WORLD TRADE ORGANIZATION

RESTRICTED

WT/GC/W/108
13 November 1998

(98-4497)

General Council

Original: English

CONCERNS REGARDING IMPLEMENTATION OF PROVISIONS RELATING TO DIFFERENTIAL AND MORE FAVOURABLE TREATMENT OF DEVELOPING AND LEAST-DEVELOPED COUNTRIES IN VARIOUS WTO AGREEMENTS

Communication from India

1. The underlying principle of the Uruguay Round Agreements is to create a fair and equitable multilateral trading system that leads to development and increasing incomes. The Marrakesh Agreement establishing the World Trade Organisation recognises, in its Preamble that relations between Member countries should be conducted with a view to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services…" The Preamble recognises further that "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."

2. These principles are amplified further through specific provisions in various individual Agreements, Decisions and Declarations, which provide for special and differential treatment to developing and least developed countries. In WTO document No.WT/COMTD/W/35 dated 9 February 1998, these provisions have been listed out and the status of action indicated. The Discussion Paper, entitled "Special and Differential Treatment : Search for a New Strategy", prepared by UNCTAD for the Group of 77, further highlights some of the problems relating to differential and more favourable treatment for developing and least developed countries. In their communication, submitted to the Committee on Trade and Development, Morocco has stressed the need for an analytical review to "provide the necessary framework for an evaluation of the implementation of the measures." (WT/COMTD/W/46 dated 17.7.1998).

3. The question of special and more favourable treatment for developing and least developed countries has been engaging the attention of negotiators from the days of the 1947-48 Havana Conference onwards. The developing countries have stressed at all times the peculiar structural features characterising their economies and the distortions arising from historical trade relationships, which have constrained their trade prospects. The low level of industrialisation, inability to access advanced technologies, non-availability of adequate investible resources, high dependence on primary products in their export basket and vulnerable BOP situations are factors that need to be taken into account while assessing their capacity to compete on equal terms with developed countries.

4. The UNCTAD-II Conference at New Delhi in 1968 and the Tokyo Round negotiations resulted in some favourable changes for developing countries. The UNCTAD-II Conference led to the introduction of GSP schemes and, in the Tokyo Round, the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") was taken. However, the situation changed since the 1980s and there has been increasing

discrimination against trade emanating from developing countries, manifesting itself in such measures voluntary export restraints, higher MFN tariffs, proliferation of restraints on textiles and clothing, and increased harassment through anti-dumping and countervailing duties.

5. The special and more favourable treatment provisions in the Uruguay Round agreements fall under two main categories:

a) Time limited derogations in the form of longer transition periods, more favourable thresholds in the application of countervailing measures and for undertaking certain commitments, and greater flexibility with regard to certain obligations.

b) Clauses, providing for specific, although undefined, action by developed countries under certain agreements, while dealing with developing countries.

6. So far as the first category is concerned, it is necessary to evaluate the provisions presently available in various agreements with a view to determine whether changes are necessary and whether the intentions of the negotiators have been fully translated into practice. The experience of the past three years of developing countries will provide clear guidelines for such evaluation. In certain cases, such as with regard to the Agreement on Textiles and Clothing, while provisions have been implemented in letter, the expected market access benefits for developing countries and least developed countries have not materialised. To that extent, the Agreement has failed to achieve its underlying objectives. Exhaustive study of all such provisions is, therefore, necessary in order to make positive recommendations to the third Ministerial Conference.

7. The first category of provisions is relatively straightforward and can be dealt with in terms of increase in transition periods, improvement in de minimis margins, and higher flexibility for developing and least developed countries. It is the second category of provisions for special and differential treatment that poses more problems. In such cases, there has been difference of opinion between developed and developing countries regarding the meaning and interpretation of provisions. Likewise, some of the provisions which are more in the nature of “best endeavour” clauses are virtually ignored in the process of implementation of agreements.

Balance of Payments Provisions

8. Article XVIII of GATT, particularly Article XVIII:B, is one provision which helped developing countries in pre WTO times to enjoy a certain degree of flexibility in their trade regimes. Article XVIII permits developing countries to impose quantitative restrictions on imports for balance of payments reasons, taking into account not only the foreign exchange reserves position, but also the development needs of the economy. This is clear from paragraph 2 of Article XVIII:B, which is extracted below:
“The contracting parties recognise further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agreed, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.”

9. Paragraph 8 of Article XVIII further elucidates this point :

"The contracting parties recognise that contracting parties coming within the scope of paragraph 4(a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade."

10. Paragraph 9 of Article XVIII indicates that the developing countries may maintain quantitative restrictions for balance of payments "in order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development." Paragraph 11 stipulates that "in carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources."

11. It is thus clear that the intention of the negotiators was to take into account the development needs of developing countries while estimating the adequacy or otherwise of foreign exchange reserves in the process of determining legitimacy of maintenance of quantitative restrictions. However, in actual fact, we find that assessments of adequacy of foreign exchange reserves are made exclusively on the basis of a comparison of volume of reserves with value of imports during the past few years. The development dimension is ignored. Thus, in practice, there is no distinction between Article XII (which deals with quantitative restrictions maintained for BOP reasons by developed countries) and Article XVIII:B which provides a special dispensation for developing countries. It is necessary to clearly define the scope of Article XVIII:B and to lay down guidelines for ensuring that the development dimension is fully taken into account while assessing foreign exchange reserves. A differential has to be clearly built into the provision so that Article XVIII:B serves its purpose in ensuring long term stability of the BOP position of developing countries, without making them vulnerable to violent fluctuations in reserves and exchange rates which can lead to severe and sustained setbacks in the growth process

Anti-dumping Measures

12. Another instance is provided by Article 15 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which relates to anti-dumping. Article 15 is extracted below:

"It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

13. However, we find that anti-dumping measures are being virtually used as weapons by certain developed countries to deny access to the products of developing countries. On the same commodity, anti-dumping action has been repeatedly initiated by certain developed countries. This has created instability and unpredictability in the market, which militates against basic GATT principles. It is vitally important to lay down clear guidelines for making sure that the provision in Article 15 is translated into practice. Some areas where special and differential treatment can be considered for exports from developing country Members are enumerated below:

a) A de minimis dumping margin limit of 2% of export price has been prescribed and no anti-dumping duty can be imposed if the dumping margin is below this threshold limit. This de minimis limit is the same for exports from developing as well as from

developed countries. Many of the export products of developing countries are produced by labour intensive small and medium enterprises. Imposition of anti-dumping duties, or even the threat of imposition of such duties has a serious adverse effect on the functioning of such units. As a consequence, there is fall in production, heavy unemployment, decline in incomes and increase in poverty levels. In view of the high sensitivity of these sectors to any export disruption, the de minimis dumping margin of 2% should be enhanced. The level of enhancement in respect of each developing and least developed country should reflect the disadvantage that the industry in such country suffers vis-à-vis comparable production in developed countries. For instance, the Federation of Indian Chambers of Commerce and Industry has estimated that the disadvantage suffered by Indian industry by way of differential costs of working capital, financing cost of refund of excise duty, intangible infrastructure costs, sales tax on local bought outs and octroi amounts to approximately 17%. The inherently high prices sometimes maintainable in the domestic market are not sustainable in exports, and the prices of the latter often represents reduced levels of profitability for the exporter. The price differential of 2% presently constituting the de minimis dumping margin is unrealistically low. However, the extent of disadvantage would vary from country to country and its assessment could be a cumbersome, contentious issue. Hence it is better to have an across-the-board de minimis which could be prescribed vis a vis all developing countries to adequately reflect the higher price levels which prevail in such countries.

b) Article 5.8 of the Anti-Dumping Agreement presently provides that the volume of dumped imports shall normally be regarded as negligible, if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product, unless countries which individually account for less than 3% of the imports of the like product collectively account for more than 7% of the imports into the importing Member. In view of the liberalisation of global trade and in view of the fact that more and more developing countries are entering into what were earlier untapped markets for them, it is necessary to increase these percentages with a view to help developing countries. These percentages should be increased respectively to 7% and 15% in the case of imports from a developing country into a developed country.

c) Since anti-dumping investigations are against specific exporters, the impact of investigations and the resulting duties, if any, are felt by the exporters from developing countries who, more often than not, are very small in size and operations. The cost of defending the interests of the exporters of the developing countries Members is also prohibitive and a matter of concern. It is, therefore, important that investigations should be initiated against developing country Members only if the petition has the support of at least 50% of the domestic industry of the developed country Member. Further, no investigation should be initiated for a period of 365 days from the date of finalisation of a previous investigation for the same product resulting in non-imposition of duties. However, if it is established by the complainants that the circumstances have changed drastically subsequently to the finalisation of a case, such investigation should be initiated only if it has the support of at least 75% of the domestic industry of the developed country Member. Further, stricter criteria should be applied for such repeated investigations and the period of investigation should not be less than one year. Guidelines should be established to define the parameters of “establishing”, “drastic” change of circumstances and the “stricter criteria” to be applied in such cases.

d) Article 9.1 of the Agreement allows the investigating authorities to impose anti-dumping duties where all requirements for imposition have been fulfilled. This Article further states that it is desirable that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry. It is a matter of concern that a large number of developed countries, who also happen to be active users of the mechanism, apply duties to the full extent of the margin of dumping. While the Agreement does not make it obligatory for the investigating authorities to follow the "lesser duty rule", the application of duties to the full extent of dumping margin invariably leads to higher level of protection to the domestic industry which is in excess of the duty required to negate the injury caused to their domestic industry. It would be appropriate, therefore, to have a special provision that the application of the lesser duty rule be made mandatory when a developed country Member is investigating the alleged dumped imports from a developing country Member. In addition, norms and criteria should be established to operationalise the "lesser duty" route in terms of "adequacy" to remove "injury".

e) The Agreement on Anti-dumping has severely limited the role of panels in disputes relating to anti-dumping. Article 17.6 lays down that if the panel finds that the authorities have established and evaluated facts properly, objectively and without bias, it shall not overturn the conclusion reached by the authorities even though, on the basis of the same facts, the panel itself would have decided differently. Since developed countries are increasingly resorting to the use of anti-dumping duties against developing countries, it is necessary that the same standard of review that is applicable to disputes relating to other covered agreements is made applicable to disputes relating to anti-dumping.

Subsidies and Countervailing Measures

14. There is an in-built imbalance in the Agreement on Subsidies and Countervailing Measures. While subsidies normally used in developed countries (research and development, regional development and adaptation to environmental standards) are considered non-actionable, subsidies usually used by developing countries for development, diversification and upgradation of their industry are actionable. This imbalance has to be removed by making the latter range of measures also non-actionable. Article 27.2 of the Agreement provides a special dispensation for developing country Members to the effect that the prohibition of paragraphs 1(a) of Article 3 does not apply to developing country Members referred to in Annex VII and to other developing countries for a period of 8 years. However, the subsidies which are maintainable under the provisions of Article 27 are subject to countervailing measures in accordance with the provisions of Article VI of GATT 1994. The special dispensation and the resulting benefits from the provisions of Article 27 thus stand negated by virtue of the provisions relating to countervailing measures. It is, therefore, necessary that countervailing measures are not allowed to be used by developed country Members against subsidies maintained by developing country Members within the special dispensation provided under Article 27.

15. There are several other provisions in the Agreement on Subsidies and Countervailing Measures that need to be altered to take into account the interests of developing countries. These include the following:

a) The de minimis level below which countervailing duties may not be imposed has now been fixed as 3% for developing countries. The disadvantages faced by industry in developing countries in comparison with their counterparts in developed countries are many. The high cost of capital, low levels of infrastructure development, inadequate

integration and organisation of the economy, poorly developed information networks – these characterize industry in developing and least developed countries. The details of the inherent cost disadvantages in these countries have been elaborated in para 13(a). The recent thinking among economists recognises the need for more active role for the state. In order to offset the many disadvantages that developing and least developed countries encounter, it is necessary that the de minimis level below which countervailing duties may not be imposed would need to be scaled up to a realistic level. The volume of the subsidized imports represents less than 4% of the Para 27.10 of the SCM Agreement provides that any countervailing duty investigation of a product originating in a developing country shall be terminated as soon as it is determined that total imports of the like product, unless imports from all the developing country Members, of the like product collectively account for more than 9% of the total imports. Again, in view of the liberalisation of world trade and the fact that more and more developing countries are expanding their export markets, it may be necessary to review the justification of carrying on countervailing duty investigation even when the total volume of imports is less than 4%, though the total volume of imports of the products from all developing countries is greater than 9%. Our suggestion would be that countervailing duty investigations should not be initiated, or if initiated should be terminated when imports from a developing country are less than 7% irrespective of the cumulative volume of imports of the like products from all developing countries. Alternatively if a safeguard is needed to be provided to developed countries for a surge of subsidized imports from a number of developing countries at the same time, then the deminimis volume of the cumulative imports should be increased to at least 15%.

b) Even if the investigating authorities of a developed country Member come to the conclusion that the export prices contain an element of subsidy, the duties should necessarily be restricted to the amount by which such subsidy exceeds the de minimis level.

c) The definition of “inputs” under footnote 61 in Annex II of the Agreement needs to be widened to include all inputs which are financially, not necessarily physically incorporated in the cost/price of export products. This would allow remission of import charges on capital goods when used for the production of export goods. Similarly, consumables other than those prescribed under the current definition also need to be included. These changes are necessary so that these duties and import charges can be rebated by developing countries without being considered subsidies.

d) Aggregated and generalised rates of duty remission should be allowed in the case of developing countries even though the individual units may not be able to establish the source of their inputs. This is necessary as export production units in developing countries are very small in size in comparison with their counterparts in developed countries, as a consequence of which they do not have the necessary expertise to maintain elaborate systems of accounting of inputs.

e) Paragraph K of Annex I states that export credit at rates below those which the granting authority actually has to pay for the funds so employed would be considered as export subsidy. As a matter of special dispensation to developing country Members, such export credits should not be considered as subsidies so long as the rates at which they are extended are above LIBOR**.**

f) In many developing countries, including India, taxes can be collected by government authorities at different levels. Customs duties, income tax, excise duties on

production of goods, etc. are charged and collected by the Central Government. Similarly, the state government charge sales tax on sales made within the respective states. There are several other taxes collected by the municipal and other local authorities in the form of octroi, cess etc. The impact of such taxes vary from state to state and also from district to district. Goods produced in the country suffer from a number of these taxes at various stages of production. Some of these taxes like excise duties are to a considerable extent taken care of by a system of abatements at every stage of production. Still there is some portion of excise duty which remains unabated in addition to a large number of other taxes which have to be absorbed as a part of the cost of manufacture. The main contention is that even though the GATT Agreement permits neutralisation of all taxes, several taxes remain un-neutralised in many developing countries because of the plethora of taxes and multiplicity of collecting agencies. The developed countries get over this problem by using the VAT system. Since the introduction of VAT in developing countries will take time in view of its complexities and cost involved. Such countries should be allowed to neutralize the cost escalating effect of such taxes by partial or full remission of direct taxes.

SPS and TBT

16. Article 10.1 of the Agreement on Sanitary and Phytosanitary Measures stipulates that "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." Likewise Article 12 of the Agreement on Technical Barriers to Trade provides for differential and more favourable treatment to developing country Members and stipulates further that "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." Here again, we continue to observe imposition of standards by developed countries that are either beyond the technical competence of developing countries or do not take into account the special development, financial and trade needs of developing countries or fundamental climatic or geographical factors or fundamental technological problems of developing countries. We also do not see a corresponding willingness on the part of developed countries to transfer to developing countries better and more advanced technologies at fair and reasonable cost. Guidelines need to be prepared, which lay down a process of prompt and regular notification and discussion of standards laid down by developed countries, creation of a positive link between transfer of technology at fair and reasonable cost and the application of standards and a procedure for early removal of restrictions that are unreasonable.

17. To give effect to the broad principles enunciated above, certain specific submissions have been made by India to the relevant Committees in WTO administering the Agreements on Technical Barriers to Trade and that on Sanitary and Phytosanitary Measures respectively during the review process of these Agreements. Under the TBT Agreement, India has emphasised three broad issues. Firstly, means have to be found to ensure effective participation of developing countries in setting of standards by international standard-setting organisations. Secondly, technical cooperation is required to upgrade conformity assessment procedures in developing countries to gain their acceptance in developed markets. Acceptance by developed country importers of self declaration regarding adherence to standards by developing country exporters and acceptance of certification procedures adopted by developing country certification bodies based on international standards have been urged. Thirdly, the importance of broad basing and multilateralising Mutual Recognition Agreements between national standard setting bodies has been stressed. Also, the need for developing equivalence of standards has been highlighted, where the legitimate purpose behind setting up of standards is

achieved in a standard set in a developing country keeping in view the limitations of technical and technological knowhow or fundamental climatic or geographical factors.

18. In view of the various constraints and barriers that developing countries have been facing on account of SPS measures, it is important for the Secretariat to undertake a study to identify such market access barriers, which exports from developing countries have been facing. In particular it would be important to focus on instances where buyers from developed countries have been insisting on the enforcement of standards, which may not be appropriate to the technical standards prevalent in developing countries. Further in view of what has been stated above in para 17 about the lack of participation of developing countries in the activities of standard setting bodies, it is suggested that representatives of the relevant international standardizing bodies are invited to make presentations to the Committee so as to assess the extent to which the special problems of developing countries have been taken into account in this body, and what these organisations propose to do to improve this participation. Developing countries are also invariably not in a position to convey their concerns on proposed SPS/TBT measures since the said notifications do not provide sufficient information regarding the proposed standards, especially with regard to the risk assessment methodology and other factors which may have been taken into account for determining the appropriate level of SPS protection. This necessitates that details of notifications have to be obtained from the enquiry points and by the time this information is actually obtained the last dates for comments is often over. It is therefore important that adequate information and time should be given for members to respond to proposed measures. In addition it is also important that the adequate interval of time mentioned in Article 2 of Annex B of the SPS Agreement should be specified, since at present varying time periods are provided by developed country Members between the publication of an SPS regulation and its entry into force. In order to further transparency it should be ensured that the proposing Members should specifically respond to those Members who have submitted comments or raised objections on the proposed measure. We would also like to suggest that a comprehensive database be created incorporating Members' SPS rules and regulations having a major trade impact with a view to minimise the difficulties being faced by developing country exporters**.**

19. Since standards are emerging as one of the major non-tariff barriers to the market access of developing countries, it is imperative that they be speedily rationalised from the developing countries' perspective.

TRIMS

20. The Agreement on Trade Related Investment Measures poses an entirely different set of problems. These problems relate to both the transition periods allowed for removing TRIMS as well as the notification for availing transition provisions. The transition period allowed for existing TRIMS is five years for developing countries and seven years for least developed countries. This period lapses automatically and extension has to be agreed to in the Council for Trade in Goods.

21. Developing countries should have the freedom to use regulatory measures to channel investment in such manner that it leads to increase in exports. Local content regulation, as an instrument of policy, can perform two critically important functions in developing countries. Firstly, they can further the process of industrialisation in these countries by creating linkages within their economies. Secondly, it helps in the conservation of foreign exchange by progressive substitution of imported sources of inputs by domestic supplies. The need to impose local content regulations in developing countries has been felt especially in respect of foreign investments. If foreign investment takes place in one industry, it should be able to encourage domestic investment by creating demand in other countries. The importance of such a mechanism can be seen from the fact that once foreign investment has been attracted, it should be expected to lead to an income effect that brings about a higher level of domestic sales.

22. The balance of payments implications of industrialisation without local content regulations can be serious for a developing country. The existence of import dependent industries can lead to increasing burden of external liabilities, which may eventually undermine the very process of industrialisation. The increasing imbalances on the payments front can, at least, in theory, be met by depreciation of the foreign currency. However, this would inevitably lead to increase in input costs resulting in domestic firms becoming globally uncompetitive. With their fragile export production bases, developing countries would run the risk of encountering repeated and severe balance of payments crises, which would set back for many years their process of growth.

23. Since implementation of the TRIMs Agreement is coming in the way of industrialisation and balance of payments stability of the developing countries, it is necessary to review the relevant provisions of the TRIMs Agreement with the objective of not impeding industrialisation of developing countries.

SERVICES

24. Article IV of the General Agreement on Trade in Services provides that increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members through strengthening of their domestic services capacity and its efficiency and competitiveness, inter-alia through access to technology on a commercial basis; the improvement of their access to distribution channels and information networks; and the liberalization of market access in sectors and modes of supply of export interest to them.

25. Similarly, Article XIX:2 of GATS provides that the process of liberalization in trade in services shall take place with due respect for national policy objectives and the level of development of individual Member, both overall and in each sector. There shall be appropriate flexibility for individual developing country Member for opening sectors liberalizing fewer types of transactions, progressively extending market access in line with their development situation.

26. Negotiations under GATS in the Uruguay Round and subsequent negotiations on financial services, movement of natural persons and Basic Telecommunication reveal that interests of developing countries are not being adequately addressed despite provisions of Article IV and Article XIX:2. Developing countries are being asked to undertake more and more market access and national treatment commitments, while developed countries are not providing adequate market access in sectors and modes of supply of export interest to developing countries. Even though, there were spill over negotiations on movement of natural persons, hardly any commitments were undertaken by the developed countries for movement of natural persons without commercial presence. Similarly, access to technology in several critical areas still remains closed to the developing countries. As developing countries have limited comparative advantage in trade in services, there is a need to have a comprehensive assessment of the benefits that have accrued to the developing countries through trade in services since the formation of WTO. In the absence of a specific mechanism for implementing Article IV and Article XIX:2, these Articles have been remaining more as pious statements of intention and GATS has not been able to adequately address the issue of increasing participation of developing countries in trade in services.

Dispute Settlement

27. The ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ is another instrument where provisions for special and more favourable treatment of developing countries remain largely unimplemented.

28. Although the Dispute Settlement Understanding (DSU) provides for special and differential treatment in various clauses, there is lack of clarity regarding the manner in which such provisions are implemented. This is so even though in a number of relevant clauses, the words "shall" and "should" have been used in order to provide such a treatment to developing countries. There is however no way to ensure that such treatment is accorded to these countries in practice. Therefore, there seems to be a need for developing a screening process to check whether such requirements are adhered to. It is necessary that the interests of developing country Members are fully taken into account in the dispute settlement process. There should also be recognition of the fact that dispute settlement proceedings are extremely expensive, that developing countries and least developed countries do not have necessary legal expertise to handle such cases and that dispute settlement proceedings are being competitively used by certain developed countries to prove their aggression to domestic constituencies. Procedures must be developed to make sure that the interests of developing countries are protected and that developed countries do not use dispute settlement proceedings as instruments for coercion of the less privileged Member countries.

29. Certain specific suggestions are made to ensure that the interests of developing country members are fully taken into account in the dispute settlement process :-

a) In certain Articles of the DSU the special and differential treatment clause is not articulated in specific terms and mere generalisations are used. This needs to be corrected. Instances of such provisions in the DSU are as follows:-

(i) Article 4(10) of the DSU relating to consultations requires that members should give special attention to the particular problems and interests of developing country members. However, how this is to be achieved is not indicated.

(ii) Under Article 12.11, "where one or more of the parties is a developing country Member, the Panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

(iii) Article 21(2) of the DSU regarding surveillance of implementation of recommendations and rulings requires that particular attention should be paid to the matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement. Concrete details are again not provided. Similarly, Article 21(7) and Article 21(8) also need further elaboration.

b) In cases initiated by developed countries, the period of implementation suggested as a guideline to the arbitrator in Article 21.3[c] of the Dispute Settlement Understanding may be increased from 15 months to 3 years for developing countries where disputes between developed and developing countries result in findings in favour of the developing country.

c) Where developing countries, as respondent, have won cases initiated by developed countries, the legal fees and other costs should be paid by the developed country that had initiated the case.

d) In cases in which the developed country is the complainant and a developing country is the respondent, the period available to the concerned developing country for

making submissions, rebuttals etc. as indicated in Appendix 3 to the Dispute Settlement Understanding, should be doubled. This will also entail a corresponding change in Article 12.8 of the Dispute Settlement Understanding.

e) In cases, where a developed country is the complainant and a developing country is the respondent, the developed country should acquire the right to initiate dispute settlement action against the developing country, only if it is able to demonstrate that the alleged violation of a provision of a covered agreement by a developing country causes, to the developed country, trade impairment or trade loss above a threshold or deminimus level. Various methods of arriving at this deminimus or threshold level of trade loss could be examined. For instance, the deminimus level could be a certain percentage of the value of imports of that particular item by the developing country concerned or a certain fixed percentage of the total market size of the developing country for that particular item. By adopting this approach it would be possible to ensure that developed countries do not raise disputes against developing countries unless the measure taken by the developing country is demonstrated to have a significant impact on the trade of the developed country.

f) If, due to circumstances beyond the control of a developing country and in spite of such country's best endeavour, the developing country is unable to complete action within the implementation period laid down in Article 21.3 of the Dispute Settlement Understanding, the matter should be considered by the Dispute Settlement Body and additional time given to implement the commitment. This should apply only in cases where the developing country is able to establish that despite best endeavour, it has not been possible to fulfil the commitment due to force majeure conditions.

g) Article 22 of the Dispute Settlement Understanding provides for compensation and suspension of concessions in case a defaulting Member country fails to comply with the recommendations of the Dispute Settlement Panel or the Appellate Body, as the case may be, within the reasonable period of time determined under paragraph 3 of Article 21. However, there are no clear guidelines regarding the manner in which such compensation or suspension of concessions is to be calculated. This is not an issue that can be left entirely to negotiations between unequal partners. There should be guidelines laid down in the same manner as in the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994. Besides, it is essential that differential and more favourable treatment for developing and least developed countries is built into these guidelines also, so that a developing country or least developed country has to pay substantially less compensation than a developed country in comparable circumstances

h) Considering the disparity between developed and developing countries in commercial strength, it is obvious that developing and least developed countries have very little capacity to take effective retaliatory action against developed countries. In cases where developing countries are to get ultimate relief through retaliation against developed countries, there should be joint action by the entire membership of the WTO.

Special Working Group

30. There is thus a strong need for immediate review of the special and differential treatment provisions for developing and least developed countries with a view to ensuring that the full benefits of the multilateral trade system accrue to developing countries. A process of evaluation has to be

immediately initiated, either through a specially constituted Working Group or through special and dedicated sessions of the Committee on Trade and Development in order that necessary amendments to various agreements are formulated and placed for discussion before the General Council. This process of evaluation and formulation of amendments has to be a time bound process to be completed by December 1998 so that serious discussion in the General Council can commence in January 1999.

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