
**Special Session of the Dispute Settlement Body
26-27 January 2004**

MINUTES OF MEETING

Held in the Centre William Rappard
on 26-27 January 2004

Chairman: Mr. Péter Balás (Hungary)

<u>Subjects discussed:</u>	<u>Page</u>
1. Discussion of proposals relating to the "implementation" phase	1
2. Presentation of new proposals.....	2

The Chairman welcomed participants to the sixteenth meeting of the Special Session and said that the airgram for the meeting had been circulated in WTO/AIR/2237 and that the draft agenda (TN/DS/W/63) contained two items, namely (i) discussion of proposals relating to the "implementation" phase and (ii) presentation of new proposals. Under the first item, the Chairman drew attention to the proposals submitted by Members on the implementation phase and also his text contained in TN/DS/9 and requested Members to indicate possible areas of convergence. With regard to item 2, he recalled that Malaysia had made a statement concerning a forthcoming proposal, which had since been circulated as JOB(04)/2 and proposed that it be taken up under agenda item 2.

1. Discussion of proposals relating to the "implementation" phase

1. The representative of Mexico recalled that his delegation had constantly stated that the greatest problem in the DSU's functioning was in the implementation area and said that it was his wish that Members would have a fruitful discussion that would contribute towards finding a solution to this problem. He said that he would like to make three points: (a) He referred to DSB Special Session minutes of 13 and 15 November 2002 and said that more than 20 delegations had concurred with the view of Mexico that the implementation phase of the dispute settlement system was weak and needed to be strengthened; (b) he referred to the diagnoses document submitted by Mexico at the November meeting and said that this document highlighted three aspects which demonstrated the shortcomings of a weak implementation mechanism: (i) the growing number of dispute settlement cases; (ii) the average time taken for an inconsistent measure to be brought into conformity was excessively long; and (iii) the exorbitant costs that were then implied for the complainant; and (c) the statements made by Members at the present meeting and the one on Friday underscored the importance attached to the implementation phase by Members. It was therefore disappointing that the Chairman's text did not create greater incentives for prompt compliance. He said that there was an urgent need to have an in-depth knowledge of each of the problems in the functioning of the dispute settlement mechanism in order to be able to set priorities and understand what exactly was going to be solved. Hurrying through a conceptual discussion, then working on a new Chairman's text was not the response. Members should not fall into the same errors as those of the past. For substantive progress to be made, there was a need for a new approach.

2. Presentation of new proposals

2. The representative of Malaysia said he was fully aware of the fast approaching May 2004 deadline to conclude the DSU negotiations. While the remaining time might be short, Malaysia believed that the concept of provisional measures could be further debated and elaborated since the concept was not completely alien for many Members who had been involved in arbitration or any other adjudication process at international and national levels. Provisional and protective measures had one simple objective which was to address emergency or urgent situations. It did not prohibit any party from obtaining a fair trial. Experience had shown that provisional measures had been a useful interim remedy pending the final determination or disposal of the substantive dispute. Malaysia and Singapore had recently sought and obtained certain provisional measures before the International Tribunal for the Law of the Sea (ITLOS) prior to the final determination of alleged violations of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS). The measures had a positive impact on consultations later held between the parties and encouraged them to intensify their efforts to find a mutually acceptable solution to the problem.

3. With respect to the WTO dispute settlement system, the available statistics had shown that by May 2003, only about one third of the nearly 300 cases had reached the full panel stage. A significant number of disputes was thus resolved through the consultation process. In cases where consultations were not able to resolve the dispute, the weaknesses of the dispute settlement system became apparent. The process was usually drawn out meaning increased costs for the affected Members. Malaysia firmly believed that it was timely for some changes to be made to the DSU mechanism to ensure effective resolution of disputes to the satisfaction of all parties. Malaysia was concerned about irreparable or serious damage that could be done to an industry of a Member, particularly a developing country, as a result of the shortcomings in the dispute settlement system. Every effort should be made to uphold the principle that all Members should be able to trade freely within an equitable system. To this end, appropriate and adequate avenues and remedies should be made available and the introduction of the concept of provisional measures in the dispute settlement understanding would be a positive step towards that direction. Provisional measures would permit Members to have an interim remedy against an allegedly inconsistent measure until the final disposition of the case.

4. Should a Member impose a measure to protect its industry, this would inevitably inflict damage on industries producing like goods in other Members. The damage could be irreparable depending on the importance of the market imposing the measure and the nature of the restrictive measures. The three-year length of the DSU process, would itself be enough to cause severe harm or injury to the affected country. Provisional measures would minimize the damage and prevent further harm or injury being inflicted on the affected Member. Under the current system, a Member's market share could be eroded if the dispute took a longer time to resolve, as had been pointed out by Chile. This situation was exacerbated by the fact that current WTO remedies were prospective. He reiterated that the concept introduced in Malaysia's paper was not new and could be found in many international dispute settlement mechanisms and in national legislation of many countries. The inclusion of the provisional measures would not only streamline and closely align the DSU mechanism with other international dispute settlement mechanisms, but would ensure a more conducive trading environment for Members.

5. Given the central role of the dispute settlement mechanism, it was Malaysia's expectation that delegates would seriously deliberate and contribute positively towards the proposal on provisional measures. Subject to the response of the delegates, Malaysia was prepared to further develop the concept and formulate relevant rules and procedures for the implementation of provisional measures. It might be advisable for the Special Session to establish a technical and legal expert working group to work further on this issue. Malaysia was conscious that the introduction of provisional measures would fundamentally alter the dispute settlement system, but it remained convinced about the positive

contribution that could be made by the concept of provisional remedies to the dispute settlement system and to the WTO system as a whole. Under Malaysia's proposal, prior to the imposition of a measure or after its imposition, a Member would have the right to request consultations with the Member seeking to impose or which had imposed the allegedly inconsistent-WTO measure. Should consultations fail to lead to the withdrawal of the measure, the affected Member could request provisional measures from a panel. The panel would hear the case by oral and written submissions and eventually prescribe the necessary provisional measures as an interim relief to the affected Member. To prevent abuse of this remedy, relief would be granted only in cases of urgency and where serious injury would result. To ensure compliance, the panel could prescribe certain specific steps to be observed by the country which had imposed the measure.

6. The representative of Mexico welcomed Malaysia's proposal and said that it was appropriate for temporary relief to be granted to Members which had suffered as a result of the imposition of WTO-inconsistent measures. He said that the technical details of the Malaysian proposal were still being studied by his delegation, which would later welcome the opportunity to further discuss the concept with Malaysia and others with a view of incorporating it into the DSU. As rightly pointed out by Malaysia, this concept was nothing new to either international or domestic legal systems, so it was time for Members to embrace this concept.

7. The representative of the United States expressed his delegation's appreciation for the Malaysian paper's recognition of the importance of the prompt resolution of disputes, and of the damages that can be suffered while waiting for the conclusion of the dispute settlement process. Malaysia also had demonstrated the importance of not extending the overall time frames for dispute settlement, and of more efficiently allocating the time spent. However, the proposal raised a number of questions and concerns. For example, did the proposal imply that complainants could seek authorization to suspend concessions before there had been a multilateral finding that the respondent had breached a WTO obligation? Was Malaysia proposing an amendment to Article 23 of the DSU? What would be the role of the Appellate Body concerning provisional measures? The United States looked forward to further discussion of the issues and questions raised by Malaysia's proposal.

8. The representative of India welcomed the proposal by Malaysia and said that there had been some earlier proposals on provisional remedies. He said that his delegation had a number of concerns and would appreciate receiving responses from Malaysia. It was not clear which measures would be deemed "inconsistent". He said that like the United States, India could not discern from the proposal whether this would be determined through a multilateral process, and whether there would be an expedited process to enable provisional measures to take hold faster. It would be extremely useful if the terms "urgency", "serious harm or injury" could be clarified and an indication given as to who would determine their occurrence. India wanted to confirm its belief that there would be a multilateral process to determine these issues before provisional measures were granted.

9. The representative of Thailand said that his delegation was sympathetic to the proposal by Malaysia as it was their belief that provisional measures would not have any detrimental effect on the operation of the DSU. In fact, they could enhance the credibility of the dispute settlement system and also the WTO as a whole. The elements suggested in the proposal, including the need for prior consultations was consistent with the general principles of international law, which required states to cooperate with one another in order to settle disputes by peaceful means. In the context of the WTO, however, Thailand was not sure whether prior consultations should be made mandatory. He sought further clarification from Malaysia as to how panels would be composed in light of the fact that they had to be established as promptly as possible. Would the parties to the dispute have to agree on panel composition over a short period of time, and whether following the lack of agreement, any of the parties could request the Director-General to immediately appoint the panellists?

10. The representative of the European Communities said that the EC shared the view that there was a need to discuss and consider some means of getting more rapid and effective remedies under the dispute settlement system. However, there were a number of complexities which had to be considered critically before a decision was made. He requested Malaysia to further clarify the following: (i) since there was an assumption that it would be open to any Member to apply for provisional measures which would be decided on by a panel taking into account the urgency of the situation and the likelihood of irreparable damage being caused, it was not clear whether the panel would also be responsible for examining the substantive legal claim of WTO-incompatibility of the measures taken by the responding Member; (ii) it was unclear which remedy would be granted to the complaining Member in the event of the responding Member not suspending or terminating the action against which the provisional measure had been requested. Would the complaining Member be able to retaliate against the responding Member immediately without the determination of the substantive legal claims.

11. The representative of Japan requested Malaysia to clarify when the complaining Member could be authorized by the Panel to take retaliatory action. It was not clear how far the deliberations on the substantive claims should proceed before the provisional measures were actually granted. It was also unclear as to which criteria would be used to determine whether the measures concerned would cause irreparable damage or how urgent should the situation be before authorization was granted by the panel. It appeared that Panels would have a wide discretion under Malaysia's proposal which might not always be exercised to the advantage of the complaining Member. Given that the complaining Member could be authorized to take retaliatory action in the event of non-compliance, it was important for there to be clear procedures which would allow the responding Member to ask for a review of the panel's decision to grant provisional measures if it was dissatisfied. Regarding the time-frame for the composition of panels, he said that Japan shared the views of Thailand.

12. The representative of Brazil referred to paragraph 6 of Malaysia's paper which listed some international judicial bodies which could grant provisional remedies and asked the experience to date in terms of whether the grant of such remedies had facilitated the eventual resolution of disputes and their compliance rate. He said that Brazil would be interested in knowing whether NAFTA had provisions which allowed the grant of provisional remedies. While MERCOSUL had provisions on the grant of provisional remedies, they had never been resorted to. He said that Brazil shared the underlying sentiments of the Malaysian proposal, as there were occasions where the introduction of a measure might cause irreparable damage to the trade of a Member. The lack of effective and timely remedies could be frustrating for Members. Given the potential for abuse of this remedy, he asked whether the complaining Member would be liable to pay damages to the responding Member if the measures in respect of which a provisional remedy was granted was subsequently found to be WTO-consistent.

13. The representative of Argentina said that the grant of provisional remedies should not prejudice the final outcome of a dispute. He asked whether Malaysia had thought about a guarantee mechanism to cover situations where the challenged measure was subsequently found to be WTO-consistent. Under the rules of the International Centre for Settlement of Investment Disputes (ICSID), the tribunal was allowed to grant provisional measures, but the complaining party could be required to post a guarantee in the event of the challenged measure being subsequently found to be legal.

14. The representative of Chile said that the dispute settlement system of the WTO was quite unique and that it was inappropriate to make comparisons of it with judicial mechanisms of other international organizations. International judicial bodies such as ICSID and the International Court of Justice were courts of law whose rulings were binding on the parties to the dispute. The dispute settlement system of the WTO could not be likened to a court of law, as its primary purpose was to help the parties to find a settlement to their dispute by issuing recommendations. He said that Chile shared the concerns expressed by India and the U.S. and asked for further clarification of the

circumstances that would be taken into account by a panel in deciding whether or not to grant a provisional remedy to the complaining Member. In cases of repeated violations of a WTO provision, a persuasive case could be made for the grant of a provisional remedy.

15. The representative of Malaysia said that fairness and access to justice were at issue and his delegation had suggested a system to provide access to justice for both parties. He reiterated that the concept of provisional remedies was not alien and it was recognised in most domestic legal systems. With respect to question whether the complaining Member should post a guarantee in the event that the measures were found to be WTO-consistent, he said that it was Malaysia's view that the complaining Member should be required to compensate the responding Member if it was subsequently found by the Panel that the challenged measures were WTO-consistent. With respect to the comment by Chile that the WTO's dispute settlement system could not be likened to a court of law, he said that while it was true that the WTO's dispute settlement system was unique, in many respects there were some features which resembled those in domestic legal systems. Suspension of concessions could, for example, be likened to punitive measures in the domestic legal systems of some Members. With respect to Japan's comment about the wide discretion that panels would have under the proposal, he said that it was inevitable for panels to have a wide discretion to enable them to evaluate all the facts and the surrounding circumstances and make informed decisions which would protect the parties' rights and also uphold the integrity of the dispute settlement system. He stressed that a provisional measure was an interim measure and that the final judgment could go either way. Its main purpose was to prevent irreparable damage to the trade of the complaining Member.

16. The representative of Canada said his delegation shared Malaysia's concerns on the problems caused by a lengthy dispute settlement process and the difficulties and costs that such a process could impose on an ultimately successful complainant. Under the current system, the complaining Member was not entitled to any remedy while the case run its course. It could be envisaged that in certain situations, irreparable damage could be caused during this period. He said, however, that Canada shared some of the concerns expressed by the United States, India, the European Communities, Japan, Brazil and other Members. In listening to Malaysia's response, it might be helpful to think about how provisional measures could be applied or made an integral part of the dispute settlement system. This would give Members a better sense of what Malaysia and Mexico envisioned in the application of provisional measures and what form these measures would take in national treatment, SPS and subsidies disputes. He thought that if Members had some answers to those questions, it might be easier to contemplate how provisional measures could be made to work under the dispute settlement system.
