

SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS

Concept Paper from Hungary

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

I. BACKGROUND

1. In pursuance of the mandate given by Ministers in paragraph 44 of the Doha Ministerial Declaration, the Trade Negotiations Committee (TNC) at its meeting held on 28 January - 1 February 2002, decided that " ...the review of all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational ... shall be carried out by the Committee on Trade and Development in Special Sessions." It was also agreed that the Special Session carries out the work programme on special and differential (S&D) treatment set out in the Decision on Implementation-Related Issues and Concerns, which Ministers endorsed in paragraph 44 of the Doha Ministerial Declaration.

2. In order to give effect to the mandate given by Ministers, a number of WTO Members, with reference to paragraph 12.1 (i) of the Decision on Implementation-Related Issues and Concerns, submitted proposals aimed at converting various special and differential treatment provisions in WTO agreements and decisions into mandatory ones.

3. The delegation of Paraguay, referring to paragraph 44 of the Doha Ministerial Declaration, submitted a proposal on the Enabling Clause¹ in TN/CTD/W/5 dated 24 May 2002. The core idea of this proposal, which was supported by a large number of developing countries during the subsequent discussions at the Special Sessions of the Committee on Trade and Development (CTD), was to ensure the implementation of the Enabling Clause in such a way as to prohibit any differentiation (discrimination) among developing countries in access to the benefits of national Generalized System of Preferences (GSP) regimes. Paragraph 10 of the proposal specified 6 of the criteria currently used by GSP-providing countries for differentiation among developing countries, reliance on which would be made impossible in the future even by way of asking for a specific waiver to that effect.² Several of these criteria proposed to be prohibited deal with the level of economic development and competitiveness of beneficiary countries and the proposal asserted that they were based on subjective, arbitrary and unilateral positions and gave rise to discrimination among developing countries.

4. In order to move forward the consideration of this proposal's legal and practical implications - as called for in the work programme on S&D treatment endorsed by Ministers at Doha - the delegation of Hungary submitted a number of questions in its communication of 8 July 2002

¹ Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L/4903)

² See paragraph 10 of TN/CTD/W/5 and paragraph 21 of TN/CTD/W/5/Add.1.

(TN/CTD/W/10) and requested written replies. The most important question from the point of view of the Hungarian delegation and the answer provided thereon was the following:

Question in paragraph 4.5 of TN/CTD/W/10:

"Does it follow from the proposal that if a GSP providing country wishes to avoid granting such preferences to richer countries, the only way is to abolish its scheme altogether, or does Paraguay see any legal way to limit the availability of preferences to those WTO Members with a lower level of economic development?"

Answer in paragraph 11 of TN/CTD/W/5/Add.2:

"No, within the scope of the Enabling Clause Paraguay does not see any legal way to limit the availability of preferences to those WTO Members with a lower level of economic development, avoiding at the same time granting preferences to richer countries".

5. The implications stemming from the answer provided by the delegation of Paraguay, again supported by a number of developing country delegations during the discussions at the Special Session, are far-reaching, especially for GSP provider countries at an intermediate level of development, like Hungary. The Hungarian delegation is not able to support an interpretation of the Enabling Clause (or agree to its modification to that effect), according to which a country like Hungary would be obliged either to provide trade benefits to countries that are richer than herself or to stop operating a GSP system in favour of poorer developing countries in real need of preferential market access.

6. Hungary believes that the provision of preferential market access conditions for developing countries is one of the most tangible and effective means of supporting the development process of countries at a lower level of economic development than ourselves. The Government of Hungary used this important policy tool in the past close to 30 years and wishes to keep on doing so in the future. However, an obligation to provide continuous economic assistance through preferential market access for countries more developed and competitive than us in order to be allowed to maintain our GSP-regime would not be acceptable for the Hungarian Government, for our economic operators and for the public at large. The Hungarian delegation believes that setting such an obligation would be unjustifiable economically and politically and would also threaten to defeat, at least partially, the very objective of the Enabling Clause. Hungary fears that those developing countries would be the real losers of such an interpretation that need preferential market access the most. The acceptance of the proposed interpretation would also have systemic implications for our organization, as it would prove that the WTO is incapable of dealing with the fact that WTO Members, and among them developing countries, form a very heterogeneous group, with countries and territories having different levels of development, different interests and needs.

7. Hungary feels that the above considerations are not specific to its individual case. There are at least two groups of WTO Members at a comparable level of economic development, which face the same or a similar dilemma: GSP-operating WTO Members not having declared themselves as developing countries in the organization, as well as more advanced developing countries, which may consider the setting up of a GSP system in favour of their poorer developing partners.

8. Against the above background the following briefly expands on Hungary's understanding of the origin of and intent behind the Enabling Clause and outlines possible options for the necessary clarifications with a view to make these provisions more precise, effective and operational.

II. THE ORIGIN OF AND INTENT BEHIND PART IV OF THE GATT AND THE ENABLING CLAUSE

9. GATT CONTRACTING PARTIES started to seriously consider the adoption of measures for the maintenance and expansion of export earnings of less-developed countries to the development and diversification of their economies in the early 1960s. In 1961 a Declaration was adopted on the "Promotion of the Trade of Less-Developed Countries"³. Then at the Ministerial meeting in May 1963 Ministers recognized "the need for an adequate legal and institutional framework to enable the CONTRACTING PARTIES to discharge their responsibilities in connection with the work of expanding the trade of the less-developed countries" and the amendment of the GATT was initiated to introduce a Part IV. The Protocol Amending the GATT to Introduce a Part IV on Trade and Development was adopted on 8 February 1965 and entered into force on 27 June 1966.

10. As we all know, when referring to the group of countries and territories that should benefit from the individual and joint action necessary to further their development and to ensure that they secure a share in world trade that is commensurate with the needs of their economic development, Part IV of the GATT consistently uses the term "*less-developed countries*". This expression clearly indicates the relationship between the levels of development of countries that should benefit from S&D treatment, and those which should individually and jointly provide it. In short, it is intended that countries at a higher level of economic development should provide S&D treatment for those that are less-developed than they are.

11. After intergovernmental negotiations held under the auspices of UNCTAD resulted in the adoption of the GSP, the legal possibility for its implementation, first through the Decision of 25 June 1971⁴, then through the adoption of the Enabling Clause, was created in the GATT. Although both the 1971 Decision and the Enabling Clause use the term "*developing countries*", which came into use replacing the earlier term "less-developed countries", there is no evidence to assume that its meaning and the relationship between the levels of development of providers and beneficiaries of GSP were meant to change.

12. Due to differences in specific characteristics and circumstances of individual countries, both potential providers and beneficiaries, the Enabling Clause provided right from the start certain flexibilities for the shaping of national GSP-schemes. First of all, the establishment and maintenance of such a system is not mandatory, the Enabling Clause simply permits any WTO Member who wishes to set up a GSP regime to deviate from Article I of the GATT, provided that the conditions in the instrument are met.

13. The Enabling Clause furthermore indicates that the S&D treatment, through the operation of a GSP system, should be provided on a dynamic basis. Paragraph 3c of the Enabling Clause states that GSP schemes should be designed and, if necessary, modified to respond to the needs of developing countries. Hungary considers that paragraph 3c in fact provides the basis for taking into account changes in individual development levels as well as the development, financial and trade needs of individual developing countries.

14. The flexibilities embodied in the above referred provisions became increasingly important over the past decades. It is well known that the term "less-developed" or later "developing" country was never defined and the original practice of self-election, self-selection remained applicable until this day. At the same time a very substantive differentiation has been taking place among the participants of the multilateral trading system, as well as within this group of countries, regarding the overall and sectoral levels of development and competitiveness. This process brought about deep changes in the relative levels of development of individual countries. A number of developing

³Decision of 7 November 1961.

⁴Generalized System of Preferences – Decision of 25 June 1971 – (L/3630).

countries at a higher level of development caught up with some of the GSP providing countries and even overtook them in terms of overall economic development or sectoral competitiveness, in particular in areas where they have huge comparative advantages. Despite these changes no WTO Member has changed its self-classification, no Member has renounced its "developing country" status. This led to the current situation, which can be aptly illustrated by the example of Hungary, a GSP providing country at an intermediate state of economic development.

15. Hungary has a per capita GDP level of about US\$5,000, which is above most developing countries, but well below developed economies and even many of the more advanced developing countries, especially in Asia and in Latin America. Many of these countries became globally competitive producers and exporters even in the most sophisticated industrial sectors, while several of them remained important suppliers with improved technologies in more traditional sectors such as agriculture. Still, the Hungarian Government has been operating a rather generous GSP system since 1 January 1972, with tariff preferences for a wide range of products produced in developing countries. The scheme is applied on a permanent basis, i.e. it does not involve time limits or renewal requirements. There are no quantitative ceilings or any special safeguard mechanism for the products concerned. The GSP regime does not contain a priori sectoral limitations or exclusions. Under the Hungarian GSP system, since 1978, all products originating from the least-developed countries enjoy duty and quota-free treatment in Hungary.

16. Due to Hungary's intermediate level of development, there is, however, a limitation on the scope of beneficiaries based on their level of development: the Hungarian legislation maintains the right of not providing GSP benefits to countries with a higher level of economic development – as measured by per capita GDP levels – than our own.

17. Thus the Hungarian GSP regime - like that of a number of other GSP providers - contains at least the following two of the criteria mentioned in paragraph 10 of the proposal by Paraguay: development indices and graduation. According to Paraguay, these criteria are discriminatory and, as such, are illegal at present. Paraguay furthermore states, that Members should not be allowed to use such criteria, even through obtaining a waiver.⁵

18. As this interpretation is not acceptable for the reasons spelt out above, Hungary puts forward the following possibilities for clarifying the provisions of the Enabling Clause.

III. POSSIBILITIES FOR CLARIFYING THE COMMITMENTS STEMMING FROM THE ENABLING CLAUSE

19. In order to clarify the commitments stemming from the Enabling Clause, the Members of the WTO should adopt an agreed interpretation containing the following elements:

20. First, it should be spelt out that the terms "*developing country*" and "*less-developed country*" have equivalent meaning and the use of the former one in GATT/WTO provisions does not change the original intent of the Enabling Clause: i.e. to provide a legal possibility for more developed countries to grant trade preferences to the less-developed ones, notwithstanding the principle of Most-Favoured Nation (MFN) contained in Article I of the GATT.

21. Second, it should also be spelt out clearly that it is not discriminatory in the context of the Enabling Clause, if the GSP scheme of a Member does not cover, in line with the original intent of the Enabling Clause, more developed countries than itself. This clarification is all the more necessary because, as spelt out above, the absolute and even more the relative levels of development and

⁵ Paragraph 21 of TN/CTD/W/5/Add.1 by Paraguay reads: "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.*"

competitiveness of various countries change fast, and previously less developed countries often overtake GSP providers, which originally had a higher level of development.

22. The following question is how to give practical effect to the proposed agreed interpretation. There are three options to achieve this goal and thereby to maintain the necessary flexibility for the operation of national GSP schemes:

- (a) The **relative approach** was already raised by a number of developing countries during the discussions at the Special Session of the CTD. This would mean that no WTO Member would be obliged to provide GSP benefits to countries with higher levels of development and competitiveness. An agreed set of economic indices should be elaborated for Members to base their decisions on. This approach could be the least controversial to accept for the WTO Membership and would be easy to operate at the national level: GSP regimes could be shaped relatively easily on this basis. As a further advantage such an approach would make it easier for more advanced developing countries, whose level of economic development is comparable to, for example, that of Hungary, to operate GSP schemes of their own and provide preferential market access to less advanced developing countries without having to extend that treatment to developing countries at a relatively higher level of development.

The relative approach has, however, also a number of deficiencies. First of all, it would result in an extremely complex web of GSP providers and beneficiaries, as each provider could have a different set of GSP beneficiaries depending on their relative relationship of development indices. This would create transparency problems to start with, but the predictability of the GSP benefits would also be greatly limited. With the fast changes in the world economy and the economic situation of individual countries, the list of beneficiaries of national GSP schemes would change constantly, reflecting changes in the relative levels of development. Furthermore, as the economic indices used for establishing the relative development position of countries would be probably expressed in US\$ or some other internationally used currency, any change of exchange rates, especially more substantial depreciations or appreciations of national currencies could instantly and even repeatedly overturn the relative relationship, turning more developed countries into less developed ones and vice versa, requiring corresponding changes in the lists of GSP beneficiaries.

- (b) The **absolute approach** would involve the establishment of a uniform threshold, defined through the use of agreed economic indices relating to the level of development, above which a country could not claim benefits from GSP providing countries. As a major advantage this approach would greatly simplify the way of defining GSP beneficiaries and would make this determination more transparent. Furthermore, by having a uniform list of beneficiaries, there would be a much higher level of coherence among national GSP schemes. While the effects of economic changes or currency movements would not be fully eliminated, their effect on the list of GSP beneficiaries would clearly be more limited than in the case of the relative approach. Thus, there would be a higher level of transparency and predictability for both GSP providers and beneficiaries concerning the country coverage of national GSP schemes.

This approach has also a number of disadvantages. First of all, it could be extremely difficult to get consensus on the principle and even more on any specific level of economic indicators. The definition of such indices would automatically exclude or include a country from the beneficiaries of all national GSP schemes and thus from all trade benefits. Furthermore, considering that there are a number of WTO

Members operating GSP schemes with quite low levels of development, a rather low common threshold would have to be established in order to avoid any obligation for less advanced developing countries to help more developed ones. Thus a large number of the present GSP beneficiaries would be instantly eliminated from a uniform list. To sum up, such an approach might be too inflexible.

- (c) A **combined approach** could use the positive elements in both previous solutions: under this option, there would be an agreed threshold of development under which countries are entitled to GSP benefits, but it would be supplemented by a rule based on the relative approach, i.e. they could not claim benefits from less-developed GSP providers than themselves. Such an approach would make it easier to agree on the uniform threshold level as it could be substantially higher than under the absolute approach: due to the flexibility provided by the additional relative criteria, the uniform threshold should not be set at the level of the GSP provider with the lowest level of development. Thus a much smaller list of present beneficiaries would be affected by the change. Of course even this method could not automatically solve all the difficulties mentioned earlier, including the choice of indices, the effects of exchange rate movements, but it would provide on the one hand a more predictable and equitable outcome, and would allow more flexibility to deal with the borderline cases.

23. The above ideas should not be considered as specific proposals but rather as a conceptual contribution to solving the problems raised by the submission of the delegation of Paraguay. There might be a list of further issues, which could merit examination, such as the automaticity of any of the approaches mentioned above: would the GSP benefits be linked just to economic indices or would there be additional criteria (e.g. the official declaration by a country defining itself as "developing", etc.)? Another set of possible questions is related to the potentials of product or sector-specific competitiveness criteria, etc. The delegation of Hungary is ready to discuss with other Members the issues contained in this submission or other approaches aimed at clarifying the provisions of the Enabling Clause.
