WORLD TRADE ORGANIZATION

RESTRICTED

TN/DS/M/31
26 June 2006

(06-3112)

Special Session of the Dispute Settlement Body
21 March 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 March 2006

Chairman: Mr. Ronald Saborío Soto (Costa Rica)

The Chairman welcomed delegations to the thirty-fourth meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2777 and that the draft agenda (TN/DS/W/84) contained two items, namely: (i) discussion of contributions by delegations; and (ii) "Other Business". With respect to the first agenda item, he said that three proposals had been received since the previous meeting of the Special Session. The first was an informal contribution by Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway, circulated as Job (05)/19/Rev.1. The second was an informal contribution from Canada, circulated as Job (06)/56, while the third was a contribution from the United States, circulated as TN/DS/W/82/Add.2. It was his intention to ask the proponents to present their proposals and then open the floor for comments from Members. He further said that it was not his intention to raise any item under "Other Business" and asked whether any delegation wished to do so. As there was no request from the floor, he proposed the deletion of this item from the agenda. The agenda of the meeting was then adopted as amended.

1. Discussion of Contributions from Members

The Chairman thanked the delegations which had submitted contributions and said that given the looming deadlines, it was important for delegations which were thinking of submitting contributions to do so as soon as possible. It was his understanding that the contribution by the Group of Seven Countries (G-7) – Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway – was a revision of their earlier proposal on third party rights. The new proposal had taken into account the comments provided by Members during informal consultations, such as those facilitated by Mexico. He invited Canada on behalf of the G-7 to present the revised proposal.

The representative of Canada said that this proposal was a revised version of the proposal on third party rights that the G-7 had submitted to the Special Session some time ago. In revising this proposal, the G-7 had taken into account the views and drafting suggestions made by Members during informal consultations, particularly in the context of the Mexican Group meetings. He thanked Mexico for facilitating these meetings and also delegations which had commented on the proposal. The G-7 was confident that this revised proposal was clearer and far better textually. He highlighted the changes in the revised proposal. With respect to Article 10.2 of the DSU, the scope of the rights of third parties had been clarified, particularly their right to respond to questions both orally and in writing to questions of the panel. As regards Article 10.3, the language of the original draft was unclear. The new formulation in parenthesis had captured the intention of the proponents and improved the text. Regarding Article 17.4, the changes introduced in paragraph (b) reflected more accurately the original intention of the G-7. Some consequential changes had been made to paragraph 6 of Appendix 3. The G-7 had taken on board the vast majority of drafting suggestions made by delegations. In that context, it would be advisable for Members to be guided by the following principles when drafting proposals. First, the proposal and the draft language should refer to each

party. This would avoid any confusion and make clear the obligations of each party. Second, it was better to draft in the active voice rather than in the passive voice. This method of drafting clarified the obligations of each party. Third, proposals should closely reflect existing language in other parts of the DSU, so that any change in language was not taken to reflect a change in intention or a conceptual change. Finally, he said that the G-7 had taken careful note of the suggestions made by Members concerning third parties joining consultations under Article 4.11. After careful reflection, however, the G-7 believed that its proposal had struck a careful balance between the rights of third parties and those of the parties to the dispute. From an intellectual and policy perspective, the proposal was coherent. However, the G-7 was open to further suggestions to improve the proposal and also looked forward to the moment when negotiations could begin on texts.

The Chairman thanked Canada and its partners for their contribution and invited Members to provide their comments informally on the three sub-themes addressed in the proposal starting with third party rights.

The representative of India associated his delegation with the statement made by Canada on behalf of the G-7 and thanked the Chairman for his introductory statement as well as the encouragement to delegations to come forward with proposals to the Special Session as soon as possible. This revised proposal by the G-7 was an example of the efforts of India and other countries in responding to the plea by the Chairman. India was working in various groups and formats and expected to submit contributions to the Special Session in due course. In reference to the Chairman's introductory statement concerning deadlines, he said that while work should proceed at a quickened pace, no deadlines had been agreed by the Special Session.

The Chairman thanked India for its statement and recalled that in his statement after being appointed as Chair, he had clarified that the timelines were merely indicative and designed to assist Members to fulfil the obligation of completing the negotiations as rapidly as possible. He thanked Members for their comments on the G-7 proposal and said that it was apparent from the discussions that Members still had different views on how the rights of third parties should be enhanced at various stages of the dispute settlement process. The differences seemed to be more pronounced on the rights to be given to third parties at the Appellate Body stage.

The Chairman then invited Canada to present its proposal which had been circulated as Job(06)/56. But before doing so, he said that it was his understanding that the proposal was not new and that it was a revised version of an earlier proposal by Canada on the handling of confidential information in the course of dispute settlement proceedings.

The representative of Canada said that this proposal was a revision of an earlier proposal (TN/DS/W/41), which was submitted to the Special Session in 2003. It dealt with the concept of the maintenance of some form of confidentiality for proprietary information submitted during dispute settlement proceedings. In the course of discussions with Members, Canada had recognized that its earlier proposal was unclear in certain respects and could benefit from additional refinement. Members' experiences with the dispute settlement system had demonstrated the need for effective procedures for handling confidential information. In that regard, it was appropriate to distinguish between on the one hand, the confidentiality of the process and on the other hand the confidentiality of information submitted during the process. The proposal was intended to deal with the latter issue. The party submitting the information might consider it to be confidential or seek protection on the grounds that it had some proprietary value. Put differently, the information might have some financial or commercial value for private parties. The proposal had been refined to broaden the concept of confidentiality. It now referred to strictly confidential information and contained a new definition which was broadly based on Article 39 of TRIPS Agreement. Attempts had been made to prevent the abuse of these procedures by Members who might try to designate information that was neither confidential nor had any proprietary value. While the earlier proposal only covered the panel process,

the revised proposal had been expanded to cover other circumstances during dispute settlement proceedings, such as arbitrations and procedures under Annex V of the Agreement on Subsidies and Countervailing Measures. The proposal had also urged a revamping of Article 18 of the DSU in light of the discussions on transparency and the need to provide additional guidelines for the handling of strictly confidential information. As a supporter of the enhancement of transparency in the dispute settlement system, Canada recognized the need to work further with Members to better integrate the concept of transparency into the current proposal.

The Chairman thanked Canada for its proposal and suggested that Members provide their comments informally. After the discussions, the Chairman thanked Members for their comments which showed that further work on some elements of the proposal might be necessary. He also thanked Canada for agreeing to work further with Members to refine the proposal. He said that the next proposal to be discussed was that of the United States. It was his understanding that the proposal, circulated as TN/DS/W/82/Add.2, further elaborated on one of issues – measures under review – in the earlier proposal of the United States on Member control and flexibility, submitted sometime ago to the Special Session. He invited the United States to present its proposal.

The representative of the United States welcomed the opportunity to introduce its additional proposal on parameters concerning the measure under review in dispute settlement. The proposal was part of the overall proposal on improving flexibility and Member control in WTO dispute settlement. As Members might recall, the United States had previously submitted proposals for parameters on the use of public international law in dispute settlement as well as on the interpretive approach to use in dispute settlement. This latest proposal was intended to complement the two previous ones in order to provide further guidance to WTO adjudicative bodies in carrying out the tasks entrusted to them. Members would recall that when the United States tabled the two previous proposals, it had explained that it would be tabling a proposal on the measure under review. The purpose of this latest proposal was to enhance the ability of the WTO dispute settlement system to carry out its central objective of promoting the prompt resolution of disputes between parties.

As with the prior two proposals, the US proposal under discussion at the present meeting recognized that there were areas in which 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 some of the issues with which parties, panels and the Appellate Body had recently wrestled and to ensure that Members had a chance to express their desire in terms of how the system should deal with these issues. In particular, this proposal addressed three areas. The first area concerned the order of analysis that was appropriate in dispute settlement. This part of the proposal sought to ensure that dispute settlement was working to resolve actual disputes and clarifying the application of the covered agreements in the context of a particular dispute, rather than addressing hypothetical situations or rendering authoritative interpretations of the covered agreements in the abstract.

In this connection the proposal emphasized that the order of analysis should respect the fact that findings needed to relate to a measure actually taken by a Member affecting the operation of a covered agreement and not to hypothetical situations. The second area concerned the definition of a measure. While it would appear ill advised to attempt to craft a definition of "measure" that would apply to each and every provision of every covered agreement, there was room for guidance on what was a measure, including by providing guidance on what was not a measure. The third area concerned the distinction between mandatory and discretionary measures and the usefulness of clarifying the ability of Members to challenge a measure that is mandatory but not yet in effect. It also addressed the situation where a Member had discretion under its measure allowing it to act either consistently or inconsistently with its obligations. The question in that situation was whether WTO adjudicative bodies would be justified in presuming that the Member would act in bad faith and would deliberately exercise its discretion to breach its obligations.

All three of these issues have taken the time and resources of Members in particular disputes but without the Membership providing guidance to help panels, the Appellate Body or arbitrators to manage these issues on a systemic basis. The United States believed that it would be in the interest of all Members to provide such guidance. While the United States had suggested parameters in the present proposal, it was referring to them as "draft" parameters because it believed that each of these areas could benefit from discussion among the Members, recognizing that there were several possible ways to express each of these. The United States had suggested language at this level of detail to avoid being overly prescriptive. It could envision the language being adopted in something akin to its current form, after reflecting discussions among Members. Members were uniquely qualified to provide guidance in these areas since ultimately the WTO dispute system needed to address the needs of Members. The United States would suggest that the most appropriate means to provide additional guidance in these areas was not through an amendment to the DSU but rather through some other more flexible means, such as through an authoritative interpretation by the General Council or Ministerial Conference, or through a decision by the DSB.

The United States looked forward to hearing Members' views on these issues as well as those it had previously tabled. It looked forward as well to further refining the guidance so as to enhance the ability of the dispute settlement system to better fulfill its basic purpose.

The Chairman thanked the United States for its contribution and invited Members to provide their comments informally. After the discussion, he thanked Members for their active participation and said that while the discussion had been useful, there were still some issues which had to be discussed further. He also thanked Members who in response to his appeal had submitted contributions and asked those working on new or revised contributions to come forward with them as soon as possible. He asked them to provide updates on status of work and when they expected to submit them to the Special Session.

The representative of the European Communities said that the European Communities was in the process of finalising a proposal on post-retaliation. It was currently being discussed in the Mexican Group and should hopefully be submitted to the Special Session before its next meeting.

The Chairman thanked Members for their active participation and asked delegations who were working on contributions to keep him abreast of any developments. He announced that the next meeting of the Special Session would take place on 24-25 April 2006.