

**Special Session of the Dispute Settlement Body
24 -25 April 2006**

MINUTES OF MEETING

Held in the Centre William Rappard
on 24-25 April 2006

Chairman: Mr. Ronald Saborío Soto (Costa Rica)

The Chairman welcomed delegations to the thirty-fifth meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2802 and that the draft agenda (TN/DS/W/85) contained two items, namely: (i) discussion of contributions by delegations; and (ii) "Other Business". With respect to the first agenda item, he said that four new proposals had been received since the previous meeting of the Special Session. The first was an informal contribution by Hong Kong, China, which had been circulated as Job(06)/89. The second was a joint contribution from Japan and the European Communities, circulated as Job(05)/47/Add.1. The third was a contribution from the United States, circulated as TN/DS/W/86, while the fourth was a joint informal contribution by Argentina, Brazil, Canada, India, New Zealand and Norway (G-6). This document was currently available in the room and would be circulated later as a Job document. He said that it was his intention to invite 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

1. Prior to giving the floor to Hong Kong, China, the Chairman stated that it was his understanding that the proposal advocated an alternative approach for addressing the conditions under which non-disputing Members should be allowed to participate in consultations as third parties. It had been crafted taking into account earlier proposals and the views expressed by Members. He invited Hong Kong, China to present its proposal.

2. The representative of Hong Kong, China said that Hong Kong, China had raised this idea in the past during discussions in the Special Session and also during informal consultations, especially in meetings of the Mexican Group and had benefited from the comments of Members on earlier draft texts. The proposal focussed on one particular element of the third party rights, which was the acceptance or rejection of requests to join in consultations by third-country Members. It advocated an alternative approach to the all or nothing approach proposed by the Group of Seven Countries (G-7). Essentially, Hong Kong, China shared the concerns of the G-7 that Article 4.11 of the DSU practically gave the responding Member a free hand in deciding whether to reject or accept requests by third-country Members to join in consultations. This could result in discrimination among third-country Members. However, the all or nothing approach bundled all requests to be joined in consultations and required the acceptance or rejection of all requests. Such an approach was too rigid and failed to take into account the differences among the requesting countries. Furthermore, it could

also lead to a practice where the responding Member might be tempted to routinely reject all the requests, especially where they considered that one particular request was not justified. Given these shortcomings, Hong Kong, China believed that an alternative approach was warranted. Under the suggested approach, there would be a presumption of acceptance of all requests to join in consultations by third-country Members, unless the responding Member and complaining Member either decide jointly or separately to reject the request. The advantages of this proposal were that it minimised the risk of the responding Member rejecting a third-country Member depending on whether or not it was supportive of its position in the dispute. In that context, it addressed the concerns of the G-7 relating to discrimination among Members. It further provided some flexibility for the parties in line with the desire to retain some Member control over the dispute settlement system. As previously noted, the responding Member and the complaining Member could reject a particular request from a third-country Member, if they believed that the participation of third parties would, for example, complicate efforts to reach a mutually satisfactory solution in the dispute. She said that Hong Kong, China was looking forward to a fruitful discussion of the proposal and was ready to respond to any questions that Members might have.

3. The Chairman thanked Hong Kong, China for its contribution and invited Members to provide their comments informally on the proposal. After the discussion, the Chairman thanked Members for their active participation and said that it was apparent from the discussions that Members had different views on how the rights of third parties could be enhanced in the dispute settlement system. He expressed his gratitude to Hong Kong, China for agreeing to hold further discussions with other Members on the proposal.

4. The Chairman then invited Japan and the European Union to present their joint proposal which had been circulated as Job(05)/47/Add.1. But before doing so, he said that it was his understanding that the proposal elaborated on a specific aspect of the broader issue of "post-retaliation", which was originally covered in an earlier proposal by the proponents (Job(05)/47).

5. The representative of Japan said that the present proposal by Japan and the European Communities (EC) elaborated on an earlier proposal relating to the creation of a specific post-retaliation procedure under which an existing DSB authorization to suspend obligations would be removed, once the implementing Member had achieved compliance. The earlier proposal which was submitted in 2005 did not include an explicit mechanism to adjust the authorized suspension of obligations following a compliance review with a negative outcome for the implementing Member. This was now addressed in the current proposal by the introduction of a new paragraph 8(e) of Article 22. The EC and Japan had come to the conclusion that such a provision would be a necessary component of the improved post-retaliation procedure. It appeared both fair and useful that the DSU was equipped with a mechanism for upward adjustment of the retaliation if the level of nullification or impairment had become higher as a result of the implementing Member's new measures. Conversely, when that level had dropped, downward adjustment should be possible. The EC and Japan did not believe that introducing a provision which enabled such downward adjustment created a counter-productive incentive to an implementing Member not to comply fully with the recommendations and rulings of the DSB. He recalled that a procedure for the adjustment of the level of retaliation was also contained in earlier texts produced in these negotiations. The current proposal was based on previous proposals, but also on the wisdom accumulated during these negotiations. In formulating the proposal, the EC and Japan had been guided by the desire to encompass all possible scenarios that could occur under the dispute settlement system. They had also followed the same basic approach under Articles 22.6 and 22.7 of the DSU. Specifically, the complaining Member might request the modification of the authorized level or form of retaliation. The Member concerned might then refer the matter to arbitration if it objected to the new level or form of retaliation proposed by the complaining Member. In the absence of a modification request by the complaining Member, the Member concerned might object to the previously authorized level of retaliation and refer the matter to arbitration. The present proposal was without prejudice to the interpretation of the current

rules of the DSU with regard to the post-retaliation situation. The EC and Japan believed that it was best to approach these questions from an objective and systemic perspective in the present negotiations. The EC and Japan looked forward to other Members' reactions to the proposal and the opportunity to work further with other Members with a view to agreeing on a post-retaliation procedure and on compliance review in its entirety. He said that the EC and Japan would continue to engage in the currently ongoing exercise of improving the legal drafting of submitted proposals. Once the work on post-retaliation had been concluded, the EC and Japan would submit a revised version for the entire text of Article 22.8 of the DSU with a view to ensuring consistency with the wording in other relevant provisions.

6. The Chairman thanked the EC and Japan for their contribution and invited Members to provide their comments informally on the proposal. After the discussion, he thanked Members for their constructive engagement and said that it was clear a number of elements needed to be explored further. He then invited the United States to present its proposal, which had been circulated as TN/DS/W/86. He said that it was his understanding that the present proposal further elaborated the earlier contribution of the United States on transparency.

7. The representative of United States said that Members were aware that the United States had long advocated greater transparency in the WTO dispute settlement system as a way of improving the system. There were several advantages to greater transparency. Greater transparency could improve public confidence in the fairness of the dispute settlement system at the WTO. Enhanced public confidence, 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. And greater transparency benefited WTO Members that were not a party or third party to a dispute, including by assisting them in deciding whether to become third parties in disputes. The United States had previously proposed draft amendments to the DSU and draft DSB decisions to provide greater transparency (in TN/DS/W/46). At the present meeting, the United States was responding to comments of other Members by proposing some revisions to the legal drafting. The revised legal text would continue to address the objective of greater transparency 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 Members and to the public once they had been issued to the parties. And as had been indicated before, the United States 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. In proposing these revisions, the United States appreciated the comments received from other delegations. The United States had particularly tried to respond to what appeared to be three key drafting guidelines that would benefit any legal drafting work on the covered agreements. These were: first, to use the same term throughout to mean the same concept and, second, wherever possible, to use singular rather than plural terms; and third, wherever possible, avoid the use of the passive voice. The United States looked forward to hearing Members' views on these proposals as well as those it had previously tabled.

8. The Chairman thanked the United States for its proposal and its responses to the questions posed by Members. He also thanked Members for their constructive engagement and said that the discussion had revealed that there were areas which needed to be explored further. He invited New Zealand on behalf of the G-6 to present their proposal on remand authority for the Appellate Body.

9. The representative of New Zealand said that the proposal by the G-6 was a revision of an earlier proposal by the G-6 on remand authority for the Appellate Body. Textually, the revised proposal was an improvement over the earlier proposal. It had been drafted taking into account the views expressed by Members during informal consultations. She said that the G-6 was ready to respond to the questions that Members might have when the meeting switched to an informal mode.

10. The Chairman thanked the G-6 for their revised proposal and their responses to the questions posed by Members. He also thanked Members for their constructive engagement and said that the discussion had revealed that there were issues that needed to be discussed further. He expressed his appreciation to Members who had responded to his plea that proposals should be submitted as rapidly as possible to the Special Session. He also welcomed increased consultations among Members and noted that this had made it possible for revised texts to be submitted to the Special Session. He said that it was his understanding that further informal work was continuing, particularly within the Mexican Group, and reminded Members that such meetings were open-ended and that greater involvement by them could be beneficial for the process. He encouraged Members that were still working towards the submissions of contributions to also consult informally with other Members. If the Special Session were to have text-based negotiations by the summer, then Members should submit their proposals as rapidly as possible. It would have been preferable if Members had submitted their contributions before the present meeting. It was important to have a clearer picture of where the Special Session was heading and what it was aiming for. He invited delegations that had indicated in the past that they were working on contributions to give an indication when they would submit their proposals to the Special Session. He recalled that India had informed the Special Session at its previous meeting that it was working with some Members on development-related issues and was also in consultations with other developing-country groupings, including the African Group. He then invited India to take the floor.

11. The representative of India said that India had been working intensively within the "like-minded group" which had a number of proposals (TN/DS/W18, W19 and W47) on the table and was presently engaged in consultations with other Members on these proposals. Work was relatively advanced and it had been expected to present revised proposals to the Special Session before its present meeting. However, it had not been possible to do so and it was the expectation of India that they would soon be submitted to the Special Session for its consideration. India was also consulting with the LDC Group and the African Group with a view to exploring commonalities in their proposals and making a submission to the Special Session. Furthermore, India had been working in other forums with some Members on issues of interest to developing countries. The objective was to develop a coherent proposal encompassing existing textual proposals and other proposals for submission to the Special Session. He reiterated that while India agreed that the pace of work should be quickened, the Special Session had not agreed on any deadlines. India was committed to working as rapidly as possible and would be submitting revised proposals with its co-sponsors to the Special Session after preferably discussing them within the Mexican Group.

12. The Chairman thanked India for the information it shared with the Special Session and expressed the hope that India and its co-sponsors would soon be submitting revised proposals to it. He welcomed the intention of India and its co-sponsors to hold informal consultations on the proposals within the Mexican Group. He said that his plea to delegations to submit proposals on a timely basis was meant to pave the way for text-based negotiations as soon as possible, preferably by the summer break. He reiterated that no deadlines had been agreed by the Special Session and that the dates proposed were merely indicative intended to assist the Special Session to comply with its ministerial mandate.

13. The representative of Nigeria said that the African countries were currently engaged in intensive consultations to revise their proposals. They had had contact with other Members, including India regarding proposals of common interest. Once work on these proposals had been completed, it was the intention of the African Group to discuss them as widely as possible with other developing-country Members, including with India and other members of the "like-minded group" and also present it for Members' reactions in the Mexican Group. He supported the statement by India that while the pace of work should be quickened, there had not been any agreement on deadlines in the Special Session.

2. Other Business

14. The Chairman recalled that in May 2003, the Special Session of the Committee on Trade and Development referred a number of special and differential treatment (SDT) provisions, otherwise known as "Category II" proposals, to the Special Session with a specific instruction that they be considered as soon as possible and on the basis of "a specifically drawn-up time schedule of work". In October 2005, consideration of these proposals was postponed, at the request of the proponents, on the understanding that they would be taken up after the Hong Kong Ministerial Conference meeting. Following his assumption of the Chairmanship of the Special Session, he and other chairpersons of WTO bodies had been requested to provide updates on work on these proposals. He had informed the Chairman of the CTD Special Session at the end of March 2006 that the Special Session had resumed its work and was intending to meet approximately once a month until the summer, and that while no specific date had yet been set to discuss these Category II proposals, it was his intention to schedule a meeting as soon as possible to take up this issue. He asked whether the proponents could give an indication when they would like consideration of these proposals to take place. He said that he and the Secretariat were available to provide any assistance that might be required to facilitate discussion of these proposals. He invited India to take the floor.

15. The representative of India said that among the proposals being discussed within the "like-minded group" were the Category II proposals. While work had progressed sufficiently well, the Group had not finished its consideration of one particular Category II proposal. India was working intensively with its co-sponsors, but it could not give any firm date when they would be submitted to the Special Session. However, India was committed to finalizing work on these proposals as rapidly as possible, so that they could be examined by the Special Session.

16. The representative of Nigeria said that the African Group was working on the Category II proposals but like India, it could not give a firm date when they would be submitted to the Special Session for its consideration. The Group was, however, determined to submit the proposals as soon as possible, so that a thorough discussion could be held on them in the Special Session, preferably after they had been discussed in the Mexican Group.

17. The Chairman thanked India and Nigeria for their statements and said that the next meeting of the Special Session was scheduled to take place on 22-23 May.
