equivalent concessions or other obligations. The proposal also provided for arbitrations on the proposed level of suspension to be completed within 60 days of the referral of the matter to arbitration, instead of 60 days after the expiry of the reasonable period of time. The proposed change would enable arbitrators to meet the deadline. He said that the proponents were of the view that their proposal offered a logical solution to the sequencing problem. It was up to Members, however, to decide whether this proposal was the most adequate and comprehensive solution to deal with this problem. In concluding, he recalled that the panelists in the *EC – Bananas* case had noted that they were aware of the debates concerning the relationship between Articles 21.5 and 22 of the DSU and that they viewed that question as one best resolved by Members in the DSU review. That was more than five years ago and it was probably high time to live up to those expectations. Finally, he noted that the proponents would be pleased to respond to any questions that Members might have.

10. The representative of New Zealand said that he would start with a general description of the problem sought to be addressed through remand and then outline some of the principles and thinking that laid behind the proposed legal text. He recalled that the mandate of the Appellate Body was limited to only addressing issues of law. Inevitably, there would be times when the Appellate Body

could not complete its analysis of a certain issue because there was not a sufficient factual basis for it to do so. In such situations, without a remand procedure, the only option to get such an issue addressed would be to restart the entire dispute settlement process again with respect to that issue. This could involve consultations, a nine-month or more panel procedure, and everything that went with it. It would therefore seem desirable to have a mechanism that would allow these issues to be dealt with more quickly. A remand process would be needed both to reduce timeframes and as a matter of good institutional process. It should not be necessary to restart a completely new case, simply because none of the issues could be resolved due to insufficient facts. This was not a theoretical problem, and had arisen in a number of cases, including *Canada – Dairy*. The possibility of it happening in other cases could not be discounted, and for that reason, the group believed that it should be addressed in these negotiations.

11. In proposing a solution to this problem, the proponents wanted to keep it as simple as possible and to make use of existing familiar concepts in the DSU. They did not wish to create anything fundamentally new. In essence, what they were proposing was an expedited panel procedure similar to the Article 21.5 compliance procedure. The proponents were also mindful of the need for flexibility, as it seemed difficult or impossible to have a "one-size fits all" solution to this problem, because the nature of the issues referred back to a panel might vary considerably. While some cases might raise only a single factual issue, others might raise several complicated issues which would require significant documentation and argumentation. It was against that background that the proponents advocated that as a general rule, the panel should circulate its report within ninety days of the referral of the matter to it, but the panel would have the flexibility to modify and adapt its working procedures. The proposal also addressed the question of who should decide whether an issue should be remanded. The proposal would allow any of the disputing parties to request that an issue be remanded. In that sense, the proposal differed from the procedure in most domestic jurisdictions where an issue would typically be remanded to a lower court by a higher court. The process would, under the proposed text, remain in the hands of the parties to the dispute. For that reason, the proponents deliberately used the phrase "referral procedure" to capture this concept. Finally, to ensure that the procedure was not used as a means for delaying implementation, it had been proposed that it should be possible for a party to request the adoption of both the Panel and Appellate Body reports. It was possible, for example, to envisage a case where there were ten different legal claims and the Appellate Body made findings on nine issues but could not complete its analysis of one issue because of insufficient factual information. In such a case, it would desirable for the original Panel and Appellate Body reports to be adopted in order to trigger implementation obligations. It would be open to the complaining party to decide to pursue the tenth issue through the referral procedure. He said that the proponents would welcome Members' views on both the general concepts lying behind the proposals and also on the specific drafting language.

12. The representative of Canada said that his presentation would focus on the proposed amendments to Article 22.8 of the DSU, relating to procedures for the removal of authorizations to suspend concessions or other obligations, or "post retaliation". Simply put, this addressed the question of what happened when a complaining party had imposed retaliatory measures and the defending party claims that it had taken measures to secure compliance, and there was disagreement between the parties that compliance had taken place. He said that Article 22.8 as currently drafted provided that the suspension of concessions or other obligations could remain in place until such time as the measure found to be inconsistent with a covered agreement had been removed, or the Member that must implement the DSB's recommendations or rulings has provided a solution to the nullification or impairment of benefits, or reached a mutually satisfactory solution with the other party. It did not cover situations where there was disagreement between the parties as to whether or not the measure that the defending party was proposing as an implementation measure was actually an implementation measure. It was possible to envisage a situation where retaliatory measures would remain in place, even though the other party might have taken measures to comply with the DSB's recommendations and rulings. At the same time, to suggest that retaliation should be lifted upon

notification by the defending party would not solve the problem either, as this would provide an incentive to defending parties to simply assert compliance so that retaliatory measures could be lifted. The proposal was intended to deal with this problem. The group was aware that there might be alternative ways to address this issue, but believed that their proposal offered a logical solution to the problem.

13. Under the proposal, there was the recognition that the Member against which retaliatory measures had been imposed would have already been found not to be in compliance with its obligations in the original proceedings and possibly also in proceedings under Article 21.5 of the DSU. It would therefore be for that Member to establish that it was no longer in violation and that the retaliatory measures imposed against it should be removed. The initial burden of launching another compliance proceeding would therefore be on the defending Member. Given the possibility that the implemented measures might raise questions as to the consistency of those measures with other obligations of the responding party, the proposal would also allow the complaining party to contest the adequacy of the implemented measures or raise allegations of violation of other obligations. The panel would examine both competing claims of the parties. Different outcomes could result from such proceedings. It could be envisaged that a panel might find that compliance had taken place, in which case the retaliatory measures should be lifted. It was also possible that the panel might find different sorts of violations or different levels of violation in which case there could be recourse to arbitration under Article 22.6. The proposal had a number of advantages. It provided a mechanism to deal with disagreements regarding compliance after retaliatory measures had been imposed. It also struck a balance between the rights of the complaining and responding parties. It was also flexible in that it recognized that the Member found to be in violation of its obligations might have increased or decreased the level of nullification or impairment of benefits. Accordingly, the proposal envisaged the possibility of another recourse to arbitration under Article 22.6. He concluded by saying that the group would welcome any comments and respond to any questions that delegations might have.

14. The Chairman thanked the proponents for the comprehensive introduction of their proposal. He said that there had been a good exchange of views during the discussion of the proposal in informal mode and that this would be reverted to in due course. He requested delegations which had posed questions to submit them in writing to the proponents to facilitate the preparation of responses.

2. Future Work Programme

15. In respect of future work, the Chairman proposed to consult further with participants on how best to proceed and suggested that the dates of the next meeting be confirmed for 25 and 26 November. The discussion initiated in respect of the contribution by the group of six delegations could be continued at that meeting. In parallel, the Chairman said that he would be undertaking some further consultations. He also encouraged delegations, in the meantime, to continue to talk to each other and informally work together in various formats and noted that the more discussions participants had amongst themselves, the more it would facilitate the negotiations.