

# WORLD TRADE ORGANIZATION

TN/CTD/W/5/Add.1  
8 July 2002

(02-3784)

---

Committee on Trade and Development  
Special Session

Original: Spanish

## APPLICATION OF THE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS CONTAINED IN THE AGREEMENTS AND DECISIONS OF THE WTO

### Communication from Paraguay

#### Addendum

The following communication, dated 4 July 2002, has been received from the above delegation.

#### **I. INTRODUCTION**

1. The delegation of Paraguay has decided to submit a second document in the light of the interesting and important reactions generated within the Committee on Trade and Development by its proposal distributed as document TN/CTD/W/5.
2. First of all, the delegation of Paraguay thanks all delegations which in one way or another have contributed to enriching the debate on waivers, their consequences and the effective application of the Enabling Clause.
3. The Enabling Clause is regarded as a substantive and pivotal instrument in the special and differential treatment regime of the World Trade Organization. It is one of the mechanisms which, in a genuinely operational and highly effective manner, contribute to the development of developing countries, given its systemic nature and direct impact on effective market access.
4. The purpose of this document is to clarify and qualify the initial proposal by the Paraguayan delegation, TN/CTD/W/5, since a number of delegations have very kindly submitted questions, either orally or in writing.

#### **II. SPECIAL AND DIFFERENTIAL TREATMENT MUST BE FAIR AND EQUITABLE**

5. The aim pursued by the signatories to the GATT and the WTO Agreement was increased trade liberalization and further participation of all Members in the work of building a fairer trading system. As a result, recognition was given to the need to accord special and differential treatment to the developing countries.
6. In recognizing this need, the developed countries affirmed their belief that differential and more favourable treatment and fuller participation of developing countries were fair and equitable principles. This led to the adoption of the Enabling Clause as a mechanism for improved management of the Generalized System of Preferences (GSP). The Enabling Clause authorizes "*preferential tariff*

*treatment accorded by developed contracting parties to products originating in developing countries in accordance with the GSP*", as adopted and harmonized under the Decision of 25 June 1971 on the Generalized System of Preferences, which provides that preferences must be "*generalized, non-reciprocal and non-discriminatory*".

7. As was reaffirmed by the Ministers in the Doha Declaration, the special and differential treatment provisions are an integral part of the WTO Agreements and must be understood as an "established right" for developing countries, in the same way as the Enabling Clause, for example, with the aim of giving them the opportunity to participate effectively in the multilateral trading system.

8. In this connection, it is worth recalling that the grant of facilities and privileges to developing countries under the Generalized System of Preferences (GSP) is a discretionary power of the developed countries. It is an act which depends on their own inclination, meaning that it is an option available to developed countries. However, if such special and differential treatment is to be fair, once adopted it must conform to the mandatory rules and regulations applicable to the parties which accord such special treatment, and it is for this reason that the delegation of Paraguay draws attention to the fact that it is the Enabling Clause which clearly establishes those mandatory rules.

9. Consequently, it is important to make it clear that what the delegation of Paraguay is demanding is that the benefit of special and differential treatment accorded to a country or a specific group of countries should not operate to the detriment of another country or group of countries. The Enabling Clause must therefore be applied fairly.

### **III. IT IS NECESSARY TO BUILD A FAIR, SECURE AND PREDICTABLE MULTILATERAL TRADING SYSTEM**

10. The plurilateral, bilateral and other discussions on the Enabling Clause held at successive special sessions of the Committee on Trade and Development brought to light a series of "special or specific waivers" skilfully submitted and defended by certain Members, disregarding the request that they comply with the rules laid down in the above-mentioned clause.

11. The delegation of Paraguay agrees that some of these waivers are provided for and accepted in the Enabling Clause itself, as will be shown in the next chapter.

12. As was pointed out in paragraph 10 of document TN/CTD/W/5, there are also waivers not agreed among Members which could be accepted, provided that they cause no damage or injury to a developing country, or that the developed country requesting the waiver provides satisfactory compensation to the developing country which suffers economic injury on account of the measure in question.

13. Otherwise, such non-consensual waivers give rise to discrimination inconsistent with the Enabling Clause, sometimes based on arguments for the grant of the privileges or facilities concerned, such as the following:

- (a) Waivers of an economic nature:
  - (i) Competitiveness criteria;
  - (ii) specialization and development indices;
  - (iii) sectoral and country graduation;
- (b) Waivers of a political nature:

- (i) Linking the benefits to non-trade issues, such as environmental and social (labour) standards;
- (ii) intellectual property rights; and
- (iii) the fight against drugs.

14. All these arguments in favour of measures under the Enabling Clause are based on a subjective, arbitrary and unilateral position taken by certain developed countries, thereby giving rise to discrimination with highly damaging costs to the economies of non-beneficiary developing countries. Such a severe distortion of the trade rules generates a great deal of insecurity and totally eliminates predictability.

15. The economic operators and, in particular, the governments of developed countries with which we have entered into bilateral agreements for the promotion and mutual protection of investment (these being a common source of foreign direct investment flows to the developing countries), insistently demand that the developing countries ensure a "legal and economic certainty and predictability".

16. It is crucially important for the developing countries to ensure that the required predictability is achieved through observance of the relevant rules and regulations, so as to avoid the trade-distorting effects of waivers which undermine the competitiveness of their industries and exports. For this reason, it is not possible or advisable to continue building a multilateral trading system based on waivers and exceptions which give rise to discriminatory forms of treatment.

#### **IV. WAIVERS GRANTED**

17. Some of the waivers from Article I of the GATT are necessary and are in conformity with the provisions of the Enabling Clause, such as those provided for in paragraph 6 of the Clause: "*having regard to the special economic difficulties and the particular development, financial and trade needs of the least developed countries (LDCs)*". This is confirmed in paragraph 8 which states: "*particular account shall be taken of the serious difficulty of the least developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs*".

18. In this connection it is worth pointing out that we also consider that the establishment of agreements between blocs of countries and other countries and/or blocs of countries, allegedly under Article XXIV, but outside the rules and disciplines of the WTO, gives rise to discriminatory forms of treatment and deprives the system of any transparency, because of waivers and exceptions.

19. The latter point serves to highlight the fact that in Doha the Ministers recognized that regional trade agreements can play an important role in promoting and liberalizing trade and in encouraging economic development.

20. The delegation of Paraguay is convinced of the truth of this assertion, given our membership of regional economic integration schemes such as the LAIA and MERCOSUR. Such schemes are based on the principles, disciplines and procedures of the WTO, and they are authorized under paragraph 2(c) of the Enabling Clause.

21. Any waiver must be in conformity with the already agreed and established principles of the multilateral trading system; in other words, *preferences must be generalized, non-reciprocal and non-discriminatory*.

## **V. THE PRINCIPLES OF NON-DISCRIMINATION AND FLEXIBILITY**

22. The Paraguayan delegation's proposal (TN/CTD/W/5) has also generated an interesting discussion because it appears to highlight two contrasting principles on which the multilateral trading system is based: the principle of non-discrimination and the principle of flexibility.

23. The delegation of Paraguay sees no contradiction in its proposal. Non-discrimination is the general norm and is based on Article I of the GATT 1947, i.e. equality of treatment based on the most-favoured-nation clause. It should also be remembered that "the elimination of discriminatory treatment" (non-discrimination), apart from being rooted in a principle recognized in various Decisions and Agreements of the WTO multilateral system, constitutes an objective clearly expressed in the third paragraph of the preamble to the 1947 General Agreement on Tariffs and Trade.

24. Flexible action is possible under this basic principle and objective, but the limit to such flexibility is that it should not cause injury to third parties, because such injury, if it occurs, destroys the balance between the principles of non-discrimination and flexibility. It is unacceptable that, in order to help some, allegedly under the principle of flexibility, others should be injured. This is discrimination, not flexibility.

25. As Members of the WTO, we all accept the principle of flexibility, but we do not accept that the application of that principle to some should cause injury to others. If such injury occurs, two optional lines of approach are available to the aggrieved developing country Member:

- (a) The adoption of opposition to the waiver without applying flexibility; and
- (b) the acceptance of reasonable compensation for a lesser injury, involving the application of flexibility.

26. This is how the Paraguayan delegation sees the question of compatibility and balance between these two principles in accordance with WTO rules and standards, within a fair, equitable and predictable trading framework.

## **VI. CONCLUSIONS AND PROPOSALS**

27. The Enabling Clause is a substantive and pivotal instrument in the special and differential treatment regime of the World Trade Organization. It is one of the mechanisms which, in a genuinely operational and highly effective manner, contribute to the development of developing countries, given its systemic nature and direct impact on effective market access.

28. The Enabling Clause authorizes "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the GSP", as agreed and harmonized under the Decision of 25 June 1971 on the Generalized System of Preferences, which provides that preferences must be "generalized, non-reciprocal and non-discriminatory".

29. Special and differential treatment must be fair and equitable. The benefit of special and differential treatment accorded to a country or to a specific group of countries must not operate to the detriment of another country or group of countries. The Enabling Clause must therefore be applied fairly. It is not possible or desirable to continue building a multilateral trading system based on waivers and exceptions which give rise to discrimination. It is necessary to build a fair, secure and predictable multilateral trading system.

30. Nevertheless, it is recognized that some of the waivers from Article I of the GATT are necessary and are in conformity with the provisions of the Enabling Clause, such as those provided

for in paragraph 6 of the Clause: "*having regard to the special economic difficulties and the particular development, financial and trade needs of the least developed countries (LDCs)*". This is confirmed in paragraph 8 which states: "*Particular account shall be taken of the serious difficulty of the least developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs*".

31. As Members of the WTO, we all accept the principle of flexibility, but we do not accept that the application of that principle to some should cause injury to others. If such injury occurs, two optional lines of approach are available to the aggrieved developing country Member:

- (a) The adoption of opposition to the waiver without applying flexibility; and
- (b) the acceptance of reasonable compensation for a lesser injury, involving the application of flexibility. This is how the Paraguayan delegation sees the question of compatibility and balance between the two principles of non-discrimination and flexibility, in accordance with WTO rules and standards, within a fair, equitable and predictable trading framework.

32. On the basis of the foregoing, the delegation of Paraguay maintains its proposal that waivers from Article I of the General Agreement should not be used to accord advantages or privileges to developing countries, where they clearly discriminate against other developing countries. When developed countries wish to accord advantages or privileges to developing countries, they should do so through the Enabling Clause and in accordance with the spirit and the letter of its provisions.

33. The delegation of Paraguay requests that the benefit of special and differential treatment accorded to a country or to a specific group of countries should not operate to the detriment of another country or group of countries. The Enabling Clause must therefore be applied fairly.

34. We are faced with the task, the challenge and, indeed, the necessity of building a free, open and competitive multilateral trading system. In order to guarantee success in this endeavour, we must have greater access to the markets of developed countries, to prevent the establishment of new trade barriers, eliminate discrimination and provide for sustainability and predictability so that trade and development in combination produce satisfactory results for all the parties.

---