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SPECIAL SESSION ON SPECIAL AND DIFFERENTIAL TREATMENT

Communication from Switzerland to the CTD in Special Session

The following communication dated 9 September 2002, has been received from Switzerland.

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1. The General Council, at its meeting of 31 July 2002, instructed the Special Session of the Committee on Trade and Development (CTD) to continue to examine the various Agreement-specific proposals and cross-cutting issues. The CTD should also prepare a monitoring mechanism for special and differential (S&D) treatment, assess other proposals on institutional arrangements and criteria for technical and financial assistance, and consider how to incorporate S&D treatment into the architecture of WTO rules. The timetable for these tasks is tight (detailed responses should be given to the Agreement-specific proposals by 31 October 2002; a report to the General Council has to be made by 31 December 2002) and a large number of issues have to be dealt with. Hence, it is of utmost importance to efficiently structure and distribute the work to be undertaken. This is why some proposals are made below on the principles and the process to be followed.

2. When considering a specific S&D provision, it will be essential to be able to rely upon a common understanding of its objectives and the considerations that should trigger a change. The African Group alludes to this sequencing of work by first elaborating on principles of S&D treatment (TN/CTD/W/3/ Rev.2). Subsequently, the European Communities (EC) described some elements that deserve attention when looking into the overall purpose of S&D treatment (TN/CTD/W/13). The question then arises whether Members would like to repeat such a discussion each time a S&D provision is considered, tailored to the very nature of the proposal, or whether it would be more efficient to first agree on a number of cross-cutting principles that apply to all S&D provisions. Switzerland prefers the latter approach.

I. PRINCIPLES AND OBJECTIVES

3. **Common rules versus differentiated treatment**. Common rules give all countries a stake in negotiations and make the multilateral trading system work. They provide the rationale for decision-making by consensus rather than by exerting power. At the same time, some Members and applicants for membership have difficulties in introducing or applying some common rules because of their institutional environment, the structure of their economy and their incipient integration in international trade relations. This is why the right balance has to be found between common standards and their flexible application. WTO rights and obligations should not and do not impede development but work for development. It follows that S&D provisions are not meant to set aside the common rules and to create a two-tier trading system. Rather, they are to fit the reality of evolving and highly differentiated economic conditions among WTO Members helping some to get a better

hold in international trading. Thus, a sweeping departure from the fundamental principles embodied in the WTO system is not desirable but flexible solutions should be used when needed:

(a) Substantive rules and procedures should be adapted to suit the special situation of groups of developing countries or, in exceptional cases, of individual Members without jeopardizing the overall coherence of the trading system e.g. certain technical obligations which are not of paramount importance for the trading system might be waived for some time in the case of poorer Members. A discussion on S&D treatment should take place in the CTD and some other bodies of the WTO, based upon homogeneous clusters of proposals (e.g. as suggested in part II below). Also, the CTD should redefine country groups that face similar problems adapting to WTO rules (see paragraph 6 below).

(b) S&D provisions are to be formulated in an effective manner and where deemed feasible in a binding form. Yet, as the economic circumstances underlying the granting of S&D treatment are expected to improve over time, S&D provisions are temporary by nature and should be accompanied by graduation criteria.

4. **S&D provisions are not a panacea.** As mentioned earlier, the multilateral trading system contributes to economic and social development. This is not to say that trade is the main or only factor that leads to improving living standards and sustainable development. There are many other factors. This is why it would not be realistic to expect S&D treatment, as a modulation to the rule, to be the main instrument to overcome deeply-rooted structural problems. Besides their own policy and operational decisions as the main source for their economic future, developing countries are partners in many international development efforts. Even within the WTO, special treatment is not reserved to S&D provisions. So far, the negotiations on market access have provided flexibility to developing countries. Typically, targets and commitment levels (e.g. for tariff reductions) have depended on development status. In services, market access has been determined explicitly "bottom up". The request-offer bargaining has not forced countries to engage in liberalization commitments unless they perceive an overriding trade and investment interest.

5. **Goals and clusters**. The important number of existing S&D provisions and reform proposals as well as their diverse content require that our discussion be broken down into homogeneous elements. In our view, the best method to form these discussion clusters is to apply two criteria:

(a) Where the S&D provisions form part of the modalities or rules that are being discussed in an active negotiating forum, they should be addressed there and be given priority in the scheduling of discussions. Where possible, an "early harvest" might be considered according to paragraph 47 of the Doha Ministerial Declaration.

(b) In all the other cases clusters should be formed according to the specific goals pursued by the provisions. In that respect, the African Group in TN/CTD/W/3/Rev.2 has made very useful proposals regarding capacity building and transition periods. When evaluating the provisions, the circumstances under which a rule was established should be carefully scrutinized. The economic environment and national policies might have changed over time.

6. **Legitimate differentiation among groups of Members**. The multilateral trading system is based upon the principle of non-discrimination. Yet, if common rules affect Members in substantially different ways, it might be necessary to modify the application of a rule or create a special rule in order not to discriminate against certain Members. Equal treatment of Members with fundamental differences of starting positions is not conducive to creating a competitive edge for and to fostering the trade interests of those – the poorest – who need it most. This is why developing countries, as a

group, have been recognized in some GATT and WTO Agreements and Decisions. To differentiate among developing countries, the Enabling Clause of 28 November 1979 establishes an important precedent authorizing the special treatment of least-developed countries (LDCs) in some instances. Other distinctions have been made since, e.g. in Subsidies and Countervailing Measures (SCM), Article 27 and Annex VII (specific countries until they reach US$1,000 per capita income) or in a Ministerial Decision adopted on 15 December 1993 on Net Food-Importing Developing Countries. In GSP and regional preferential schemes quite a few other modifications were made to the dualism developing versus LDCs. Also, transition countries appeared on the international scene a decade ago. Some of the low-income transition countries have a similar economic structure as some LDCs but are not treated as such. Finally, we examined with attention operational proposals for special treatment of a group of small economies (WT/COMTD/SE/W/3) presenting often similar demands as LDCs. This growing country differentiation carries the risk of obstructing the discussions on S&D treatment provisions and leads to arbitrary differentiation. For this reason, participants should reconsider and simplify the various existing and requested categories and agree on a transparent differentiation among developing countries based upon per capita income and trade participation. In some cases, categories will have to be adapted to the specific provision and agreement. Particularly when periods of transition and technical assistance are concerned, measures for specific countries should be considered rather than for country groups. Members could move up the scale as their capacity improves, implying more specific graduation criteria (as for instance defined in the SCM mentioned earlier). The discussion on this topic is urgent and should become another focus of the CTD.

7. **Monitoring and review**. Little is known about when and how S&D provisions were used and how they contributed to development objectives. This makes it difficult to discuss changes in S&D provisions and, in some cases, find the reasons why they were only rarely used or why some obligations were not fully complied with. The implementation of some norms require new capacities and institutional development. It is difficult to assess why these rules were not complied with without knowing how the country was given support through technical assistance. Furthermore, it is difficult to judge how coherent S&D provisions are as part of the multilateral trading system if their application is not reviewed systematically by WTO bodies. For all these reasons S&D treatment should be monitored by the WTO. A proposal to that effect is presented in part III.

II HOW TO DISCUSS THE SPECIAL AND DIFFERENTIAL TREATMENT PROPOSALS

8. Amendments to or new interpretations of S&D provisions may (i) modify the rights and obligations of Members, (ii) contribute to better interpret the rule without substantially altering it, or (iii) turn out not to be amenable to be implemented. For each proposal, these implications are to be evaluated. This implies that experts of the agreement in question need to be involved to consider how the change affects the overall balance of the agreement.

9. Following the General Council's instructions to assign the proposals to clusters, we suggest the following:

(a) Where the Doha Work Programme addresses the issue specifically as a negotiating item, the proposal should be directed to the negotiating group for discussion as part of the negotiating agenda. This would concern about 35 proposals in agriculture, services, rules (anti-dumping, subsidies and regional trade agreements), market access and dispute settlement. Since it will be difficult to deal with these proposals conclusively before the end of 2002, negotiating groups should be instructed to assign a high priority to their discussion. The CTD should be regularly informed on progress made in these decentralized fora and assess the coherence of the solutions found.

(b) The proposals for better trade opportunities for developing countries are discussed by the CTD in Special Session in one cluster. This concerns some ten proposals and could include, e.g., proposals regarding the Enabling Clause and import licensing. But our proposal excludes S&D provisions that concern the future of the GSP. The GSP discussions (e.g. the question of binding tariff preferences or creating common guidelines) require a separate agenda. Although this is an essential element of special treatment, discussions should start once the market access negotiations in agriculture and manufacturing are more advanced.

(c) Another cluster would group proposals that would safeguard developmental policies. Roughly 15 proposals might fall into this category, e.g. GATT Article XVIII, Trade-Related Investment Measures (TRIMs) - related proposals, and waivers from general trade obligations and from obligations under specific agreements. As some of the reforms pursued could alter substantially the present rule system, it might become necessary, when discussions are well advanced, to seek guidance from the WTO Ministerial Conference.

(d) A number of proposals intend to ensure the availability of technical assistance and flexible transition periods. This might concern close to 20 proposals, such as those related to Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT) and Customs Valuation. A solution could most likely be found by implementing a monitoring mechanism that would follow progress in each country in establishing the institutions necessary to comply with the specific rules. Monitoring should therefore be high on the agenda.

(e) Finally, a few technical proposals remain that would not require changes to existing trade rules. This concerns procedures of notification and consultation (including consultations on Balance-of-Payments (BOP) Measures).

10. We suggest that the Secretariat be mandated to allocate the proposals to these clusters and to propose a time-table for discussion.

III MONITORING MECHANISM

11. As mentioned earlier (7 and 9(d)), we consider monitoring to be a major element to ensure a better and coherent implementation of S&D provisions in the future. At the initiative of the African Group such a mechanism is now on the agenda. Our suggestions for the functions of such a mechanism are as follows.

12. In each country the WTO should (possibly with the support of consultants or other international institutions):

(a) set benchmarks with the authorities to measure the use of S&D provisions and establish the duration of the transition periods where applicable;

(b) analyze periodically the status of S&D provisions and, if required, advise the government on remedial action necessary to better use opportunities under S&D treatment or comply with WTO obligations;

(c) assess whether technical assistance and capacity building services provided to the country are adequate to ensure institutional development and the implementation of WTO rules;

(d) report periodically to the CTD on the status of S&D provisions, action plans to implement WTO rules and the adequacy of technical assistance provided to the country.

13. The CTD should, in the sense of a peer review, discuss periodically the status of S&D provisions, action plans and institutional development in developing Member countries.

14. To comply with this monitoring function, the WTO may have to increase its visits in Member countries and establish country data banks with the support of the respective governments. The program should start with a pilot phase, testing the most efficient methods to establish monitoring. Synergies with trade policy reviews, the analytical studies under the Integrated Framework, monitoring already done in the WTO bodies and WTO's technical cooperation audits should be explored.

15. An external expert group should evaluate the efficiency and efficacy of the monitoring function after five years of operations.

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