

NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING

Special and Differential Treatment for Developing Countries

Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan,
Sri Lanka, Tanzania and Zimbabwe

The following communication, dated 20 September 2002, has been received from the Permanent Mission of India on behalf of Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe.

I. SUSPENSION OF CONCESSIONS AND OTHER OBLIGATIONS

Developing-country Members have participated in as many as 149 disputes (out of 262) either as complainants or defendants. They raised 47 complaints against developed-country Members and 37 between themselves.

However, securing compliance from the defaulting Member is proving to be a difficult task and it is likely that in many disputes the developing countries may be left with no option other than to seek recourse to suspension of concessions and other obligations under the provisions of Article 22. However the tremendous imbalance in the trade relations between developed and developing countries places severe constraints on the ability of developing countries to exercise their rights under Article 22. The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and would only further deepen the imbalance in their trade relations already seriously injured by the nullification and impairment of benefits.

A considerable portion of developing-country Members' imports comprise essential commodities like raw materials, food items and capital goods. In such situations withdrawal of concessions in the goods sector would not be practicable or effective. Same is the case in the services sector, especially in case of important services like telecommunications, etc. Moreover, it would be recalled that the "cross-retaliation" provision seemed to have been incorporated in the DSU at the instance of developed-country Members, who felt that in case of non-compliance by developing-country Members in the IPRs area, they would not be able to effectively retaliate against developing-country Members, who would have limited, if any, trade marked or patented products of their own. Therefore, cross-retaliation in goods and services sector would be more effective.¹ It is proposed that a complaining developing-country Member should be permitted to seek authorization for suspending concessions and other obligations in sectors of their choice. They should not be required to go through the process of proving that, (1) it was not "practicable or effective" to suspend concession in

¹ See WTO publication "Reshaping the World Trading System: A History of the Uruguay Round" by John Croome, at page 323.

the same sector or agreement where the violation was found; and (2) the "circumstances are serious enough" to seek suspension of concessions under the agreements other than those in which violation was found exist. This burden of proving is quite onerous as Ecuador's experience in *Bananas* dispute showed. Accordingly a new paragraph *3bis*, it is proposed, be inserted in Article 22 as follows:

"Notwithstanding the principles and procedures contained in paragraph 3, in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed-country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements."

The above proposal is without prejudice to the other proposals tabled/to be tabled by other developing-country Members on "collective retaliation" "large scale retaliation" "prohibiting non-complying Members from invoking dispute settlement procedures under the DSU and covered agreements", etc.

II. LITIGATION COSTS

Our experience over the past seven years of the dispute settlement process has been that the cost of litigation before the WTO panels and the Appellate Body is prohibitively high. It is therefore necessary to provide special and differential treatment to the developing-country Members in disputes against developed-country Members. If a developed-country Member is found to be in violation of its obligations under the WTO covered agreements in a dispute brought by a developing-country Member or if the developed-country Member failed to prove its claims against a developing-country Member in a dispute brought by it, the panel/AB shall determine reasonable amount of the legal costs and other expenses of the developing-country Member, to be borne by the developed-country Member.

It is proposed that a provision to give effect to this be incorporated in the working procedures of the panels in Appendix 3 of the DSU and of the Appellate Body.

III. OTHER SPECIAL AND DIFFERENTIAL PROVISIONS

In pursuance of the Doha Work Programme, some of the co-sponsors have submitted certain proposals to the Special Session of the Committee on Trade and Development on the Special and Differential Treatment provisions including those relating to the DSU. These proposals are contained in documents TN/CTD/W/2, which was co-sponsored by Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania, and Zimbabwe and TN/CTD/W/6, which was tabled by India. These proposals are on Articles 12.10 and 4.10 and 21.2, respectively, of the DSU. Some of the delegations that had earlier tabled these proposals in the Special Session of the CTD would like to resubmit them in this Negotiating Group.

Article 4.10

"During consultations Members should give special attention to developing-country Members' particular problems and interests."

Comment

Request for consultations is the first step for initiation of a dispute in the WTO. Holding of consultations is mandatory before making a request for establishment of a panel. Consultations are intended to provide opportunity to the disputing parties to know each other's views and it gives opportunity to the defending party to explain its measure subjected to the dispute.

Proposal

It is suggested that the word "should" be replaced by "shall" so as to make this S&D provision mandatory.

The precise operational content of the phrase "give special attention" is not defined. It is proposed that:

- (a) if the complaining party is a developed Member and if it decides to seek establishment of a panel, it should be made mandatory for it to explain in the panel request as well as in its submissions to the panel as to how it had taken or paid special attention to the particular problems and interests of the responding developing country;
- (b) if the developed Member is a defending party, it should be made mandatory for it to explain in its submissions to the panel as to how it had addressed or paid special attention to the particular problems and interests of the complaining developing country;
- (c) the Panel, while adjudicating the matter referred to it, should give ruling on this matter.

These suggestions, when implemented will make the provisions of Article 4.10 mandatory, effective, operational and of some value to the developing countries.

Article 12.10

"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 10 extra days for preparation of its first written submission.

Proposal

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."

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."

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 extra 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.

Article 21.2

"Particular attention should be paid to matters affecting the interests of developing-country Members with respect to measures which have been subject of dispute settlement."

Comment

This provision is part of an Article that requires DSB to keep under surveillance the implementation of its rulings, following the adoption of the panel/AB reports. The Article provides for determination of RPT (reasonable period of time) for compliance of the DSB rulings; in case of disagreement, for initiation of further dispute settlement proceedings to determine whether the defendant Member has complied with DSB rulings; and for receiving status reports on implementation of DSB rulings at every regular DSB meeting six months after adoption of the panel/AB reports.

Proposal

It is suggested that the word "should" be replaced by "shall", so as to make this provision mandatory.

The utility of the provision could be increased by clarifying the phrase "matters affecting the interests of developing-country Members". It is proposed that:

- (a) this provision, having been placed at the beginning of the long and important Article 21, should be made mandatory, for the panels and Appellate Body to interpret it as an overarching provision in all disputes, involving a developing-country Member as a disputing party;
- (b) if the **defending party is a developing Member and the complainant, a developed Member**,
 - (i) RPT: 15 months should be considered as normal RPT and if the measure at issue is change of statutory provisions or change of long held practice/policy (like QRs/BOP), RPT should be two to three years and panels/AB should indicate requirement of more RPT;
 - (ii) 21.5 Procedures: Consultations (i.e., opportunity to defend/explaining actions taken by it to comply or difficulties thereof) should be considered as mandatory; time for completion of 21.5 Panel proceedings should be increased from 90 days to 120 days; and the panel should give all due consideration as any normal panel would give to the particular situation of developing-country Members.
 - (iii) Filing of status report should be in alternative meetings rather than in every regular meeting.
- (c) if the **complaint is by a developing Member against a developed Member**:

The defending developed-country Member should be given no more than 15 months of RPT in any circumstance; existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing-country complainant.

These suggestions, when implemented will make the provisions of Article 21.2 mandatory, effective, operational and of value to the developing countries.
