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Committee on Trade and Development
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SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS

Communication from India

The following proposals[1] were submitted by India at the Special Session of the Committee on Trade and Development held on 9 April 2002 for making some non-mandatory special and differential treatment provisions into mandatory provisions.

I. AGREEMENT ON IMPORT LICENSING PROCEDURES

Article 3.5 (j) – existing provision:

> *"In allocating licenses, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period. In cases where licences have not been fully utilised, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members".*

Interpretation of the provision

1. It is clear from the above provision that it is incumbent on Members to examine the reasons for non-utilisation of licences and to take these reasons into consideration when allocating new licences. Further, it is also incumbent to give consideration to ensuring reasonable distribution of licences to new importers taking into account the desirability of issuing such licences for products in economic quantities. It will be useful to work for uniformity in the administration of Tariff Rate Quotas (TRQs). However, in view of the word "should" appearing in the last sentence of this provision, referring to special consideration to those importers importing products originating in developing countries and in particular the least-developed country (LDC) Members, there is lack of clarity on whether the provision is mandatory.

[1] India reserves the right to amend or modify the proposals at a later date.

Proposal

2. There is need for making this Special and Differential (S&D) provision mandatory to enable the products originating from developing countries to benefit from this provision. This could be done either through an authoritative interpretation or by replacing the word "should" in the last sentence by "shall". In the context of Article 3.5 (j) of the Agreement on Import Licensing Procedures, making the last section mandatory, would help developing countries, especially the least-developed ones, to increase their share in exports of products of export interest to them, as envisaged in the preamble to the Marrakesh Agreement.

II. AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Article 10.2 – existing provision:

> *"Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports".*

3. In this context, it would be recalled that the following decision was taken at Doha on 14 November 2001 vide paragraph 3.1 of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/W/10):

> "Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase "longer time-frame for compliance" referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view of finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection".

Proposal

4. While paragraph 3.1 of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/W/10) of the Ministerial Conference taken at Doha on 14 November 2001, gives an interpretation of the phrase "longer time-frame for compliance" referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, there remains some ambiguity on the period of the time-frame for compliance owing to the use of word "normally" in this paragraph.

5. In the light of the above decision and the need for longer time-frames for compliance for the developing countries, it is proposed that in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the term "should" be read to express "duty" rather than mere exhortation. This could be clarified through an authoritative interpretation under Article IX.2 of the Marrakesh Agreement Establishing the WTO. It is further proposed that the word "normally" in the first sentence of paragraph 3 of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/W/10), be deleted.

6. The above changes would make this important S&D provision fully operational and effective and will give necessary flexibility to developing countries.

Article 10.4 – existing provision:

> *"Members should encourage and facilitate the active participation of developing country Members in the relevant international organisations".*

7. Vide paragraph 3.5 of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/W/10) of the Ministerial Conference taken at Doha on 14 November 2001, Members decided:

(i) "Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying SPS-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions in this regard, including with a view to according priority to the effective participation of least developed countries and facilitating the provision of technical and financial assistance for this purpose."

Proposal

8. The language used in the Article 10.4 is of best endeavour nature. It urges Members to encourage and facilitate the active participation of developing country Members in the relevant international organizations.

9. In the light of paragraph 3.5, as mentioned above, of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/W/10) by the Ministerial Conference taken at Doha on 14 November 2001 and in view of the importance of ensuring greater participation of Members at different levels of development throughout all phases of standard setting, it is proposed that in Article 10.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures the term "should" be read to express "duty" rather than mere exhortation. This could be clarified through an authoritative interpretation under Article IX.2 of the Marrakesh Agreement Establishing the WTO. This would help achieve the intended objective of this S&D provision.

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

Article 4.10 – existing provision:

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

Comment

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

Proposal

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

12. 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 as well.

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

Article 21.2 – existing provision:

"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

14. This provision is part of an Article that requires the Dispute Settlement Body (DSB) to keep under surveillance, the implementation of its rulings, following the adoption of the panel/Appellate Body (AB) reports. The Article provides for determination of reasonable period of time (RPT) 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

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

16. 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 Quantitative Restrictions/Balance of Payment (QRs/BOP)], RPT should be two to three years and panels/AB should indicate requirement of more RPT;

(ii) 21.5 Procedures: 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 alternate 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.

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