WORLD TRADE ORGANIZATION

JOB/DSB/8

12 February 2024

(24-1232)

Page: 1/6

Original: English

DISPUTE SETTLEMENT REFORM: REFLECTIONS ON SUBSTANTIVE ISSUES

JOINT COMMUNICATION FROM BANGLADESH, EGYPT, INDIA, INDONESIA AND SOUTH AFRICA

The following communication, dated 12 February2024, is being circulated at the request of the delegations of Bangladesh, Egypt, India, Indonesia and South Africa.

---

1. The Members submitting this communication recall communications by the African Group (JOB/DSB/5), Indonesia (JOB/DSB/6), and India, South Africa and Egypt (JOB/DSB/7), on the centrality of the WTO dispute settlement system in ensuring security and predictability of the multilateral trading system and expressing concerns regarding the status of dispute settlement reforms.

2. While affirming our support to the common efforts in producing a positive outcome from the work of DS reform, we are concerned by the manner in which the ongoing discussions are proposing far-reaching changes that would fundamentally alter the nature of the dispute settlement system of the WTO, as envisaged by the Marrakesh Agreement. These changes undermine interests that we, as developing countries, including LDCs, have identified as essential in a reformed WTO dispute settlement system.

3. We note that concerns and reservations that have been raised by us in the course of the ongoing discussions have not been recorded. The consolidated draft text that is now taking shape presents a misleading view and suggests that there is convergence on the majority of the issues in the text. We highlight some areas of concern in this communication. We also note that these concerns are indicative, and do not preclude us from raising further concerns and reservations as and when necessary.

4. **In summary,** the Members submitting this communication believe that the substantive discussions that have been taking place raise the following concerns:

- The central interest that motivated Members to engage in this informal exercise i.e., the restoration of the Appellate Body, has not been addressed.
- Instead of addressing this core issue of concern, the discussion has moved in directions which will undermine the fundamental nature of the rules-based, two-tier WTO dispute settlement system with a standing appeal mechanism, and binding decisions.
- Changes are being proposed that alter the existing balance between competing interests, which span across varied areas like legal systems, levels of development and development objectives, and power differentials. For instance, the cumulative impact of changes in streamlining and composition of panels would make the process more onerous for developing countries, including LDCs.

- Some aspects substantially restrict the rights currently available to the Members under the Understanding on rules and procedures governing the settlement of disputes (DSU). For instance, the reduction of the reasonable period of time (RPT) for compliance to 6 months in certain instances.
- Some of the proposed changes cannot be contemplated without a DSU amendment. Such changes are being presented as a practice that Members agree to follow, even when these are inconsistent or contrary to the DSU, for instance, constraining the right to a second hearing for the establishment of a panel.
- There are topics where the procedures being proposed would amount to a complete inversion of the default positions in the DSU, such as on confidentiality.
- Proposed changes are not focused on the essential reforms that are required for the restoration of a fully functional system. Changes are being proposed in several DSU provisions which may not require such modification, and where the existing provisions can adequately address Members" interests, such as, in the participation of third-party citizens as panellists.
- Changes that will have a far-reaching impact on the practice of the dispute resolution system are being proposed without rigorous, evidence-based analysis in the specific context of the WTO dispute settlement system, such as "advisory working group".
- Concepts, terminologies, and practices that are novel to the dispute settlement system are being introduced without adequate clarity and precision, which may lead to further interpretive confusion and increased litigation in the future. Extreme caution should be exercised to ensure that concepts that need much greater reflection and deliberation are not introduced in undue haste.

THOUGHTS ON OUR INTERESTS IN A REFORMED DISPUTE SETTLEMENT SYSTEM

Primacy of the two-tier system

5. A two-tier and binding dispute settlement process with a standing appeal mechanism is a critical element for enhancing trust in WTO"s dispute settlement mechanism, in ensuring proper application of covered agreements, and safeguarding objectivity and fairness of adjudicated outcomes.

6. We note that there have been some informal discussions on the appellate review mechanism, which touch on issues of leave to appeal and standard of review. This discussion is being conducted in isolation from the issue of the restoration of the Appellate Body and the permanence of the underlying appellate structure. Considering the support expressed by a large number of Members to immediately start the selection processes for filling vacancies on the Appellate Body[1], we believe that the central focus of the reform efforts should be aimed at prioritizing the restoration of the Appellate Body. The discussion on the intricacies of the review standards should be considered once there is consensus on the structure of the two-tier system, with the Appellate Body at the core.

7. We also note that the focus in the informal discussions is on narrowing the possibility of appeal to "exceptional circumstances" by introducing new concepts and terms such as "real prospect of success" or "materially significant impact". There are efforts to conflate the panel and appellate stages by expanding the remit of the interim panel review. These are novel ideas that require greater examination, and should be backed by evidence.

Implications of changes in panel process

8. We acknowledge the need to streamline panel proceedings in order to enhance effectiveness and efficiency in dispute resolution. However, Members had also noted the need to evaluate the changes in the panel processes in their entirety to ensure that it does not become more onerous for developing countries, including LDCs. They noted that flexibility in panel processes is of particular importance to developing countries, including LDCs, and thus, the changes proposed could be indicative, rather than mandatory.

[1] WT/DSB/W/609/Rev.26.

9. In the draft text, the sections on *Streamlining the Panel Process* and *Conciseness and Time-frame Adherence* propose changes such as the introduction of word and time limits; and changing the time frames of panel processes. These detailed and layered changes substantially modify the nature of the panel process and adversely impact the ability of developing countries including LDCs to access the dispute resolution system. For instance:

- The panel is being given the authority to categorize cases into standard, complex, and extraordinarily complex. This determination brings substantial changes and unnecessary subjectivity into the processes applicable to the dispute.
- Parties would have to make arguments at the organizational meeting, which would have a substantive impact on the dispute such as on the complexity, confidentiality, number of hearings, etc., thus adding a substantial dimension to the organizational meetings.
- In addition, panel establishment at the first relevant DSB meeting would effectively reduce the time available, particularly for the responding party. The expedited time frames constrain the flexibility of Members to explore potential amicable solutions to resolve their disputes.
- The proposed changes are mandatory, and no attempt has been made to accommodate the diversity of national circumstances.

10. When seen holistically, these changes will make the dispute settlement process more onerous, complex, and difficult in actual practice for Members.

Diversity and inclusiveness

11. Any reform in the dispute settlement system must accommodate a wide range of perspectives and ensure that the system benefits all Members, regardless of their economic size or development status. This is essential to uphold the fundamental principles of fairness, inclusivity, and equity in international trade.

12. The changes proposed in the section on *Panel Composition* should be examined to ensure balance between "the independence of the members, a sufficiently diverse background and a wide spectrum of experience", as specified in Article 8.2 of the DSU. Proposed changes, such as qualifications of individuals nominated to the indicative list, and the nomination of non-citizens to the indicative list upset this delicate balance.

13. Several concerns raised by developing countries including LDCs have not been addressed. For instance:

- Mandating diversity to ensure that the potential list of panellists is "broadly representative" of the membership of the WTO including of different geographical areas, levels of development, and legal systems.
- Flexibility in the objective qualification criteria to enable capacity constrained Members to make nominations to the potential list of panellists.

14. The granular details of qualifications that are now being proposed does not accommodate diversity of governmental, legal, and academic practices in various jurisdictions. Changes that emphasize on certain aspects of panel selection such as narrowly defined technical expertise, without commensurate measures to account for diversity, will exacerbate the concentration of eligible panellists from certain geographical areas and legal systems.

Ensuring a balance between transparency and confidentiality

15. While recognizing that transparency is important in a Member-driven organization, especially for greater capacity building, Members had raised concerns about the asymmetrical ability of external stakeholders, particularly commercial interests, to influence or pressure the dispute proceedings. Members underscored that measures must be in place to protect confidential information.

16. The approach taken by the section on Transparency which deals with Transparency Measures vis-à-vis WTO Members and Transparency Measures vis-à-vis the General Public raises grave concerns. For instance:

- The default position on transparency and confidentiality as envisaged in Article 18 of the DSU has been completely inverted, to mandate publication of all submissions, and the observation of hearings (either in real-time or recordings) by all WTO Members and by the general public.
- The process envisaged for protecting confidential information does not sufficiently meet the gravity of the concerns raised.
- The changes would create a marked disparity in the conduct of the dispute resolution proceedings when compared to other WTO bodies such as the General Council or the Committees.

Security and predictability of the dispute settlement system

17. Members have an interest in ensuring that the dispute settlement system of the WTO remains the central element in providing security and predictability to the multilateral trading system, as envisaged under Article 3.2 of the DSU. This is particularly important for developing countries including LDCs who benefit from having stability, constancy and predictability related to both, the permanence of the underlying structure and procedures, and the application of rules.

18. The section on *"Guidelines for adjudicators*" covers topics like treaty interpretation, focus on what is necessary to resolve the dispute, and the precedential value of past reports. These provisions re-examine the interaction of WTO interpretations with customary international law, modify the manner in which a panel functions to make an objective assessment of the dispute under Article 11 of the DSU, and constrains the autonomy of disputing parties to fully explore all facets of their dispute.

19. We note that the interpretative authority of the adjudicative bodies of the WTO is based on customary rules of interpretation of public of international law, which have been set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, and on the further elaboration of these principles through the evolving jurisprudence. The DSU is also the result of the careful consideration of, and improvement upon the pre-WTO GATT system of dispute resolution. We should be careful not to undermine these underlying concepts for the sake of incremental changes.

Member Control

20. It is critical that the Member-driven nature of the WTO is not diluted or rendered ineffective through the reform of the dispute settlement system. There are several changes proposed that would undermine this interest.

21. The WTO Secretariat and the DSB Chair have been given the authority to review the nominations of the Member countries to the indicative list; to recommend changes to the nominating Member; and share that information, upon request, with other Members.

22. The authority given to the panellists to determine the nature of the case (standard, complex, extraordinarily complex), and, to invite parties to limit their claims shifts the locus of control over the panel process away from the disputing parties to the panellists.

Special and differential treatment (S&DT)

23. The dispute settlement mechanism must demonstrate adherence to the S&DT provisions recognized in the Marrakesh Agreement and built into the DSU not only in form but also in practice. The MC12 Outcome Document reaffirmed that the provisions of S&DT are an integral part of the WTO and its agreements, and must be made precise, effective, and operational.

24. To this end, in addition to strengthening the existing S&DT provisions in the DSU, additional S&DT elements should be incorporated across the agreement, including provisions relating to

accessibility and capacity-building needs that inter alia address high litigation costs. However, the informal discussion has not addressed this issue in any manner.

Ensuring effective compliance

25. We note that the section on *Compliance* introduces changes which would substantially shorten the reasonable period of time (RPT) to comply. This does not take into account the different legal and political systems of Members or provide sufficient S&DT for developing countries, including LDCs. They also introduce an element of mandatory Alternate Dispute Resolution (ADR) into the process, since refusal to engage in ADR would result in an RPT of 6 months.

26. The expedited timelines are particularly worrisome since, historically, the ask of developing countries, including LDCs, has been for a minimum RPT of 15 months. Any reform of compliance must ensure additional flexibility for developing countries including LDCs to enable them to enforce decisions of the adjudicative bodies against developed Members.

An effective Alternative Dispute Resolution system

27. Members have an interest in a strong ADR system, based on standardised rules and procedures. This is particularly important keeping in mind that power differentials and capacity differentials exist between parties in litigative actions. Members have emphasized the need to maintain the voluntary nature of ADR as currently envisaged in the DSU. The development of guidelines should not add obligations, or increase complexity of the process.

28. However, the proposed section on *ADR and Arbitration* introduces numerous guidelines, requirements, and additional processes, which will curtail the flexibility that is a core characteristic of such processes, therefore dis-incentivizing developing countries including LDCs from taking recourse to ADR. The impact of the introduction of such a multiplicity of provisions has to be examined in greater depth. For instance, the proposed addition of a *"conciliator or mediator assistance during consultations"* complicates the litigative and ADR streams under Articles 4 and 5 of the DSU. The proposed inclusion of political consultation in ADR during the compliance stage will make the process more complex and unpredictable for the countries with smaller economies.

Enhancing Accessibility through Technical Assistance and Capacity Building

29. To facilitate the effective utilization of the dispute settlement system by all Members, particularly developing countries and LDCs, we strongly encourage the enhanced implementation of capacity building and technical assistance in the area of dispute settlement. A sufficient understanding of the system among Members will be beneficial in promoting enhanced utilization of dispute settlement system by Members to safeguard their trade interests.

30. We note that while the current draft text reflects a high degree of ambition to make changes in various areas, the Section on *Accessibility with respect to technical assistance, capacity building and legal advice* is modest and restrained. A reformed dispute settlement system should open an avenue to expand scope of assistance for developing countries, including LDCs, to include other future organizations. The specific mention of individual non-WTO bodies such as ACWL may have the effect of further constraining development of multiple providers and constraining the options of countries with limited resources.

Nature of Secretariat support

31. Members have an interest in having a system that facilitates and supports the legal proceedings within the WTO, and provides comprehensive assistance to WTO Members, particularly those with limited resources. At the same time, in providing such support, impartiality and independence should be upheld.

32. While recognizing the role of the Secretariat in creating an enabling environment for the panellists to issue their decisions based on their respective understanding to the matter of the dispute, attempting to strictly delineate the nature of such assistance may have an impact that is opposite to the desired effect.

THE WAY FORWARD

33. We reiterate the call for the immediate initiation of formal discussions on dispute settlement reform, in fulfilment of the ministerial mandate under MC 12. We further state that sustainable reform can only be carried out in the context of the operation of the dispute settlement system in its entirety. The reforms must be conceptualised and implemented as a comprehensive package, and not in isolated and piecemeal sections.

34. We continue to stand ready to engage in discussions to fulfil the Ministerial mandate of MC12 provided interests and concerns mentioned above are fully addressed.

_____