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THE WTO WORK PROGRAMME ON SPECIAL AND DIFFERENTIAL TREATMENT

SOME EU IDEAS FOR THE WAY AHEAD

Communication from the European Communities

The following communication dated 18 November 2002 has been received from the European Communities.

A. SUMMARY OF THE APPROACH

1. All Members recognize that special and differential (S&D) treatment has an important role to play in given agreements, especially for least-developed countries (LDCs). All Members are willing to review and improve S&D treatment provisions in line with the Doha mandate. All Members also, however, recognize that the kinds of appropriate S&D treatment will differ from agreement to agreement, whether we are talking about existing or future agreements, and may need to differentiate between developing countries.

2. The WTO work program on S&D treatment could benefit from greater structure and focus. To make progress, Members could work on the basis of a set of S&D treatment principles or guidelines that could be used to test specific S&D treatment proposals already on the table and serve as a reference when S&D treatment is addressed in the negotiations. We should ensure as the overarching principle that the S&D treatment proposal in question genuinely meets the test of aiding development and integration into the WTO system, as opposed to permanent exclusion or "second class" Membership.

3. The proposed set of guidelines would provide orientation to the work program and help organize the debate around the numerous proposals of the African Group and others. It will in doing so make it easier to consider the merits of the specific proposals made, and take decisions, since we will have some broad criteria by which to analyze them.

4. Regarding organization of the work in the Committee on Trade and Development (CTD), the European Union (EU) agrees on the CTD monitoring and guiding discussions, while noting that the relevant subject-committees may be the best place to consider the specificities of individual S&D treatment proposals. S&D treatment proposals for which negotiating groups exist should, however, be examined in the first place in those groups, and duplication in any case avoided.

5. On timing, the EU is committed to achieving significant results by the end of 2002. The EU believes, however, that it will be necessary to foresee continued work on S&D treatment after this year, in view of the large number and complexity of proposals, and their connection in many cases

with the Doha Development Agenda negotiations, themselves at various levels of advancement. We should therefore also aim for decisions by Cancún on as many questions as possible. At Cancún, Ministers could possibly formalize agreement of what has been concluded by that date, and set the parameters for the consideration of remaining S&D treatment questions during the remainder of the Doha negotiations and work program.

B. THE MANDATE & DIFFERENT TYPES OF S&D TREATMENT

6. The WTO work programme on S&D treatment mandates recommendations with a view to making S&D treatment more precise, effective and operational, through *inter alia* examination of specific proposals; examination of cross-cutting issues; assessment of other proposals on institutional issues and criteria for financial and technical assistance; the establishment of a monitoring mechanism; and consideration of how to incorporate S&D treatment into the architecture of WTO rules.

7. Several types of S&D treatment in the covered agreements have been identified by the WTO Secretariat[1] and other delegations in various ways, and comprise at least the following:

(a) The concept of less than full reciprocity in market access commitments (e.g. in previous negotiations and in the Doha mandates on market access);

(b) measures to improve the market access opportunities of developing countries (numerous provisions in many rules agreements and in market access mandates);

(c) flexibility/deviations from/waivers of commitments in rules areas for developing countries, to safeguard developmental interests or preserve greater developmental policy space (particularly present in areas like Subsidies, the Agreement on Agriculture and others);

(d) special consideration to developing countries when industrialised countries apply policy instruments/rules (again, several agreements, but sometimes expressed as best endeavours or without precise results being identified);

(e) procedural flexibilities (e.g. simpler notification requirements, simpler procedural requirements in trade defence instruments, less frequent trade policy reviews etc);

(f) transitional periods (common to several Agreements e.g. Trade-Related Aspects of Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS), Customs Valuation, Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), and applicable to scheduling of access commitments too);

(g) provision of technical assistance and other measures of support (found in several rules areas);

(h) Flexibilities available uniquely to LDCs.

[1] The WTO Secretariat typology in document WT/COMTD/W/77/Rev.1 of 21.9.01 is a good tool for delegations. This document also provides a comprehensive examination of every existing S&D treatment provision in the WTO.

8. Using a typology similar to the above, the WTO Secretariat and some Members have developed matrices to classify the different types of S&D treatment in existing agreements, or new proposals. It is important to note that the form of S&D treatment found useful varies from agreement to agreement, depending on the subject matter of the agreement and whether it concerns rules, market access, or institutional issues.

C. THE CURRENT PROBLEM

9. The submissions by the African Group, LDC Members and others identify a number of perceived shortcomings of current S&D treatment provisions. Among these are the non-mandatory nature of some provisions, which has led to their not always being implemented, the lack of specificity as to how some S&D treatment provisions should be applied, the over-rigid nature of some provisions, which fail to take account of the specific needs of and differences between developing countries, and the failure of several provisions to deliver the positive effects intended.

10. Understanding these concerns, Members have recognized the importance of making progress on S&D treatment. The EU believes that a satisfactory outcome and rational decisions on this issue - including on specific proposals – will facilitate progress on the broader agenda of the Doha Development Agenda. The work has, however, not made as much progress yet as it should have, for three connected reasons:

(a) the subject is fairly complex and detailed, and Members need more time to consider the economic and legal effects of the large number of proposals made;

(b) it has not yet been possible to determine whether problems identified are attributable to shortcomings in S&D treatment provisions, or whether they are due to other factors such as domestic policy shortcomings or weaknesses inhibiting developing countries' fuller integration into the trading system;

(c) some of the proposals are – at first sight – fairly controversial, would entail major changes in WTO Agreements, and in many cases carry major systemic implications. Such proposals may therefore need to be considered in the context of the wider negotiating process;

(d) Members have not so far established any clear approach that can help us either to evaluate the merits of individual proposals, or give direction and a sense of shared objectives in the process as a whole.

D. A SET OF GUIDELINES

11. In the view of the EU, we should therefore try first of all to establish a number of guidelines or working assumptions that will enable us better to understand the purpose of S&D treatment and be used to evaluate specific or general proposals made, and take decisions on them. In this way we will be better able to accomplish the WTO's mandate on S&D treatment. It is worth emphasising that by developing a common understanding on such guidelines this is not intended to replace or delay consideration of specific proposals made by some Members – notably the African Group – but quite the reverse. It is intended to facilitate more rapid decisions on those proposals in the context of a more clear and consensual understanding of the role and value of S&D treatment in the WTO.

12. Several delegations have made suggestions as to these working assumptions or guidelines. We suggest that the following would be particularly useful in steering our future work:

(a) All S&D treatment proposals should be evaluated against the following basic criterion: will this aid the economic development of developing countries and their fuller integration of developing countries into the trading system, as opposed to creating what has been described as permanent exclusion or second tier Membership of the system? The following sub-set of criteria will help to answer this question.

(b) S&D treatment provisions should be seen as steps towards, or flexibilities within, a common system of rights and obligations rather than a parallel set of rules in themselves. In seeking to improve, extend or make them more operational or binding, this must be kept in mind as an aim.

(c) Given that S&D treatment is intended to assist integration of Members into the WTO system, S&D treatment provisions should be understood to be an operational part of the integration process, often of a temporary nature, and reflecting developing countries' specific capacities, limitations or needs in a given area. Their application by Members should thus be regularly reviewed, and Members should cease to apply, or rely upon, such provisions as soon as the problems they were designed to compensate for no longer apply. Criteria for graduation out of specific S&D treatment provisions will need to be developed in some cases if the provisions themselves are to be changed.

(d) Since the aim of S&D treatment is the integration of developing countries into the multilateral trading system, it follows that S&D treatment provisions which are trade expanding should be preferred to those which are trade restrictive. The latter should remain exceptional in nature.

(e) In evaluating proposals made by Members to modify existing S&D treatment provisions, the previous level of utilization of the provision in question should be known, and the reasons for this identified. Where S&D treatment provisions have been shown not to have been used or not to have had the impact on Members' integration for which they were originally designed, it is obvious that they should be carefully reconsidered, and either abandoned or modified.

(f) The current categorisations of developing countries for S&D treatment purposes are LDCs and developing countries more generally. The EU has an open mind on the scope for recognizing additional sub-categories of developing countries for S&D treatment purposes, and which would be generally applicable for all covered agreements. It recognizes, however, that notwithstanding the logic of such additional differentiation for all WTO Agreements, this may prove difficult and time consuming to agree.

(g) It should however be feasible to accept further differentiation amongst developing country users of S&D treatment in specific cases, or within specific agreements, preferably based on some simple and transparent criteria that would reflect in an objective manner the very different institutional capacities of different Members, their ability to participate in international trade, their income levels, or the ability of their economies to adjust to fuller rights and obligations. In a number of WTO Agreements differentiation beyond the developing country/LDC level has already been found useful[2].

[2] In the market access area this is already an accepted approach, as well as in the Subsidies Agreement (Annex VII), and in individually agreed extensions to transitional periods in TRIMS, Customs Valuation, and

(h) The corollary of this is that there is a relationship between the extent of S&D treatment that may be sought or applied, and the developing country Members who could qualify for it. As long as S&D treatment provisions remain available to all developing country Members irrespective of their individual level of development (the one size fits all approach), there may be limits as to how significant a departure from multilateral commitments they can represent. To the extent that only LDCs or other weaker developing countries seek to benefit from S&D treatment provisions, in view of their specific difficulties, such S&D treatment provisions may continue to be more far reaching and less time-bound. Graduation is thus a relevant concept.

(i) There should be a more clearly articulated relationship between extent of commitments, lengths of transitional periods for assumption of commitments, and the provision of technical assistance to help meet commitments. This relationship should be put on firmer foundations in those agreements and areas where it is most relevant. The EU believes that in many instances measures to build capacity to implement WTO Agreements, within the context of a country's overall development process, constitute among the most effective ways to help a Member's integration into the trading system.

E. KEY AREAS FOR DECISIONS

13. By applying the above assumptions or guidelines to existing agreements where proposals for change have been made, Members should be in a position to take constructive decisions on many such S&D treatment proposals. While all proposals should be studied on their merits, the EU believes that the following areas, among others, offer good prospects for decisions either at the end of 2002 or thereafter.

(a) The application of S&D treatment in all **market access** negotiations, as foreseen by the Doha mandates. S&D treatment should be expressed both in terms of measures to ensure greater access for developing country exporters as well as less than full reciprocity in market access commitments, according to the developmental level of the country in question. Application of S&D treatment measures in the three different market access negotiations should be monitored systematically via the monitoring mechanism to be established.

(b) Requests for extensions of **transitional periods** for compliance with given obligations, where objectively justified and measurable, and where a time limit and an implementation plan has been set. This approach has worked well in areas like TRIMS and Customs Valuation. The EU remains willing to consider extensions on an individual Member basis in key areas, along these lines.

(c) Review and possible adjustment or clarification of SDT provisions (e.g. de minimis rules) in the area of trade defence so as better to take account, in an objective manner, of the situation of developing country Members at lower levels of development or international competitiveness. The Negotiating Group on Rules would be the appropriate forum to address these points.

(d) Proposals to simplify or **streamline procedural requirements** for developing countries, in particular LDCs, e.g. as regards consultation procedures, notification and transparency requirements.

GATT Article XVIII. The submission by the African Group also proposes greater differentiation of transition periods taking account of each Member's particular needs and capacities.

(e) Proposals to make more specific, and therefore operational, provisions in covered agreements for giving **special consideration to developing countries** in application of trade policies and measures. The EU wishes to make two immediate suggestions in this respect that respond to specific developing country concerns/proposals, including from the African Group. First, that all developed country Members establish specific mechanisms (or improve existing ones) to provide more information to developing countries regarding their domestic requirements and procedures in areas such as SPS, TBT, Import Licensing etc, and that such mechanisms also include measures aimed at reducing any difficulties developing country exporters may have in complying with such requirements. Second, the EU believes that an agreed interpretation of Article 15 of the Anti-Dumping Agreement on the question of constructive remedies for developing countries would constitute important progress, and this should be developed for adoption as rapidly as possible. The EU notes that constructive discussions are underway on this point.

(f) Needs in terms of **technical assistance**, which could be subject to stronger guarantees and more specific work programmes in return for clear commitments on implementation on the part of recipient countries. Some of the ideas proposed by the African Group could provide a starting point for work.

(g) Measures **specific to least-developed countries**. In this respect, the EU suggests further work on the following points, among others: a) that Members consider the feasibility of a moratorium being applied by all Members on any anti-dumping or countervailing measures on products from LDCs, pending any possible future revision of these two agreements in this area; b) that all industrialised country Members and larger developing countries follow the example of some Members and give duty and quota free access to all products from LDCs, in accordance with the undertakings at the United Nations Conference on LDCs in 2001; and c) that rapid progress be sought on agreeing criteria for simplified accession procedures and conditions for LDCs in the accession process.

F. PROCESS – WAY FORWARD

14. The suggested approach therefore is to use the proposed set of guidelines in order to evaluate the different proposals made and, more widely, to create the basis for implementation of the basic notion of S&D treatment in all relevant areas of the negotiations. As argued earlier, application of these guidelines will facilitate the discussions on each individual proposal and ensure greater consistency of decisions and results. The EU in any case intends to use these guidelines to assist its own evaluation of Members' proposals.

15. In organizational terms, we need an approach that is both efficient and that will ensure sufficient horizontal consideration and guidance from the CTD on all S&D treatment proposals. We therefore suggest the following:

(a) For S&D treatment proposals in areas already under negotiation, they are best taken up in those negotiations. The different negotiating groups could add S&D treatment as a specific agenda item in their work programs. The guidelines we suggest should be kept in mind when S&D treatment is considered in each of these negotiations, and the CTD should retain an overview of the progress made in the negotiating groups, through regular reporting back.

(b) Some S&D treatment proposals are now overlapping with other implementation issues. The EU considers that to avoid duplication of work, implementation

proposals should continue to be addressed in the relevant committees under the implementation work program, without prejudice to the role given to the CTD as regards S&D treatment.

(c) To ensure coherence of approach and the right degree of political attention, all other S&D treatment proposals should continue to be monitored by the CTD. However, since the nature and purpose of S&D treatment varies greatly between different WTO Agreements, proposals could in the first instance be studied in the relevant technical committee/group.

(d) Members should in this context now set in motion the S&D treatment monitoring mechanism under the authority of the CTD, as proposed by the African Group. The work of the monitoring mechanism should enable Members to respond in a concrete manner to several elements of the S&D treatment mandate.

(e) The precise *modus operandi* of this monitoring mechanism needs to be decided. It should, however, among other things ensure that the specific discussions on S&D treatment scheduled in the negotiating groups remain on track and make commensurate progress. It should also seek to determine whether the problems identified can be resolved through the proposed modifications of S&D treatment provisions or whether the problems and possible solutions lie elsewhere.

(f) Examination of each individual proposal should begin with an assessment by Members of the utilisation and experience with the S&D treatment provision whose modification is being proposed. This examination – essential to understand the value or inadequacy of a particular S&D treatment provision - should not, however, be used to delay decision making. The Secretariat's document on this (see footnote 1) is a good starting point for this examination.

(g) Members should, as far as possible, try not to modify existing WTO texts but rather try to improve or clarify S&D treatment provisions, e.g. via guidelines, decisions or interpretations. It has to be recognized that, where modification of WTO Agreements is being suggested, this may not be possible to do in the short term.

(h) As suggested earlier, to the extent that work has to continue beyond December 2002, Members should then aim to take decisions on proposals as far as possible by the Fifth Ministerial meeting, and give further guidance at Cancún on the modalities to be observed during the remainder of the negotiations. In Section E of this paper the EU has suggested a number of areas where we think progress by Cancún is both feasible and desirable. This is a non-exclusive list and the EU remains open to discussing other proposals and approaches. The EU is also intending to provide the WTO with its comments on the complete list of proposals made, in line with the agreed work programme of the CTD, very shortly.