

PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE

The Dispute Settlement Understanding (DSU)

Communication from Pakistan

The following communication, dated 26 March 1999, has been received from the Permanent Mission of Pakistan.

Pakistan considers that even though the dispute settlement mechanism has been on the whole working satisfactorily, there is room for further improvement. The following proposals are submitted for further examination, clarification and modification of some of the provisions of the DSU.

I. SELECTION OF PANEL MEMBERS

1. Article 8 of the DSU provides that panels should be composed of "well qualified governmental and/or non governmental individuals". The Article further provides that in order to assist the selection of panelists "the Secretariat shall maintain an indicative list of governmental and non governmental individuals possessing qualifications" outlined above. Such a list is prepared by the Secretariat by requesting Member countries to nominate qualified individuals for inclusion in the list. The names recommended are included in the list only after they are approved by the DSB. The Article further provides that the parties to the dispute should not oppose nominations except for compelling reasons. It is only in cases where parties to the dispute cannot reach agreement on the names suggested by the Secretariat within 20 days of the establishment of the panel that the Director General is expected to appoint a panel. In doing so, he is expected to consult the Chairman of the DSB and the Chairman of the relevant Council or Committee.

2. The basic thrust of the procedures is to ensure that panelists for settlement of disputes brought to WTO are selected from well qualified government and non government experts. Based on this, Pakistan therefore considers that basic principles on which the system for selection of panelists is based should not be changed. However, the selection of panelists should be from a pool of candidates representing a broad range of expertise ensuring a balance between panelists from developed and developing countries.

3. To enable the DSB to examine this issue and the solution that could be found to the practical problems that arise as a result of delays in the selection of panelists, Pakistan would suggest that the Secretariat should be requested to prepare a paper explaining the procedures followed at present in the preparation of the Indicative List and providing the following information:

- Names of the individuals who were selected to work as panelists since the establishment of WTO, their nationality, background and experience (e.g. whether member of the Mission, official from national capital or non governmental expert).

- In cases where the individual appointed was a non governmental expert, was his name included in the Indicative List of experts? If not, what criteria were used in selection of the individual?
- The number of cases where the Director General had to decide on the composition as parties were not able to agree on the names suggested by the Secretariat.
- The number of cases where the same individual was selected to work on different panels.

II. THE ROLE OF THE APPELLATE BODY

A. AUTHORITY FOR REMAND

4. Under the DSU the Appellate Body is expected to examine only "issues of law" covered by the panel report. However, it has no authority to send back for examination by the panel, where it considers that the panel:

- has failed to examine fully the facts of the case; or,
- has, in interpreting law, not taken into account some of the provisions of the covered agreements.

5. This situation has resulted in the Appellate Body examining de novo facts of the case, or "making" a finding on legal issues which were not addressed by the panel (See Appellate Body Report in the US Shrimp Turtle case).

6. Pakistan considers that in all such cases in order to ensure that the disputes are settled on the basis of fuller examination of both issues of fact and law, the Appellate Body should be required to "remand" the case to the panel for reexamination. To avoid the settlement of disputes being unnecessarily delayed as a result of such remand, it may be provided that the panel should complete its examination within a period of one month.

B. NEED TO CURB APPLICATION OF EVOLUTIONARY APPROACH TO THE INTERPRETATION OF LAW BY THE APPELLATE BODY

7. In some of the recent cases the Appellate Body has adopted an "evolutionary" approach in interpreting the provisions of the covered agreements. In the US Shrimp Turtle case, for instance, it has observed that in interpreting the terms and words in legal instruments "drafted some fifty years back" the treaty interpreter "must read the treaty in the light of contemporary concerns of the community of nations" even though such concerns may not have existed when the treaty was adopted.

8. Pakistan completely disagrees with the broad interpretation given by the Appellate Body to its mandate. Article 3 of DSU clearly stipulates that recommendations and rulings of the panels and Appellate Body "cannot add or diminish the rights and obligations provided in the covered agreements". The broad interpretation given by the Appellate Body in the Shrimp Turtle case to the provision of Article XX (g) that the term "exhaustible natural resources" which was originally intended to cover "physical resources" must now be broadened to cover "living resources" taking into account the contemporary concerns of the community for environmental protection has, by significantly increasing the possibility of the provisions of Article XX being invoked to justify restrictive trade measures, resulted in diminution of the rights available to the member countries under GATT.

9. In the view of the delegation of Pakistan such customary law on interpretation applies only to treaties which are negotiated on a once and for all basis. Such treaties need to be distinguished from WTO Agreements, which contain provisions for surveillance of their operations on a continuous basis. It would therefore be necessary to clarify the relevant provisions in the DSU to make it clear that the responsibility for clarifying or modifying the provisions of the WTO Agreements clearly rests with the WTO Member countries and that it would not be appropriate for the Appellate Body to usurp these functions under the guise of interpreting law on the basis of contemporary developments. In all cases, where the Appellate Body considers broader or different interpretation would be justifiable and equitable taking into account contemporary developments, it should refer the matter to the General Council for consideration and for making such modifications in the relevant rules as the Member countries consider appropriate.

C. AMICUS BRIEFS: PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS:

10. The participation of Non-Governmental Organisations in the dispute settlement process has not been authorised by the Members. It is therefore troubling that in a recent dispute, legal submissions from NGOs were reviewed by a Panel and the Appellate Body and with this a question has arisen whether panels should take into account "amicus briefs" submitted to it by public interest groups and NGOs. The relevant applicable provisions of the DSU are contained in Article 13.2 which reads as follows:

"Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group".

11. The ruling given by the Appellate Body in the Shrimp-Turtle case goes to suggest that the panels could, under the above provisions, take into account in giving rulings "unsolicited" information or briefs submitted by non-governmental organisations. In view of the uncertainty created by the Appellate Body's decision, it would be necessary to clarify that the provisions of Article 13.2 would not permit panels or the Appellate Body to take into account "unsolicited information" including "amicus briefs" from private parties.

III. COMPENSATION AND SUSPENSION OF CONCESSIONS

A. CROSS RETALIATION

12. Article 22.3 provides that where the erring party fails to modify the measures to bring them in conformity with the recommendations of the panel and the negotiations between parties to the dispute for "satisfactory compensation" fail, the complaining party may take retaliatory action by suspending concessions or other obligations. Such retaliatory action can be taken by suspending obligations either under the Agreement in which the panel and Appellate Body has found a violation or other nullification or impairments or under any other covered agreements. In essence these provisions imply that for a perceived lapse in the area of services and intellectual property by a developing country, retaliatory action against it could be taken in the goods sector.

13. Since cross retaliation across agreements may affect more seriously the developing countries, it may be desirable to provide that retaliatory actions against developing countries, under the provisions of the Article, should be taken only through suspension of obligations under the same agreement in which they have been found to be in violation, and in all fairness this situation calls for removal of the provision for cross retaliation.

B. FINANCIAL COMPENSATION

14. It would be useful to clarify that the term "compensation" used in Article 22 includes grant of financial compensation to the complaining party by the country which has been found to be in violation of the rules.

15. Panels should be authorised to recommend payment of such financial compensation in disputes between developed and developing countries where they find that as a result of WTO inconsistent measures taken by developed countries, the developing country has lost its trade in the affected product. The amount of financial compensation should be independent of the requirement to remove the offending measure and should be determined taking into account such factors as the impact of the inconsistent measure on trade, the duration for which it was applied, and the time it would take to develop exports after the measure was removed.

C. COSTLY NATURE OF PROCESS

16. The dispute settlement process is often very costly for developing countries. This is particularly so for two reasons:

- First, the work of panels has become extremely technical. Thus, the process of preparation of a case, the presentation before the panel and response to the queries of the panel needs legal expertise which may not be available in developing countries. Hence, for an effective preparation of a case, developing countries often bank upon the law firms of the developed countries. This is a costly undertaking.
- Second, very often the preparation of such cases requires the collection of information from other countries entailing much expense.

17. In our view the ever increasing legal costs call for specific provisions in the WTO budget to assist developing countries meet the costs involved in the dispute settlement mechanism.
