WORLD TRADE ORGANIZATION

RESTRICTED

TN/DS/M/34
4 August 2006

(06-3768)

Special Session of the Dispute Settlement Body
13 July 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 13 July 2006

Chairman: Mr. Ronald Saborío Soto (Costa Rica)

The Chairman welcomed delegations to the thirty-seventh meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2861 and that the draft agenda (TN/DS/W/88) 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 new contributions had been received from Members since the last meeting of the Special Session and he proposed that they should be considered at the present meeting. Regarding the second agenda item, he said that he would like to make a statement about the future work of the Special Session. He asked whether any delegation wished to raise a specific issue under this agenda item. There was no response from the floor and the agenda of the meeting was adopted.

1. Discussion of Contributions from Members

1. The Chairman reiterated that three new proposals had been received since the last meeting of the Special Session. These were a contribution from Japan on third-party rights circulated as Job(06)/175; a contribution from Cuba, India and Malaysia containing revisions to texts initially proposed in TN/DS/W/47, and lastly, a contribution from Switzerland on third-party rights circulated as Job(06)/224. He proposed that since the contributions of Japan and Switzerland related to the same issue, they should be taken up together. He then invited Japan to present its proposal.

2. The representative of Japan said that Japan did not see a need for altering the structure of Article 4.11 of the DSU. Currently, if a Member's request to join consultations under this Article was not accepted, that Member was free to request its own consultations with the Member that had implemented the alleged inconsistent WTO measures. Japan could not support the "all or nothing" approach nor the "double negative" approach, but could agree to two elements contained in earlier proposals by Members, such as the Group of Six Countries and Hong Kong, China. The first element related to having a requirement obliging Members receiving consultation requests from third parties to respond to them within a certain time-frame. This requirement would help third parties, particularly non-residents to plan ahead and generally enhance predictability. The second element related to requiring Members receiving consultation requests from third parties to respond to them in writing. It was logical to stipulate the same obligation not only for requests but also for replies. This proposal was not entirely new; it had built on earlier proposals by Members. The textual contribution on these two elements should assist Members in their text-based negotiations. She stressed that this contribution only related to Article 4.11 consultations and was without prejudice to Japan's position on other aspects of third-party rights.

3. The Chairman thanked Japan for its contribution and invited Members to provide their comments informally on the proposal. After the discussion, he thanked Members for their constructive engagement and invited Switzerland to present its proposal.

4. The representative of Switzerland said that the aim of their proposal was to strengthen the rights of third parties at the consultations phase. The means to achieve this aim were information and transparency. The proposal was based on the conviction that third parties, as well as all other WTO Members, had a genuine interest in obtaining clear information on ongoing consultations and specifically, the result of such consultations. The interest did not lay exclusively in actively participating in the discussions held within the framework of consultations – which remained confidential – but also and perhaps principally, obtaining comprehensive information in due time. Without a timely notification of the status or the result of consultations, it could not be excluded that the settlement of a given dispute came at the expense of countries not participating in that dispute. Given these considerations, Switzerland was of the view that paragraph 6 of Article 3 of the Dispute Settlement Understanding (DSU) should be refined through the inclusion of a new paragraph 4a in Article 6 of the DSU. This proposal would oblige disputing parties to provide a status report to the DSB every 60 days on the evolution of the consultations. The reports should enhance the transparency of the dispute settlement system as a whole and prevent the staying in limbo of consultations for a long period. It should be noted, however, that the proposal did not prejudice the right of the complaining party to request the establishment of a panel.

5. WTO Members had a genuine interest in knowing about the content of mutually agreed solutions. The proposal would oblige the disputing parties not only to notify that a solution had been mutually agreed but to communicate the substance of the agreed solution. With respect to cases staying in limbo, it was not the objective to dig into the past and resurrect dormant cases. The proposal was prospective in nature. The idea was to avoid cases staying in limbo for a long period in the future. This was the *raison d'être* of the last sentence of the proposal. Paragraph 4a of Article 6 was of a procedural nature. There was a certain overlapping of the four alternatives contained therein. The stress was less on choosing one alternative or the other but more on the fact that information on the state of the consultations was to be given to the DSB. He said that the proposal had benefited from comments provided informally by Members under the auspices of the Mexican Group. This Group had proven to be a very valuable tool in furthering the DSU negotiations. It was the strong intention of Switzerland to remain fully engaged in the Mexican Group as well as in the discussions in the Special Session.

6. The Chairman thanked Switzerland for its contribution and invited Members to provide their comments informally on the proposal. After the discussion, he thanked Members for their active participation and noted that it was clear from the discussions on both the Swiss and Japanese proposals on third-party rights that there were still a number of issues which needed further clarification. Different approaches towards enhancing third-party rights had been suggested and it was imperative that they all be considered fully by the Special Session. He thanked once again the Swiss and Japanese delegations for their contributions and invited Cuba, India and Malaysia to present their proposal.

7. The representative of Malaysia recalled that a group of like-minded developing countries had presented a number of proposals in two contributions during the pre-Cancun stage of the DSU negotiations. These proposals were contained in two documents TN/DS/W/18 dated 7 October 2002 and TN/DS/W/19 dated 9 October 2002. The text of the amendment to the DSU based on these proposals was contained in TN/DS/W/47 dated 11 February 2003. There was convergence on some of these proposals which were fully or partially included in the Balas text, while others triggered a number of questions and comments from some Members. Based on the discussions in the pre-Cancun days as well as informal consultations with some other Members in the post-Cancun work of the DSB-Special Session, the proponents had revisited the texts contained in TN/DS/W/47 to address

questions and concerns as well as to make legal drafting changes. The resulting revisions were now embodied in the document presently before the Special Session. In introducing the proposal, she said that she would like to focus initially on what was not contained in these revisions. Proposals relating to paragraphs 2, 4 and 6 of Article 17 and paragraph 10 of appendix 3 of the DSU did not find a place in these revisions. The proponents were continuing to revisit these texts in the light of developments in the dispute settlement practice including recent changes in the Appellate Body Working Procedures. They were yet to make any suggestions on these four proposals. The revision exercise also took into account the ongoing consideration by the Special Session of the Category II Special and Differential Treatment proposals tabled earlier in the Special Session of the Committee on Trade and Development. Some Members of the Like-Minded Group had also tabled independently proposals pertaining to Articles 4.10, 12.10 and 21.3 of the DSU. Progress on these issues should advance the work of the Special Session.

8. With respect to notification of mutually agreed solutions, she said that it was the only means through which Members would learn about solutions agreed between the parties to the dispute. Transparency demanded that the terms of such solutions were made available to WTO Members in sufficient detail and without undue delay after arriving at the solution. The proposal had been retained in its entirety in its substance, although certain drafting changes had been made. The first change was to avoid judgmental language regarding sufficiency of the details of the terms of the solution. The second change was a purely drafting change: the term "solution" was used instead of "agreement" in respect of what was to be notified. Regarding *amicus curiae* briefs, the proponents recognized the strong views that it had attracted from some Members. However, for the reasons which were well known in light of the earlier discussions on the subject, including the debate on this issue in the General Council, the proponents continued to require a change to the DSU to ensure a correct interpretation of the word "seek" in Article 13 of the DSU. In light of the discussion so far, the proposal now recognized the right of the panel to seek information contained in Article 13. The proposal limited this right to information or advice that the panel sought so as to exclude unsolicited inputs into the dispute settlement process. They were mindful of the fact that the Appellate Body had drawn up procedures for accepting such unsolicited briefs. That was an unacceptable step in the light of the objective of the proposal. Therefore, a footnote was proposed to be added to paragraph 9 of Article 17 relating to the Appellate Body Working Procedures, clarifying that the Appellate Body shall seek or accept information only from participants and third participants to a dispute.

9. With respect to cross retaliation, the proponents believed that developing-country Members, when in a dispute with a developed-country Member, should have the right to cross-retaliate notwithstanding the threshold for such cross-retaliation contained in Article 22.3. That demand was reflected in the revised text for Article 22.3 *bis*. The textual revisions were purely of a drafting nature. Regarding reimbursement of litigation costs, the proponents continued to believe that reimbursement of these costs to developing countries was important to improve their access to the dispute settlement mechanism. Some developed-country Members had a number of questions and concerns relating to definitional and operational issues. Taking into account these questions and concerns, Article 3 *bis* had been re-drafted to make it simple, practical and operational by providing flexibility to panels and the Appellate Body to determine what were reasonable costs of litigation. In answer to questions relating to implementation of a decision on litigation costs, a last sentence had been added to enable this decision to be an integral part of the recommendations and rulings to be adopted by the DSB. With regard to special and differential treatment (SDT) at the consultation stage, the proponents had proposed that Article 4.10 of DSU should be strengthened to make it operational and effective. The discussions on this issue had raised a number of questions, including which Article in the DSU this provision should come under and the consequences of such an obligation in the dispute settlement process. To address such questions and concerns, apart from making the language in Article 4.10 mandatory, a new Article 4.10 *bis* had been added. This Article did two things. Firstly, it obliged developed-country Members to provide adequate opportunity to developing-country Members to make requests for SDT. Secondly, it obliged them to explain the rejection of each request. This was

simply an exercise in making the existing Article 4.10 operational and effective. In addition, to ensure clarity of jurisdiction, a new sentence was proposed to be added to Article 6.2 to enable this matter to be justiciable before panels and the Appellate Body.

10. With respect to SDT at the panel stage, certain amendments had been proposed to Article 12.10 to make it operational. The first was to extend the consultation period for developing countries and the second was to provide them with more time for submissions. The original text had been revisited and replaced by two simple changes: a new second sentence and a new penultimate sentence to capture both these objectives. Regarding SDT in the determination of the reasonable period of time (RPT), the original proposal of an amendment to Article 21.2 of the DSU had prompted a number of questions from Members who believed fixing benchmarks was not practical and that it would be better to decide the RPT on a case-by-case basis taking into consideration the circumstances of the case. This proposition had been accepted by the proponents. As a result, a simple footnote had been added to Article 21.3(c) obliging the arbitrator determining the RPT to take into account the particular problems and interests of developing-country Members in interpreting the particular circumstances that would determine the length of the RPT.

11. The Chairman thanked Malaysia, Cuba and India for their contribution and invited Members to provide their comments informally on the proposal. After the discussion, the Chairman thanked Members for their constructive comments and said that there were a number of issues which had to be clarified further. He commended the proponents for taking into account the views of Members in revising their proposal which had made a meaningful contribution to the work of the Special Session.

2. Other Business

12. The Chairman expressed his gratitude to delegations for participating actively in the negotiations. The informal work being done by them reflecting the bottom-up approach had contributed immensely to the negotiations. This process had resulted in draft legal texts on a number of issues and this had given the Special Session an excellent basis to make further progress in the next phase of work. He urged Members which were in the process of revising their contributions to consult informally with other Members and seek their views before presenting them to the Special Session. He said that the African Group had informed him that their revised contribution was in the process of being finalized and should be ready by the time of the next meeting of the Special Session. He recalled that he had requested delegations to start giving thought to how the Special Session could work towards a rapid conclusion of the negotiations as instructed by Ministers at Hong Kong, China. He had already started consulting delegations on this issue and it was his intention to continue the informal consultations with Members, in order to further shed light on the work programme in the months ahead, building on the work accomplished thus far. He announced that the Special Session was scheduled tentatively to meet on the following dates after the summer break: 11-12 September; 4-5 October; 9-10 November; and 11-12 December.