UDENRIGSMINISTERIET

Medlemmerne af Folketingets Europaudvalg
og deres stedfortrædere

Asiatisk Plads 2
DK-1448 København K
Tel. +45 33 92 00 00
Fax +45 32 54 05 33
E-mail: um@um.dk
Telex 31292 ETR DK
Telegr. adr. Etrangeres
Girokonto 300-1806

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THE WTO WORK PROGRAMME ON SPECIAL AND DIFFERENTIAL TREATMENT

Communication from the European Communities

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

I. INTRODUCTION

1. In a recent submission to the WTO[1], the European Communities (EC) set out some initial views on the substance and management of the WTO work programme on Special and Differential (S&D) Treatment. In the present paper the EC wish to revisit some of those ideas to take into account the recent discussions in the Committee on Trade and Development (CTD) and the views of other WTO Members on the EC's earlier proposals. The EC also wish to identify further issues for possible decision making by the end of the year, and provide further thoughts on the organization of work thereafter, with a view to ensuring an outcome on S&D treatment which reflects the interests and priorities of all Members.

II. THE MANDATE ON S&D TREATMENT

2. *As noted in the previous EC submission*, 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.

3. The submissions by the African Group, least-developed country (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.

4. Understanding these concerns, all Members have recognised the importance of making progress on S&D treatment, including through taking early decisions where possible on specific proposals. *As*

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[1] Document TN/CTD/W/20

noted in the EC's earlier submission, however, progress has not been as rapid as it ought to have been, for several 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.

III. A CHECKLIST OF ISSUES

5. In the light of the above, the EC continue to believe that the work programme on S&D treatment could progress more successfully if Members were to keep in mind a number of broader considerations. The EC have therefore suggested that a checklist of key points could be used to guide the work in general and when evaluating specific proposals, as follows:

(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 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.

(i) S&D 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.

(ii) 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.

(iii) 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. *As a general principle, the EC would have difficulties in agreeing to proposals aimed at permitting permanent or unilaterally determined trade restrictive measures.*

6. In evaluating proposals made by Members to modify existing S&D treatment provisions, the previous level of utilisation 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 may merit being either abandoned or modified.

(a) 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, 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.

(b) The current categorisations of developing countries for S&D treatment purposes are LDCs and developing countries more generally. *Several developing countries have underlined that S&D treatment provisions in the future should be more tailored to individual circumstances rather than a "one size fits all" approach. This is certainly one possible approach but could imply a considerable negotiating effort to develop provisions that fit individual circumstances. An alternative - which the EC are open to - would be the design of S&D treatment provisions that would further distinguish between Members at different levels of development according to new criteria, but here we may run into concerns from some about further categorisation of developing countries. In the absence of specific criteria for differentiation, the only alternative to current arrangements, becomes, by default, the type of "à la carte" approach proposed by some and which, as suggested above, would be very time consuming to develop or which would tend to lead to the lowest common denominator in terms of ambitions.*

(c) 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 EC believe 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.

IV. KEY AREAS FOR DECISIONS

7. By applying the above checklist of issues 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, either in the short term or on a longer timeframe.

8. In terms of decisions to be taken by the end of this year, the EC in their previous paper indicated a number of issues. Having looked at these further, the EC believe that the following areas could, following additional work in some cases, be amenable to decisions before the end of the year:

(i) The proposals of the LDC group and African Group regarding the flexibilities available to developing countries under Article XXIV of the GATT.

(ii) *The proposals of the LDC group and African Group regarding recourse to waivers under GATT Article IX and the Understanding in Respect of Waiver Obligations.*

(iii) *The LDC proposal regarding review and possible simplification of notification obligations.*

(iv) Proposals for extensions of transitional periods, which where well motivated, and accompanied by an implementation plan, should be given sympathetic consideration by Members. This approach has already worked well in areas like Trade-Related Investment Measures (TRIMs) and Customs Valuation. *The EC has difficulty on the other hand with proposals that amount to unilaterally determined and open-ended transitional periods.*

(v) *The proposal by the African Group to ensure that Sanitary and Phytosanitary (SPS) measures do not create unnecessary barriers to trade, and to ensure greater transparency in the SPS area and support for developing countries to meet SPS standards. Proposals on the other hand to exempt developing countries from meeting SPS (and Technical Barriers to Trade (TBT)) requirements cannot however be entertained as this would undermine efforts to ensure required standards of health and safety.*

(vi) A series of proposals aimed at improving technical assistance to developing countries, *in areas such as TBT, Preshipment Inspection, Customs Valuation, GATS etc.,* including through better targeting and prioritising of assistance and ensuring more coherence in the technical assistance activities of the major intergovernmental organisations. *Proposals to bind levels of funding for assistance are not, however, supported by the EC.*

(vii) *The proposal of the Africa Group concerning the flexibilities open to developing countries in respect of preferential origin rules.*

(viii) *The proposals of the LDCs to take account in a more systematic manner of the priority sectors or interests of LDCs in the GATS negotiations, including possibly a special session of the Council for Trade in Services (CTS) on this subject.*

(ix) *Proposals by the African Group to confirm certain provisions of the Dispute Settlement Understanding (DSU) regarding: the right of developing countries to require a panellist from a developing country in disputes between a developed and a developing country; and the requirement for panels to take into account any S&D treatment provisions appearing in any WTO Agreement relevant to the dispute in question.*

(x) Adoption of a decision to streamline and simplify procedures for accessions of LDCs.

(xi) Introduction of a Monitoring Mechanism for S&D treatment.

9. Apart from the above, it may also be possible to make progress by the end of the year on a number of additional proposals. This could include, for example, those proposals on: simplified consultation procedures under the Balance-of-Payments Understanding; greater coherence between intergovernmental bodies in the agricultural sector, and discussion of this issue in the Working Group

on Trade, Debt and Finance; reporting obligations under Article 66 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement; and clarification of specific provisions of the Agreement on Safeguards.

10. *In the medium term, the EC have already noted, in their previous submission, the importance of making progress also on the following issues, in most cases in the context of the Doha negotiations*:

1. **Market Access.** Several proposals have been made to implement fully S&D treatment provisions relating to market access. The Doha mandates in all **market access** negotiations (agriculture, services, non-agricultural products) all foresee S&D treatment, for example measures to ensure greater access for developing country exporters, or less than full reciprocity in market access commitments, according to the developmental level of the country in question. Proposals should therefore be pursued in the negotiations but the proposed monitoring mechanism could be used to take stock of progress made.

2. **Other Measures to Improve the Export Possibilities of Developing countries.** In its previous submission the EC identified two further important proposals. First, 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 least-developed countries, in accordance with the undertakings at the UN Conference on LDCs in 2001 and paragraph 42 of the Doha Ministerial Declaration.

11. The second proposal was 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. *The EC have to this end recently decided to establish a one stop trade information network for developing countries to carry out this important function, and note that some other WTO Members have announced similar measures.*

3. **WTO Rules.** Review and possible adjustment or clarification of S&D treatment provisions in areas such as 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. *A large number of proposals made in respect of the DSU should also be addressed in the current negotiations.*

12. Finally, the EC note that there are a number of S&D treatment proposals on which it seems difficult to make progress. These include proposals for permanent, unilaterally determined trade restrictive measures, proposals for unilaterally determined extensions of transitional periods, proposals that would exempt developing countries from having to respect SPS or TBT measures, and proposals for binding technical assistance funding and in some cases requiring the unlimited provision of such assistance.

V. PROCESS – WAY FORWARD

13. 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 work programme and 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 EC are in any case using these guidelines to assist their own evaluation of Members' proposals.

14. 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. *As noted in the previous EC submission to the CTD,* the following organization of work would be appropriate:

(a) For S&D treatment proposals in areas already under negotiation, they are best taken up in those negotiations – for example in the negotiations on agriculture, services, non agricultural market access, rules and the DSU. The different negotiating groups could add S&D treatment as a specific agenda item in their work programmes, and the CTD could recommend that sympathetic consideration be given to them. The CTD could 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 EC consider that to avoid duplication of work implementation proposals should continue to be addressed in the relevant committees under the implementation work programme, 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. 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 utilization 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 paper on this 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, for the work programme beyond December 2002, Members should 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.