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**Committee on Trade and Development
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SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS

Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe

The following communication has been received from the above delegations on 7 May 2002.

BACKGROUND

At the Fourth Ministerial Conference in Doha on 9-14 November 2001, Ministers noted the concerns expressed regarding the operation of special and differential treatment (S&D) provisions in addressing specific constraints faced by developing countries, particularly the least-developed countries (LDCs) and reaffirmed that provisions for S&D treatment are an integral part of the WTO agreements. Ministers agreed that all S&D provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. They endorsed the work programme on S&D treatment set out in the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17).

In the Decision on Implementation-Related Issues and Concerns, the Committee on Trade and Development was instructed:

- (i) "to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;
- (ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002."

Pursuant to the above decisions at Doha, the CTD-Special Session has been examining the S&D provisions with a view to making them mandatory, in cases where they are not mandatory, and to make them more precise, effective and operational. Through this submission, the delegations of Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe submit the following proposals for making S&D provisions in some of the agreements, more precise, effective and operational and thus strengthening them. This contribution

may be seen as aimed at facilitating the deliberations in the CTD-Special Session. Co-sponsors of this submission reserve the right to modify or amend any of the proposals in future.

I. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Proposal on operationalisation of Article 12.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Article 12.10

Full text of the provision

"In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph."

Comment

This provision conceives situation of a developing country Member being the defending party in a dispute settlement proceeding, while the other party may or may not be a developed country Member. The provision can be considered to be in two parts, the first part is on the consultations phase and the second part is on panel proceedings.

The first part of this Article speaks about extension of consultations period by the parties themselves or by the DSB Chair. The next part directs panel to give "sufficient time" to the developing Member to prepare its defence, the last part subjects this grant of time to the overall time frames set for the dispute settlement proceedings.

Since the word "shall" is used in second and third sentences, it could be considered as a mandatory provision. However, it is up to the discretion of the DSB Chairman whether to extend the consultations period and, if so, for how long. In case of a panel, it does not seem to have such discretion, because it "shall allow sufficient time". But the paragraph does not give any guidance either to the DSB Chair or to the panel on to how much additional time should be given. The panel is constrained by the last sentence, i.e., the application of the overall time frames. Thus, this provision seems to be of limited use or inoperable in practice to the developing country Members.

This, perhaps, is the reason why no developing Member has so far invoked the first part of the paragraph. And India invoked the second part of the paragraph in the first stage of the panel proceedings in the dispute, *India – QRs* (DS90), and got ten extra days for preparation of its first written submission.

Proposal

1. It is suggested that the words "whether" and "if so, for how long" be deleted from the second sentence and the words "for not less than 15 days, in cases of urgency as envisaged in Paragraph 8 of

Article 4, and not less than 30 days in normal circumstances" be added towards the end of the sentence. Thus the second sentence should read:

"If, after the period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall, after consultation with the parties, decide to extend the relevant period for not less than 15 days, in cases of urgency as envisaged in Paragraph 8 of Article 4, and not less than 30 days in other cases in normal circumstances."

2. Similarly, in the third sentence, after the expression "sufficient time" the words "not less than two weeks extra in normal circumstance," be inserted and in the place of "argumentation" the words "first written submission and not less than one week extra thereafter at each stage of written submission or presentation." Thus the sentence should read:

"In addition, in examining a complaint against a developing country Member, the panel shall allow sufficient time, not less than two additional weeks in normal circumstance, for the developing Member to prepare and present its first written submission and one additional week thereafter at each stage of written submission or presentation."

3. The last sentence should be rephrased as: "The additional time taken above shall be added to the time frames envisaged in Article 20 and paragraph 4 of Article 21."

The first part of the proposal gives guidance to the DSB Chair, upon being approached by either party, for extending the period at least 15 or 30 days as the case may be in normal circumstances. In case of any exceptional circumstances, (expression used in Article 21.4) he can exercise discretion to give more time to the parties.

The second part of the proposal directs the Panel to give additional time of at least two weeks for the first submission, one week each for second submission, first and second oral presentations and for interim submissions, if any.

The third part of the proposal seeks to extend the overall time frames to the dispute proceedings involving a developing country Member as a defending party.

These suggestions, when implemented will make the provisions of Article 12.10 of the DSU effective, operational and of value to developing country Members.

II. AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

Article 9.2

Text of the provision

Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Issue

Lack of technical, infrastructural and financial capacity makes it difficult to developing country Member to fulfil the sanitary and phyto-sanitary requirements of an importing developed country Member and thus restricts market access opportunities for the product involved.

Proposal

To make this mandatory provision effective and operational it is proposed that the clause "shall consider providing" be changed to "shall provide". It is further proposed to add the following sentence to the provision:

"If an exporting developing country member identifies specific problems of inadequate technology and infrastructure in fulfilling the sanitary or phytosanitary requirements of an importing developed country Member, the latter shall provide the former with relevant technology and technical facilities on preferential and non-commercial term, preferably free of cost, keeping in view the development, financial and trade needs of the exporting developing country".

The above suggestion would make this S&D provision effective and operational.

Article 10.1

Text of the provision

In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

Issue

Developing country exports to developed markets may be affected because of lack of technical, infrastructural and financial capacity to comply with SPS measures.

Proposal

For effective operationalisation of Article 10.1, it is suggested that the following addition be made to the existing provision:

"If an exporting developing country Member identifies specific problems in complying with a sanitary or phytosanitary measures of an importing developed country Member, the latter shall upon request enter into consultations with a view to finding a mutually satisfactory solution.

In this regard, such special needs shall include: securing and enhancing current levels of exports from developing and least developed country members, maintain their market shares in their export markets, as well as developing their technological and infrastructural capabilities. While notifying a measure, Members shall, *inter-alia*, indicate the following: (i) systems and/or equivalent systems that could be used to comply with such a measure; (ii) the names of the developing and least-developed country Members that could be affected by the applied measure."

The above suggestion would make this S&D provision effective and operational.

Article 10.3

Full text of the provision

With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

Issue

This provision was included at the specific request of developing country Members to take into account the possibility of their not being able to fully comply with the provisions of the agreement even after the expiry of any transition period which may be provided. However, it only enables the SPS committee to grant such an exception. Though Members may be facing problems in complying with the obligations of the agreement, very few would want to make such a request because of the recommendatory nature of the language of this provision.

Proposal

For effective operationalisation of Article 10.3, it is suggested that the words "is enable to" be amended to "shall". This will make the provision more effective. If this suggestion is accepted, the amended provision would read as follows:

*With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee **shall** grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and-development needs.*

III. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Article 12.3

Text of the provision

Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

Issue

There has been a proliferation of technical regulations and standards in developed country markets. Developing country exports to developed markets may be substantially affected because of lack of technical, infrastructural and financial capacity to comply with such standards or technical regulations.

Proposal

For effective operationalisation of Article 12.3, it is suggested that the following addition be made to the existing provision:

"If an exporting developing country member identifies specific problems of inadequate technology and infrastructure in complying with the technical regulations and standards of an importing developed country Member, the latter shall provide the former with relevant technology and technical facilities on preferential and non-commercial term, preferably free of cost".

The above proposal, if accepted, would make this S&D provision meaningful and effective.
