WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
10 April 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 10 April 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

1. Extension of the deadline for nominations of candidates for an Appellate Body member

(a) Proposal by China

1. The Chairman said that the above-mentioned item was on the agenda of the present meeting at the request of China. He recalled that China's proposal for the extension of the deadline for nominations of candidates for an Appellate Body member had already been considered by the DSB at the informal meeting held on 28 March 2006. At that meeting, an informal understanding had been reached that China's proposal should be accepted. Subsequently, in order to bring this matter formally before the DSB, China had requested that a special DSB meeting be held in order to consider its proposal. He then invited the representative of China to speak.

2. The representative of China recalled that at its 17 February 2006 meeting, the DSB had launched the process of selecting an Appellate Body member to succeed the late Mr. John Lockhart for the remainder of his term. At that meeting, it had also been agreed that the deadline for nominations of candidates would be 31 March 2006. At the DSB meeting on 24 March 2006, taking into account both the ongoing selection process in China and the fact that no nomination had been submitted up to 24 March, China had proposed, under "Other Business", that the deadline for nominations of candidates for an Appellate Body member be extended until 30 April 2006. Based upon an understanding that had been reached at the informal meeting held by the Chairman on 28 March 2006, China was now putting forward a formal proposal for consideration by Members that the deadline for nominations of candidates for an Appellate Body member be extended up to 30 April 2006 and that a decision be made accordingly.

3. The representative of Brazil said that his delegation noted China's proposal to extend the deadline for nominations of candidates for an Appellate Body member. As it had been pointed out in the context of the previous discussion on this matter, Brazil fully appreciated the complexity inherent in the task of selecting domestically a candidate with an adequate profile and required knowledge to perform such a unique and important function in the WTO. In this light, Brazil expressed its appreciation for the efforts made by Ghana and South Africa in order to present their respective candidates in a timely fashion. While Brazil would not oppose the consensus on China's proposal, it considered that it was important to stress the following systemic issues. First, Members should be extremely cautious about taking decisions with retroactive effects. Such course of action had a clear impact on the credibility of the decision-making process of the DSB. Brazil hoped that the current situation would stimulate WTO Members, in the next selection process for Appellate Body members, to consider all the relevant factors so as to determine really appropriate time-periods for different

steps in such a process, including for nominations of candidates. In any case, in Brazil's view, a decision by the DSB at the present meeting to extend the 31 March deadline should not set a precedent for the future.

4. Second, Brazil wished to briefly comment on the use by Members of "Other Business" items for substantive purposes. Brazil's comment was related not only to the specific issue under consideration, which had initially been raised under "Other Business" at the 24 March DSB meeting, but also to a series of instances where substantive matters had been brought to the DSB's attention in that way. Brazil strongly recommended that Members refrain from raising substantive matters under "Other Business". Appropriate advance notice of the matters to be discussed in the DSB was a key pre-condition for the DSB's ability to ensure security and predictability in the application of the multilateral rules. In most cases, discussions in the DSB were either a result of, or a prelude to, prolonged disputes with serious economic and political consequences for the parties directly involved, and systemic implications for the whole Membership. In that sense, at a minimum, delegations should be given time to properly consult with capitals about any matter to be discussed in a DSB meeting.

5. The representative of the United States said that selecting members of the Appellate Body was one of the most important decisions for the DSB. The United States had long supported the idea of having a robust pool of candidates for Members' consideration. Therefore, the United States was sympathetic to the objective of providing sufficient time for Members to come forward with nominations of candidates to serve on the Appellate Body. And because this was an important decision, the United States also considered that it was important that DSB procedures be followed. However, the United States was troubled by aspects of the manner in which this issue had been put before Members at the present meeting. While the agenda item made clear that the issue of additional time for nominations was to be discussed, it was only from informal discussions that the United States understood that the intention was to take a decision in this regard. Further, the DSB agenda was not accompanied by the documentation for China's proposal, as would normally be the case when a decision was to be taken. In this regard, the United States noted rules 4 and 26 of the General Council rules of procedure which were applicable to the DSB. The United States, like others, had therefore been handicapped in its ability to prepare for the present meeting. He recalled that when this issue had been discussed at the 24 March DSB meeting, Members had raised concerns about the precise formulation of any decision. Having the precise text of what was being proposed for decision would be of significant benefit to Members as they developed their positions on the proposal. The United States appreciated the explanation that had been provided at the present meeting that the decision was to establish a deadline of 30 April 2006 for nominations of candidates. The United States did not object to the substance of this request, and accordingly it was willing to join a consensus to extend the deadline. However, the United States wished to reiterate that it was essential that the rules of the DSB be followed, in particular rules designed to ensure that all Members normally had advance notice of the decisions they were being asked to take.

6. The representative of Canada said that a number of issues that he would have wished to raise had already been touched upon, therefore, he would not address them at this point. However, there were three points that he wished to comment on. First, Canada thanked the three Members that had already submitted their nominations within the deadline; i.e. Benin, Ghana and South Africa, and stressed that the decision to extend the deadline did not and ought not reflect, in any way, on Members' collective judgement in respect of any of the three candidates, all of whom on first impression appeared to be of the highest calibre.

7. Second, he wished to refer to the point raised by the United States with respect to the importance of having a robust pool of candidates from which to appoint an Appellate Body member. This was why Canada would not oppose the extension of the deadline. However, as he had mentioned at the 24 March DSB meeting, and as had been pointed out by Brazil at the present meeting, Members

had to be careful about extending deadlines retroactively. In this particular instance, the matter had been raised before the end of the 31 March deadline and the reasons for the extension were set out in China's statement. Given the nature of the deadline and the nature of this unexpected vacancy as well as the importance of the task, one could make exceptions, but this should not be seen as setting a precedent for the future.

8. Third, he said that Canada had already raised its systemic concerns regarding this matter on another occasion and, at the present meeting, he simply wished to recall the statement made by Canada at the 24 March DSB meeting. He noted that the problem with raising items under "Other Business" and expecting substantive discussions or substantive decisions was that delegations would not be able to comment because they would have no instructions from capitals. A simple extension of the deadline by one month, which appeared not to be a big deal, had ended up requiring quite a lot of consultations between Members and their capitals because of the systemic issues involved. Thus Members had been put in a very difficult position at the 24 March meeting as they had been obliged to oppose the consideration of the item raised by China. While Members valued China's comments and sympathized with its concerns they had had no instructions from capitals and had not been in a position to make a decision. It was, therefore, important that Members exercise due restraint when bringing up matters under "Other Business", in particular issues such as an extension of a deadline which could have been anticipated in advance.

9. The representative of the European Communities stated that the EC supported China's proposal to extend the deadline by one month to nominate candidates to fill the vacancy in the Appellate Body. The agreed deadline was understandably short in order to have the Appellate Body with only six members for as brief a period of time as possible. However, the EC fully understood that Members would need some time in order to identify and propose strong candidates for the important position to be filled. At the 17 February 2006 DSB meeting, the EC had stated that the quality of the candidates was of the utmost importance and that the late John Lockhart was a lawyer of the highest standing. Ultimately, it was more important to fill the current vacancy with a person equally qualified for, and as committed to the important tasks of an Appellate Body member rather than to complete the process quickly. Having as many candidates as possible might thus be beneficial for the Selection Committee, and ultimately for the DSB's tasks in the present selection process. The EC thanked those Members who had already proposed candidates and thanked in advance those Members who would make their proposals in the coming weeks.

10. The representative of Japan said that it was not the first time that the extension of this type of deadline was being considered by the DSB. In the past the DSB had faced this type of situation. At that time, Japan had made a statement to the effect that this type of extension should not constitute a precedent. In that sense, he wished to join the previous speakers who had raised that point. While Japan did not oppose the extension of the deadline, it believed that Members should refrain from misusing this type of avenue to extend a deadline that had already been agreed upon.

11. The representative of Mexico said that, on previous occasions, his country had already expressed its concern about decisions being taken not at the right time and supported the statements made by other Members to this effect. The only additional comment that Mexico wished to make was that, like the United States, Mexico agreed that the selection of a member of the Appellate Body was one of the most important decisions to be taken by the DSB. However, on the two occasions when this matter had been discussed very few delegations were present in the room. Therefore, Members had to exercise due restraint in holding meetings such as the present meeting with only one item on the agenda, which would last for a short period of time and not many delegations would turn up, as was the case at the present meeting.

12. The representative of India said that his country supported China's proposal. However, he wished to join other speakers who had highlighted systemic concerns relating to the retroactive effect

of decisions taken by the DSB and the need for advance notice for all important matters brought before the DSB. The decision to be taken at the present meeting, therefore, should not constitute a precedent for the future.

13. The representative of Norway said that, like Brazil, the United States, Canada and Mexico, his country had systemic concerns regarding the matter at hand. To this effect, he underlined that systemic issues should not be raised under "Other Business" because as Mexico had just stated, Members needed time to consider and to know that a particular matter would be taken up so that they should be present in the room. Another point to which some previous speakers had referred to was that selecting Appellate Body members was an important issue and Norway understood the need for time to be able to present high quality candidates. Therefore, Norway could join in the consensus to extend the deadline at the present meeting. He stressed that, like Canada, the decision to extend the deadline should in no way prejudge Members' position in respect of the three candidates presented thus far.

14. The representative of Korea said that his country wished to join previous speakers who had expressed concerns about the way this matter had been dealt with. Korea understood that adequate time should be given to Members to prepare nominations in order to have qualified candidates. Therefore, Korea had no objections to the substance of China's proposal. However, as other Members had pointed out, taking a retroactive decision and the lack of opportunity for Members to consider the issue properly was not the right way to ensure security and predictability of the dispute settlement system. Therefore, Korea believed that this should not set a precedent and that efforts should be made in order not to repeat such a situation.

15. The representative of Kenya said that his country supported China's proposal.

16. The representative of Canada said that he wished to add that Members should thank China for bringing the matter to their attention because, in the end, all Members would benefit from further reflection on possible candidates. There were systemic concerns involved but what China had done was positive.

17. The Chairman proposed that the DSB take note of the statements made and agree to China's proposal to extend the deadline for nominations of candidates for an Appellate Body member until 30 April 2006. He further proposed that this decision have retroactive effect to 1 April 2006 with respect to the time-period covered by the decision.

18. The DSB took note of the statements and so agreed.

19. The Chairman noted that thus far three nominations of candidates for an Appellate Body member had been submitted. These nominations had been proposed by Ghana, South Africa and Benin respectively. At this point, and in light of the decision to extend the deadline until 30 April 2006, he wished to remind delegations that any new nominations together with curricula vitae of candidates should be addressed to the Chairman of the DSB in care of the Council and TNC Division. These nominations would then be circulated as Job documents to all WTO Members. The Selection Committee would begin its work shortly after 30 April in order to be able to present its recommendation to the DSB at the earliest possible date thereafter. The Selection Committee would interview all candidates and, upon request, would make itself available to hear the views of interested WTO Members in this regard as well.

20. The DSB took note of the statement.