WORLD TRADE ORGANIZATION

RESTRICTED

TN/DS/M/23
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Special Session of the Dispute Settlement Body
28 February 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 28 February 2005

Chairman: Mr. David Spencer (Australia)

The Chairman welcomed participants to the twenty-sixth meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2511 and that the draft agenda (TN/DS/W/73) contained three items: (i) discussion of the contributions by participants, namely Job(05)/19 by Argentina, Brazil, Canada, India, Mexico New Zealand and Norway and Job (05)/23 by the United States; (ii) work programme of the Special Session and (iii) "Other Business". He asked whether any participant would like to raise any issue under "Other Business". As there was no response from participants, he suggested the deletion of "Other Business" from the agenda of the meeting. The Chairman's suggestion was accepted and the agenda was adopted as amended.

1. Discussion of the contributions contained in Job(05)/19 and Job(05)/23

1. The Chairman said that two new informal contributions had been received from the group of seven countries and the United States. He suggested that the discussion of the two proposals take place in an informal mode. The Chairman's suggestion was accepted by the proponents, although they requested that their introductory statements be recorded in the minutes of the meeting. He invited the Argentina, on behalf of the group of seven countries, to introduce their paper.

2. The representative of Argentina said that the proposal by the group of seven countries dealt with the issue of third-party rights. The proposal had not reinvented the wheels and had been inspired by previous inputs by participants on this issue and discussions in the Special Session. In crafting this proposal, the proponents had been mindful of the basic objective of the dispute settlement system, which according to Article 3.7 of the DSU was to secure a positive solution to the dispute between the parties. While the proponents' proposal was in support of expanded third-party rights, it had been framed in such a way as not to undermine this basic objective of the DSU. It had attempted to strike a careful balance between the rights of the parties to the dispute and those of third parties. In striking this balance, account had been taken of the differences in resources available to Members to participate in the dispute settlement system. In tabling this proposal, the proponents had also been guided by their belief that any changes to the DSU must be minimal and should also be as simple as possible.

3. He said that the proposal covered four main issues. The first was the right of Members to be joined in consultations between the parties. He recalled that the main provision in the DSU regulating this issue was Article 4.11. As currently worded and applied, it permitted Members to which requests were addressed to reject them arbitrarily on the ground that the requesting Members did not have a substantial trade interest in the case. There was also the risk of discrimination among Members requesting to be joined in the consultations. Practice appeared to indicate that it was the defending Member which usually rejected requests to be joined in the consultations by third countries. Attempts

to address this issue in the past had focused on finding an appropriate definition for the term "substantial trade interest". Such efforts had so far failed as participants could not agree on a common definition. Bearing this in mind the proponents had devised a novel approach – an "all or nothing approach", under which the defendant could reject a request to be joined in the consultations only if it decided not to accept requests from any other Member. The rationale being that the complaining Member could choose to request consultations either under Article XXII or Article XXIII of the GATT 1994. Should it choose to request Article XXII consultations, it could not reject requests to be joined in consultations from particular Members. In other words, all requests should be granted. By contrast, Article XXIII consultations allowed the complaining Member to reject all requests to be joined in the consultations. In other words, consultations were held on a bilateral basis with the defending Member. Against this background, the proposal by the proponents was not radical. It reflected current practice with the advantage of restricting the current right of complaining Members to discriminate among Members requesting to be joined in the consultations.

4. The second element related to the right of third parties to attend panel hearings and receive documentation. On this issue, it was the proponents' recommendation that third parties should be allowed to be present at the first and second substantive meetings of the Panel and any other additional meetings that might be scheduled before the issuance of the interim report, except when privileged or business confidential information was being discussed. With respect to access to documentation, it was the proposal of the proponents that until the issuance of the interim report of the panel, all submissions of the parties should be made available to third parties, except those portions containing privileged or business confidential information designated as such by the party which submitted it. Apart from these situations, there appeared to be no logical reason to limit the participation of third parties under the process. It was difficult to justify the current rules in the DSU which restricted third parties to receiving only the first written submission of the parties and to attending a special session of the first substantive meeting. With regard to the active participation of third parties in the panel process, the proponents' proposal would not result in fundamental changes. Third parties would have an opportunity to file written submissions and be heard at the special sessions of the first substantive meetings. The possibility for third parties to pose or respond to questions was left to each panel to decide on a case-by-case basis, as was currently the case during the first substantive hearings of the panel. The proponents' proposal also covered the issue of additional or so-called enhanced third party rights. Currently, the decision to grant enhanced third party rights was left to the discretion of panels. The proponents' proposal would change the situation and allow the parties to the dispute to decide whether or not enhanced third-party rights should be granted. This approach struck a careful balance between the rights of third parties to participate in panel proceedings and those of disputing parties with limited resources, who could be overburdened by intensive third-party participation in the proceedings. It was important to ensure control and predictability over the proceedings.

5. The third element related to permitting Members which did not participate as third parties in the panel proceedings to join the dispute as third parties at the appeals stage. Under the current provisions of the DSU, Members were obliged to notify their substantial interest in the case at the panel stage before they could participate at the appeals stage, where issues of law and interpretation were essentially discussed. At the same time, it was possible for new third parties to be admitted as third parties to participate in compliance panel proceedings occurring after both panel and appellate proceedings. Given the systemic interest in issues considered at the appellate stage and the interest of Members to make their views known, there was no valid reason for denying them that opportunity. Additionally, amending Article 17.4 of the DSU to incorporate the right of Members to join as third parties at the appeal stage would allow Members with limited resources to participate in the process. They would not have to participate in the panel proceedings before they could be allowed to participate in the appellate proceedings.

6. The fourth element concerned some consequential amendments to Annex 3 of the DSU as a result of the proposal to grant third parties the right to attend all meetings of the panel, except where privileged or business confidential information was being discussed. The term "parties" in paragraph 7 of Annex 3 referred to the parties to the dispute and did not cover third parties. He said that the group of seven countries would welcome any comments or questions which Members might have and that they would do their best to respond them now or as soon as practicable.

7. The representative of the United States thanked the Chairman for giving his delegation the opportunity to introduce the "questions for consideration" that were circulated to Members. He recalled that the U.S. proposal on Member flexibility and control included an item, item (f), that proposed providing additional guidance to WTO adjudicative bodies concerning the nature and scope of the task presented to them and rules of interpretation of the WTO agreements. When the U.S. tabled the text for that proposal, it had specifically designated item (f) of that proposal as one that required further discussions with Members. After further consultation and consideration, it seemed that a good way forward would be to suggest some questions to facilitate that discussion. The topics listed were all ones that had come up in the course of various proceedings. In those proceedings, it seemed clear that panels or the Appellate Body were grappling with some difficult issues. These all seemed to be issues in which Members should have a strong interest. In fact, it had seemed that Members were in the best position to provide guidance to panels and the Appellate Body about what was the most helpful approach in terms of resolving disputes or in terms of clarifying what Members had agreed to in the DSU. These were the types of issues best discussed by Members as a whole and outside any particular dispute. As noted in the document itself, there might be additional questions or topics that would be appropriate. The U.S. would be interested in Members' thoughts on this as well. Item (f) of the U.S. proposal contemplated that the guidance could take any of several forms. Which form would be most useful would likely only become clear in the course of discussions. For example, the outcome could be an authoritative interpretation of the DSU, an amendment to the DSU, or a DSB decision. The U.S. recognized that Members had only just received these questions and was not expecting more than preliminary reactions at the present meeting. He said that the U.S. hoped to have an ongoing series of formal and informal discussions over the next period of time.

2. Future Work

8. The Chairman recalled that at the last meeting, he had indicated that he would continue to consult with Members on the best way of approaching the work of the Special Session. He had also indicated that it was imperative for Members to increase the pace of work if substantive progress was to be made in the negotiations. Since then a number of developments at the level of the General Council and the Trade Negotiations Committee had reinforced his view that there was the need for a change of gears in the Special Session. It should be assumed that when Ministers instructed at Davos that there should be substantive progress in the negotiations on rules, they were not only referring to the issues being dealt with by the Negotiating Group on Rules, but also to other issues, including dispute settlement. There was therefore the expectation that substantive progress had to be made by the Special Session by the end of the year. It was clear from his consultations that Members were generally happy with the bottom-up approach adopted thus far and would like to continue with it. The negotiations were between Members and as such they had the responsibility to take the lead by making proposals and building together the basis for a positive outcome. He had been encouraged by the recent flurry of meetings between delegations with a view to discussing how to move the negotiations forward. Such meetings were important in building consensus around issues paving the way for an agreement to be reached. He encouraged Members to continue to engage among themselves and explore the possibility of submitting revised texts for the consideration of others.

9. He said that while the bottom-up approach had proved to be useful, he intended to supplement this process by initiating at the next meeting of the Special Session a series of informal meetings in different formats. This would involve some "Room F" meetings with smaller groups of interested

parties and also some "Room D" open-ended informal discussions. It was his expectation that these meetings would contribute to the negotiating process by providing Members with an opportunity to seek clarifications and forge consensus around the issues under discussion. He stressed that these meetings would not replace plenary meetings where all necessary decisions would be taken. They were being convened only to help the process and that due regard would be given to the cardinal principles of transparency and inclusiveness. In order not to impose additional burdens on delegations, it was his intention to convene the smaller room meetings during the next Special Session which was scheduled on 4 and 5 April 2005. A fax would be send to delegations ahead of time informing them which subjects would be discussed. There were some obvious candidates, including the issue of third-party rights canvassed in the latest paper by the group of seven countries and the issues highlighted in the paper by the U.S. There was the possibility that other issues would also be discussed depending on the inputs that would be received from Members between now and the next meeting. Regarding the nature of the decisions that might be taken in July 2005 and at the Hong Kong Ministerial Conference, he said that he did not have any firm views at this stage, as the possible outcomes were directly linked to the progress made in the negotiations. If substantive progress was made in the coming months, it would largely determine the nature of the decisions that would be taken. He urged Members to focus on the negotiations and work hard to build consensus with a view of achieving substantive results by the time of the Hong Kong Ministerial Conference.

10. The representative of Canada said that his authorities had requested him to obtain more information about the work programme of the Special Session. He said that his delegation was in agreement with the U.S. that the negotiations should soon move from the current phase to actively considering legal texts which would form the basis of an eventual agreement. He asked whether this was foreseen that under the accelerated work programme earlier outlined by the Chairman. He asked if the Chairman could provide more information about the planned small room meetings, in particular the choice of issues that would be discussed. Was it the intention to have an issue-by-issue discussion as was done under Chairman Peter Balas or was the intention to have more focussed discussions on a selected number of issues? It seemed clear that Members wanted to move beyond conceptual discussions into more focussed discussions that would prepare the ground for substantive decisions to be taken. He said that it would be desirable if there was not too much overlap between the discussions to be held in Rooms D and F. It was imperative for Members to judiciously use the limited time available so as to ensure progress in the negotiations. He said that Canada might offer further comments on the work programme of the Special Session.

11. The representative of Israel thanked the Chairman for outlining the work programme he intended to follow and said that inasmuch as the process was Member-driven, the Chairman had a substantial role to play in moving forward the negotiations. She said that her delegation shared the view that it was important for there to be a change of gears in the negotiations, if substantive results were to be achieved by the time of the Hong Kong Ministerial Conference. She said that while it was important for there to be progress in all the negotiations, it should be borne in mind that the DSU negotiations were not part of the single undertaking. She said that her delegation was supportive of the planned small room meetings but it was important for the process to be as transparent and inclusive as possible.

12. The representative of India thanked the Chairman for his able leadership in the negotiations and said that India shared his general approach, particularly the emphasis on the Member-driven nature of the process and bottoms-up approach under which Members were required to take the lead in the negotiations. He said that India would continue to participate constructively in the negotiations. Regarding the planned small room meetings, he said that India was satisfied that they would be scheduled during the time allotted to the DSU negotiations so as not to impose additional burdens on delegations, particularly those with limited resources. He said that while there should be progress in all the negotiations, his delegation shared the views of Israel that the DSU negotiations were distinct and not part of the single undertaking.

13. The representative of Japan said that his delegation was in support of the work programme outlined by the Chairman, particularly the planned small room meetings. He said that it was, however, important to minimize overlap of meetings as had been previously alluded to by Canada. He said that Japan was working on a proposal which it would soon submit to the Special Session.

14. The Chairman said that it was not in dispute that the DSU negotiations were outside the single undertaking. He said that it was clear that the negotiations needed to move beyond the clarificatory phase to actively considering legal texts. He had already foreshadowed the circulation of a text for the consideration of delegations, as the negotiations progressed but could not tell exactly the shape that it would take. It was unclear at this stage whether the proposed decisions would be given effect to through a decision of the General Council, an amendment of the DSU or an authoritative interpretation of the DSU. Members would eventually have to decide which form the product should take. He reiterated his view that he intended to have focused discussions in the next phase of the negotiations. Regarding the choice of subjects to be addressed, he asked delegations to give him some discretion to choose which subjects were ripe for discussions. He recalled in that context that a large number of proposals had been submitted by delegations, including the recent ones submitted by the group of seven countries. Regarding the need to avoid overlap of meetings, he said that it was not his intention to hold simultaneous meetings on the 4-5 April. He said that in the future, it might not be possible to avoid overlaps in meetings generally, as pressure mounted on negotiating bodies to achieve substantive progress. He said that the Secretariat had reserved rooms for meetings of the Special Session on 9-10 May, 21-22 June and 28-29 July and that every effort would be made to respect the guidelines on meetings, but it was inevitable that there would be clashes at times.

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