

**INDIA'S QUESTIONS TO THE EUROPEAN COMMUNITIES AND
ITS MEMBER STATES ON THEIR PROPOSAL RELATING
TO IMPROVEMENTS OF THE DSU**

Communication from India

The following communication, dated 29 April 2002, has been received from the Permanent Mission of India.

India seeks certain clarification and information from the European Communities (EC) on their proposal relating to improvements of the WTO DSU as contained in document TN/DS/W/1. The clarification and information sought are for obtaining a better understanding of the proposal made by the EC and is without prejudice to any final position which India might take in this regard. The questions posed and clarifications sought are also not intended to be taken as exhaustive and India reserves its right to seek further information and additional queries as may be considered necessary.

I. MOVING FROM AD HOC TO MORE PERMANENT PANELISTS

The EC's first reason for moving from ad hoc to more permanent panelists ('change' herein after) is that there is a growing quantitative discrepancy between the need for panelists and the availability of ad hoc panelists.

1. Question: - If there is already a growing discrepancy between "the need for panelists and the availability of ad hoc panelists" how, in EC's view, would adequate number (15-24) of suitable individuals be available for consideration as permanent panelists?
2. Question: - Could the EC point to specific instances or trends of such a discrepancy since the establishment of the WTO?

The EC states that on the demand side, it is now clear that there are many more panels under the WTO than under the GATT. Furthermore, the total duration of the cases is increasing, because of the frequent recourse to compliance panels and to arbitration on the suspension of concessions, procedures, which are now normally handled by the original panelists. On the supply side, according to the EC, it has proved more and more difficult to find qualified panelists who are not nationals of Members involved, be it as a complainant, a defendant or a third party.

3. Question: - In the EC's view is the requirement that panelists not be nationals of Members involved in the dispute a constraint on the choice of potential panelists?

According to the EC, the result of the discrepancy between demand and supply has been an increasing delay in the selection of panelists, and an increasing recourse to the Director-General of the WTO for the appointment of panelists.

4. Question: - Could the EC provide details establishing how the discrepancy between demand and supply has been delaying the selection of panelists over time? Could the EC also provide details of the cases in which recourse had to be sought to the Director-General of the WTO for the appointment of panelists?

5. Question: - In the EC's view is the increasing recourse to the Director-General of the WTO for the appointment of panelists an undesirable trend? If so, could EC explain why?

The second reason of the EC for change was that the dispute settlement process has become much more sophisticated than before and this has increased the workload of the panelists. It is not only because of procedural developments, such as preliminary rulings and the handling of business confidential information, that cases take more time to handle. It is also due to the increased complexity of the substance of the cases brought before the panels, both from a factual and a legal point of view, and because of the increased complexity of the assessment conducted by panelists.

6. Question: - Why, in the EC's view, would permanent panelists, as against ad hoc panelists, take less time in handling various procedural developments as listed by the EC?

According to the EC, moving to a system of permanent panelists would most likely result in less reversals of panel reports by the Appellate Body than is currently the case, thereby reducing the total timeframe of the procedure, the workload of the Appellate Body and the costs for all the parties.

7. Question: - The reason why a system of permanent panelists would most likely result in fewer reversals of panel reports by the Appellate Body is not clear. Would the EC elaborate on this aspect?

8. Question: - If experience of panelists is a factor in adequately addressing the issues raised in a dispute, how does the EC reconcile this with the fact that in the disputes in which the Appellate Body reversed substantial number of findings of the panel, some of the panelists had experience of being a panelist in earlier dispute?

9. Question: - If reversal of panel reports by the Appellate Body is a reflection on the panelists, how does the EC explain that some of the panelists whose substantial number of findings were reversed, subsequently served as panelists in other disputes?

The EC's third reason for change is that it would enhance the legitimacy and credibility of the panel process in the eyes of the public, as the possibility of conflicts of interests would be eliminated and the independence of the panelists would be protected, as is the case in domestic proceedings or in the Appellate Body.

10. Question: - Could the EC point out any instance in which the legitimacy and credibility of the panel process was questioned merely because the panel was composed of ad hoc panelists?

The EC's fourth reason for change is that it would increase the involvement of developing countries in the panel process. Under the current system, only 35 per cent of the panelists having served since 1995 come from a developing country. Such a figure would increase with a more permanent roster of panelists that, as is the case with the Appellate Body, would be broadly representative of the WTO Membership.

11. Question: - Could the EC indicate the approximate number of panelists from developing countries which it would consider to be broadly representative of the WTO Membership?

The EC concludes that moving from a system of ad hoc selection of panelists to a more permanent selection process would lead to faster proceedings and better and more consistent rulings.

12. Question: - In order to ensure consistent rulings does the EC envisage a system of collegial consultations in respect of each dispute among all the permanent panelists, as is the practice in the Appellate Body?

13. Question: - Would the EC give an approximate estimate of the time saved in various stages of the panel proceedings due to permanent panelists?

14. Question: - On what basis does the EC conclude that permanent panelists would give better rulings?

15. Question: - Has the EC made an estimate of the additional costs involved if its proposal on permanent panelists were to be accepted?

The EC explains that the moving from ad hoc to more permanent panelists would not constitute a radical change from the principles of the DSU: in effect, it would amount to reducing the size of the "roster of panelists" and to streamlining the selection process on the basis of that roster. In addition, it would be fully in line with the evolution of the dispute settlement system since the Uruguay Round.

16. Question: - Why, in the EC's view, would a system of permanent panelists not constitute a radical change from the principles of the DSU given that only the Appellate Body has been envisaged as a standing body?

17. Question: - Could the EC explain what it means by "fully in line with the evolution of the dispute settlement system since the Uruguay Round"?

Referring to its October 1998 proposal on roster of 15 to 24 panelists, the EC states that this figure would be broadly accurate given the present workload of disputes. Further, on this point, according to the EC, it would be preferable at this stage to provide for a full-time activity, in order to ensure panelists of high quality and expertise and avoid as far as possible potential problems of conflict of interest.

18. Question: - A possible drawback in the EC's proposal may be that many a time governments/academic institutions may be reluctant to approve secondment of services of competent persons for a long period, say six years. On the other hand they may approve of such individuals serving as panelists on ad hoc basis for a limited period of time without the exclusion of their regular responsibilities. Thus the EC's proposal to engage permanent panelists for full time activity may in fact restrict the choice otherwise available, making more acute the imbalance between the demand and supply of potential panelists. In the EC's view how will this concern be addressed?

19. Question: - In the EC's view does the nationality of the panelist contribute to a possible potential problem of conflict of interest? How will this be addressed if permanent panelists replace ad hoc panelists?

As to qualifications, the EC proposes that the permanent panelists should have either demonstrated expertise in international trade law, economy or policy, and/or past experience as a GATT/WTO panelist.

20. Question: - If past experience as a GATT/WTO panelists is taken as a qualification how does the EC explain the fact that in certain disputes in which substantially large number of findings were

reversed by the Appellate Body the panel comprised of panelists who had served as a GATT/WTO panelist in the past?

Following the Appellate Body procedures, the EC suggests that the three panelists should be selected from the proposed permanent panelists to hear a dispute. The merit of this selection process, according to the EC is obviously that the parties to the dispute will not at all be involved in the selection of the three panelists sitting in a specific case. In line with the practice of the Appellate Body, panelists would be appointed by lottery, depending on the availability of candidates. In case of direct or indirect conflict of interests, the panelist would have to disqualify himself from the procedure, and a new drawing would be made.

21. Question: - Would the EC clarify whether the requirement that the panelists not be citizens of Member countries whose Governments are parties to the dispute or third parties would be adhered to while selecting the three panelists in a specific case? Who would determine whether there is a direct or indirect conflict of interest in a particular case? Would it be the panelists concerned or the Member countries, which are parties to the dispute including third parties?

II. IMPLEMENTATION ISSUES

22. Question: - The EC's proposal does not address the crucial issue of how to make the defendant comply. In fact if EC's proposal on making trade compensation more realistic is accepted, it could serve as an inducement for the losing party not to comply promptly with the DSB decision. If the EC agrees that the key objective of the dispute settlement mechanism is to secure withdrawal of WTO inconsistent measures, how does the proposal for making trade compensation more realistic encourage this objective?

23. Question: - The EC has suggested "encouraging non-complying party to offer a compensation package". Would EC elaborate further on what it means by "encouraging"? How does the EC reconcile this with the requirement that compensation should be voluntary?

24. Question: - Would the EC agree that by agreeing on trade compensation the defaulting Member may have no incentive at all to bring its inconsistent measures into conformity with the WTO obligations? In view of the fact that compensation can only be temporary, would the EC consider that a time limit should be fixed beyond which trade compensation should not remain effective and the defaulting member necessarily have to withdraw the inconsistent measures?

25. Question: - Does the EC recognize the fact that an inconsistent measure may adversely affect the trade interests of countries which may not be a party to the dispute and hence making trade compensation a more realistic alternative would go against the premise that the DSU serves to preserve the rights and obligations of the Members?

III. TRANSPARENCY

26. Question: - The EC has proposed that certain parts of the panel/Appellate Body proceedings be made open to the public for attendance. Would the EC clarify whether the public would also be permitted to make interventions and, if so, in what form, during such proceedings? Does the EC recognize the fact that it may be necessary to impose restrictions on reporting of such proceedings by the public that may have potential to otherwise prejudice the proceedings?

27. Question: - Is the EC also of the view that Member countries which are not a party to the dispute would have a right of attendance during panel/Appellate Body proceedings?

IV. REGULATION OF AMICUS CURIAE SUBMISSIONS

28. Question: - Does EC recognize that allowing *amicus curiae* briefs would create a time consuming additional process which cannot be reconciled with one of the reasons motivating its proposal on permanent panelists i.e. faster panel proceedings?

29. Question: - Will the EC agree that at least one party must respond to arguments emanating from *amicus curiae* brief and hence would be required to assume additional obligations not presently provided for in the DSU?

30. Question: - Would the EC agree that permitting *amicus curiae* briefs would result in giving rights to private entities which otherwise have no standing before the WTO?

31. Question: - Would the EC agree that if *amicus curiae* briefs are permitted then the present disadvantages suffered by developing-country Members in international trade would get further accentuated as very few entities in the developing countries would be in a position to make *amicus curiae* submissions, while on the other hand, developing-country Members would have to assume the added burden of defending themselves against any arguments which such submissions might contain?

32. Question: - The proposal of the EC regarding submission and consideration of *amicus curiae* briefs amounts to changing the inter-governmental character of the WTO. For one, ultimate compliance is to be done by Governments, not by others. Furthermore, Governmental position in disputes is arrived at after consultations with all domestic stakeholders. If Governments know that their non-governmental agencies have a further chance to influence the dispute settlement mechanism, then they would pay less attention to finalizing their positions and even worse, there may be implications for compliance by the Governments themselves. Would the EC comment on this aspect?

33. Question: - The EC has suggested that an application for leave to file an *amicus curiae* submission shall contain certain information including details regarding funding of the entity and whether it has any relationship with any party or any third party to the dispute. Who would verify that the submitted information is correct or is it the suggestion that whatever information is submitted in the leave to file an *amicus curiae* submission will be assumed in good faith during the panel/Appellate Body proceedings?

34. Question: - If in an *amicus curiae* brief a claim is raised which was not raised in the submission of the complaining party/third country Member, would such a claim be addressed by the panel/Appellate Body? Would the panel/Appellate Body address new arguments made in an *amicus curiae* submission, which was not otherwise made by any of the party to the dispute?

35. Question: - The working procedures of the panel/Appellate Body provides for the parties to the dispute making comments and seeking clarifications on the submission made by other parties. Does the EC envisage a procedure whereby the entities submitting *amicus curiae* briefs would also be required to submit further information/clarification, which may be sought from them by various parties to the disputes?

36. Question: - In view of the fact that the Appellate Body comprises persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of covered agreements, what purpose would be served if *amicus curiae* briefs are permitted to be submitted and considered by Appellate Body whose consideration is limited to issues of law covered in the panel report and legal interpretations developed by the panel?

37. Question: - Who will determine whether the entity making an *amicus curiae* submission has a direct interest in the factual or legal issues raised in the dispute? What parameters will be used to determine whether the entity has demonstrated such a direct interest in the factual or legal issues

raised in the dispute? Can any of the parties or a third party to a dispute adduce evidence and object to the fact that entity has not demonstrated such a direct interest?

38. Question: - Would the panel/Appellate Body be required to give a reasoned explanation of why certain submissions or parts thereof were addressed in its report, to the exclusion of other submission or parts thereof? Would the EC further agree that in absence of such reasoned explanation arbitrariness in consideration of amicus curiae brief cannot be ruled out, while on the other hand this would be a time consuming exercise?

39. Question: - In footnote 2 of document TN/DS/W/1 the EC seeks to distinguish the submission and consideration of amicus curiae briefs from the right of any WTO Member to participate in dispute settlement proceedings as third parties. Would the EC elaborate on the distinction, which it is seeking to make in this regard?
