

Committee on Trade and Development
Special Session

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SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS

Joint Communication by the Least-Developed Countries

The following communication has been received from Uganda on behalf of the above group of countries on 15 May 2002.

I. INTRODUCTION

1. The Doha Decision on Special and Differential (S&D) Treatment (as contained in paragraph 44 of the Declaration of the Fourth Session of the Ministerial Conference of the WTO) endorsed the work programme as set out in the Decision on Implementation-Related Issues and Concerns. According to paragraph 12 of the Decision on Implementation-Related Issues and Concerns, the task of strengthening special and differential treatment for developing and least-developed country (LDC) Members has three components: (a) making special and differential treatment mandatory provisions of Multilateral Trade Agreements; (b) finding "**additional** ways in which special and differential treatment can be made more effective" (emphasis added); and (c) considering ways in which special and differential treatment can be incorporated into the entire architecture of WTO rules.

2. It is clear from the elements of the work-programme on S&D (as stated in paragraph 12 of the Implementation Decision) that the strengthening of S&D requires actions in three areas:

- (a) identifying ways to make existing S&D provisions to be more binding;
- (b) additional measures to make S&D treatment more effective (this could for example, include introducing additional S&D Treatment measures and provisions in the existing agreements, extending the scope of existing S&D Treatment provisions or taking measures to operationalise existing S&D Treatment provisions);
- (c) incorporating the principles of S&D Treatment (and the principles or foundation on which S&D Treatment is based) into the system and architecture of the WTO.

3. It is critical that this important and comprehensive agenda be kept fully in mind, as it has to be dealt with as a result of the Doha mandate. In this regard, the work plan of the Committee on Trade and Development (CTD) Special Sessions (ref. 7 March 2002 document) has enumerated four main tasks to be dealt with in the five meetings between now and 17 July (date of the last meeting). The four tasks are to identify provisions which members think should be made mandatory, provide inputs on implications of making non-mandatory provisions mandatory; examine provisions which could be made more effective in operation; and consider ways to assist developing countries to make best use of the S&D Treatment provisions.

4. This is an issue of great importance to the least-developed countries (LDCs). We are of the opinion that the Doha Ministerial Declaration and the Decision on Implementation-related Issues and Concerns envisages a more comprehensive mandate than that which has been spelt out in the work plan, that, in the present form, only covers issues relating to (a) and part of (b) of paragraph 2 above. It is important to keep in mind the other aspects of (b) and also the issues relating to (c). The LDCs are of the opinion that the CTD must factor in sufficient time and priority to deal with these issues as well. For this reason, the LDCs believe that it will be useful and important to provide an outline of the overall framework and approach in which the issues of S&D Treatment should be approached, and indeed, in guiding the work plan of the CTD.

II. A FRAMEWORK FOR STRENGTHENING AND IMPROVING S&D IN THE WTO

5. Developing country Members, and particularly the LDCs, experience peculiar problems, which constrain their beneficial participation in the multilateral trading system. Fundamental to these are structural imbalances in their economies as well as distortions arising from historical trading relations, both of which combine to undermine productive and trade capacity of these countries. It follows that developing countries cannot address their development challenges and participate meaningfully in the international trade system, if they assume the same types and levels of obligations as envisaged in the Uruguay Round Agreements (URA). On the contrary, they must be accorded S&D treatment that is effective and meaningful.

6. Such differential and more favourable treatment has, for a long-time, been a fundamental principle and practice of the multilateral trading system. Prior to the Uruguay Round, this principle was enshrined in various provisions of the GATT, in particular of Articles XVIII, and more importantly in Part IV of GATT.

7. However, the conclusion of the Uruguay Round led to the erosion of their usefulness. As it emerged under the URA, the S&D treatment afforded to developing country Members was defined in extremely limited ways. S&D came to consist overwhelmingly of time-limited derogations from various multilateral trade agreements adopted at the end of the Uruguay Round. Added to these are equally limited specific measures, such as more favourable thresh-holds in the area of countervailing measures, some flexibility in relation to some measures, and "best endeavour clauses". Overall, however, as a result of the "single undertaking approach", the URA have been accepted by all Member countries, and thus the main thrust of undifferentiated liberalisation has become an obligation to developing countries.

8. The resultant effect is that S&D treatment as originally envisaged under the GATT has been undermined. Developing countries now have to assume obligations that are not "commensurate with the needs of their economic development", as envisaged in the preamble to the Marrakesh Agreement establishing the WTO.

9. The negative implications and effects of this limited approach to S&D treatment have been demonstrated by the experience of the problems of implementation faced by developing countries since the adoption of the URAs. It is important to emphasise that these difficulties derive fundamentally from the structural bottlenecks peculiar to developing countries.

10. It may be useful at this stage to recap different forms the S&D treatment provisions in the WTO Agreements take, as outlined in the Secretariat document WT/COMTD/W/77/Rev.1. They including the following:

- (a) Provisions that recognise the right of developing country governments to take measures to assist their domestic industries, and provisions requiring developing and

least developed countries to undertake only such commitments or obligations as are consistent with their development needs and within their means, such as Part IV of GATT 1994 and the Decision on Measures in Favour of Least-Developed Countries.

- (b) Flexibility in procedures concerning the enforcement of the rights of, or complaints/disputes brought against or requirements on developing and least-developed countries, such as the special procedures under the Subsidies and Antidumping Agreements.
- (c) Waivers for collective efforts among developing countries to accord preferential treatment to one another or in the extension of special measures by developed countries to provide preferential market access for products from developing and least-developed countries, such as Part IV of GATT 1994 and the Enabling Clause.
- (d) Inclusion in the objectives and principles of the agreements in terms of targets to be achieved. Article IV of GATS envisages that developing countries need to have an equitable share in services trade and developed countries should assist them to take up available opportunities.
- (e) Provisions for technical assistance to developing and least developed countries.
- (f) Provisions for transition periods for developing and least developed countries.
- (g) Binding obligations to address important needs. Article 66.2 of the TRIPS Agreement provides for technology transfer to least developed countries in mandatory terms or under binding provisions.

11. Following from the above, the LDCs propose the following general framework for the overall issue of strengthening S&D treatment for developing and least-developed countries. In the implementation of the work plan of the CTD, this general framework should form the background. In proposing this general framework, LDCs have also identified several specific agreements and provisions, which should be addressed in order to strengthen S&D treatment. The LDCs reserve the right to further elaborate on these proposals or to modify them at a later date.

III. MEASURES REQUIRED TO STRENGTHEN SPECIAL & DIFFERENTIAL TREATMENT

The general framework

12. Several elements are essential to a general framework necessary to strengthening and enhancing the role of S&D treatment as envisaged under paragraph 44 of the Doha Declaration.

13. The first element is a re-affirmation and operationalisation of development as a primary goal of the multilateral trading system. In this connection, multilateral trade agreements must contribute to overcome, rather than add to the obstacles, which prevent developing countries from meeting their developmental needs. Thus, the framework, principles, rules, programmes and proposals in the WTO should be assessed and wherever needed improved upon, in order that the development principle is afforded the highest priority.

14. The present exercise of the CTD in implementing paragraph 44 on S&D treatment of the Ministerial Declaration should be seen as a major contribution to this, as the strengthening of S&D treatment (through strengthening existing S&D treatment provisions as well as introducing additional

ones where needed) is among the most important ways of giving priority to the development principle. Thus this review of S&D treatment should not be confined only to examining existing provisions but should also come up with additional measures as envisaged in paragraph 12 of the Implementation Decision (and explained in paragraph 2 of this paper above). Importantly, this is in line with the Doha Ministerial Declaration, which in paragraph 2 states that we seek to place the needs and interests of developing countries at the heart of the Work Program.

15. The second element is a strengthening and operationalising, or even the introduction, as the case may be, of the general development principles within the agreements in the four major areas of WTO, i.e. goods, services, intellectual property and dispute settlement. In each of these areas, and their sub-categories and specific agreements, the development principle should be recognised and strengthened. There is need for an explicit recognition, consolidation and strengthening of Part IV of GATT on Trade and Development. The scope and effectiveness of this enabling clause has been eroded through the Uruguay Round process. Reversing this erosion through concrete operationalising of Part IV is thus essential, and is a key aspect of the strengthening of S&D treatment measures.

16. In the case of other agreements relating to goods, a review should be made whether there are clauses or general provisions recognising the development principle similar to GATT Part IV, and if there are inadequacies, these should be redressed. The principle in this is that the objectives and provisions of Part IV of GATT should be extended and made to apply to these other agreements.

17. In the services agreement, there are already some clauses that recognise the needs of developing countries (such as Part II Article IV, and Part IV Article XIX.2). There is the need to strengthen and operationalise the development principles and the S&D treatment measures.

18. The TRIPS Agreement is extremely weak in terms of recognition of the development principle, and of the development needs of developing countries. There is no equivalent in the TRIPS Agreement of Part IV of GATT. The S&D treatment measures in TRIPS are also very weak. This situation should be redressed.

19. In relation to the dispute settlement system, developing countries face several special problems, due to their lack of resources and other imbalances, for example that it is difficult or unfeasible for them to take recourse to the remedy of trade retaliation. There should be reflection on how the problems can be dealt with in the context of development needs and S&D treatment.

20. The third element relates to the need of developing countries to have recourse to financial resources in order to enable developing countries to undertake their obligations and enjoy their rights, including their rights under S&D treatment. There should be a costing of additional resources required by each developing country under each agreement. The meeting of the financial requirements should be considered.

21. The fourth element is the need to address supply side constraints in developing countries and their need to retain the flexibility of being able to adopt pro-development policies and options. Several issues arise in this regard:

- (a) There should be an exemption or relaxation for developing countries with respect to obligations, which if they were to be implemented would constrain or prevent these countries from adopting policies or measures that they require for their economic and social development.
- (b) There should be obligations on the part of developed countries to assist developing countries to build their supply-side capacity, including the development of

technology, infrastructure, finance, etc., in order to foster national capacity to produce as well as export supply capacity.

Agreement and Decision Specific Proposals

22. The WTO Ministerial "Decision on Measures in Favour of Least-Developed Countries" provides the general framework for the S&D treatment for LDCs in the implementation of all the **WTO Agreements**. Therefore, it is a general mandate given to all the LDC WTO Members, that has a global scope in so far as it **covers all S&D measures contained** in the agreements, declarations and decisions.

23. However, the language of this Decision **though mandatory** is not operational because it lacks procedures and "benchmarks" that would allow for the assessment of its compliance by the WTO Members: its goals and **obligations** are defined, but not the means to achieve them. In other words, this Decision is not effective from the point of view of identifying and assessing the measures taken by other WTO Members in favour of an increasing participation of the LDCs in the multilateral trading system.

24. The existing Sub-Committee on the LDCs, that is a subsidiary body established by the CTD, provides a forum to discuss the situation of the LDCs in the trading system, but is not instrumental in assessing the measures taken in favour of the LDCs nor in ensuring the effective implementation of the S&D provisions in the WTO rules.

In view of the above, the General Council of the WTO should establish annual Special Sessions of the General Council on the Participation of the LDCs in the Multilateral Trading System as a regular review mechanism – as mandated by paragraph 3 of the Decision¹.

The agenda of each Special Session will encompass:

- (a) ***the implementation of this Decision and its overall objectives in favour of the LDCs;***
- (b) ***the review of the implementation of the specific S&D provisions included in the WTO agreements, decisions and declarations;and***
- (c) ***Overall review of the S&D treatment***

25. In addition to this review mechanisms LDC should also be able to obtain improvement of the actual commitments contained in the Decision and the specific WTO agreements.

Here below under Item A and B the elements of the review and the substantive issues are listed together. Item C proposes an additional mechanism of review.

ITEM A of the Review. Specific S&D provisions in favour of LDCs included in the Decision on Measures in Favour of Least-Developed Countries

- (i) **Market access:** Paragraph 2(ii) of the Decision states that "*Consideration shall be given to further improve GSP and other schemes for products of particular interest to least-developed countries.*"

¹ "Agree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries."

Justification and rationale

26. The initiative to improve market access for LDCs was first contained in the 1996 Singapore Ministerial Declaration by which WTO Members agreed to a plan of action in favour of LDCs. Among the stated objectives of this initiative, was that of taking positive measures, for example, to provide duty-free market access on an autonomous basis, for products of LDCs and thus aiming at improving their overall capacity to respond to the opportunities offered by the trading system.

27. While recent initiatives undertaken by major trading partners in favour of LDCs such as the Everything But Arms and African Growth and Opportunity Act should be welcomed, further improvement of Generalized System of Preferences (GSP) and other schemes for products of particular interest to the LDCs should include not only expanding the product coverage, and lowering of barriers, but also include the important dimension of predictability and security of these access conditions. Binding of these measures are critical to strengthening the supply capacities in LDCs and necessary for the improvement of secure and beneficial market access for these countries.

- *Establishment of a commitment that provides a contractual status to duty free and quota free preferential market access through the negotiation of a legal instrument to make market access secure, stable and predictable. Any temporary withdrawal of duty-free treatment should be disciplined in a contractual manner;*
- *Duty-free treatment should be provided to all products. Any temporary exceptions could provide for duty-free tariff quotas, which would be subject to an agreed phase-out programme;*
- *Rules of origin requirements should be realistic and flexible to match the industrial capacity of LDCs in order to ensure the effective and full utilisation of preferences. The rules of origin should also be harmonised among preference-giving countries and subject to simplified customs documentation and procedures;*
- *Existing S&D treatment provisions under the various WTO Agreements should be improved in an effective manner with a view to ensuring that duty-free access is not nullified by non-tariff measures;*
- *Technical and financial assistance to meet the cost of compliance with SPS measures and technical standards.*

- (ii) **Technical assistance:** Paragraph 2(v) of the Decision states that: “Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services as well as in trade promotion, to enable them to maximize the benefits to liberalized access to markets.”

Justification and rationale

28. The above provision which is an obligation and thus mandatory, has not been implemented therefore LDCs have not yet realized the anticipated benefits. LDCs consider that diversification of production and export bases are critical for strengthening their supply responses and therefore increasing their participation and share in world trade. However, no modalities for implementing the commitment or benchmarks for measuring expected results have been developed to monitor its implementation by WTO Members in each of the LDCs. There is need to develop these modalities and benchmarks to provide a clear and transparent way to assess measures taken by WTO Members in the implementation of this commitment.

Proposals

Modalities: *In the implementation of the Integrated Framework (IF), the Joint ITC/UNCTAD/WTO Integrated Technical Assistance Programme in Selected Least-Developed and other African Countries (JITAP) and other Technical Assistance (TA) programmes priority shall be given to the development, strengthening and diversification of their production and export bases including for services as well as trade promotion. LDCs will submit project proposals for financing through funding mechanisms established for these programmes.*

Benchmarks:

- *Level of resources provided by WTO members compared to requirements;*
- *Increase in the value and share of new export products in total exports of LDCs;*
- *Level of market diversification arising from trade promotional efforts;*
- *Level of local processing undertaken by local companies for adding value to exports and entering manufacturing activities;*
- *Technical and technological capacities financed to upgrade and produce according to specific requirements relating to quality, health and the environment, as well as consumer preferences and tastes;*
- *Business skills developed for producing and exporting high-value and differentiated products;*
- *number of local partnerships established aimed at contributing to product differentiation, if possible, through the establishment of internationally recognized brand names that could allow enterprises in LDCs to add value to their products and attain high revenues;*
- *Level of Research & Development activities of existing research institutes dealing with new crops or products;*
- *Level of participation of LDCs in the setting-up of international standards affecting products which are of interest to them;*
- *Level of export subsidy phasing out, with a particular attention to the sectors of subsidized exports that have been damaging export opportunities as well as the viability of domestic production of LDCs;*
- *Market access barriers and conditions of access for semi-processed and processed tropical products originating from LDCs.*

ITEM B of the Review. *Implementation of the specific S&D provisions included in the WTO agreements, decisions and declarations. (This list is not exhaustive nor is it made in order of priority)*

29. The following specific amendments should be introduced in the existing WTO Agreements in order to make S&D provisions concerning LDCs mandatory, effective and operational as the case may be.

Agreement on Agriculture (AoA)

Justification and rationale

30. Article 15.2 makes specific reference to S&D treatment for LDCs. This provision exempts LDCs from reduction commitments, is mandatory by nature and has been implemented accordingly. The lack of coherence between WTO and international financial institutions however has subsequently in effect prevented LDCs from making use of this S&D. Conditionalities that LDCs face vis-à-vis programmes under the Bretton-Woods institutions constrain LDCs to adjust their

domestic policies in order "... to effectively take account of their development needs, including food security and rural development" (the Doha Ministerial Declaration, paragraph 13).

Proposals

- *LDCs shall be exempted from undertaking reduction commitments, as provided in Article 15.2;*
- *International financial institutions shall recognize LDCs' rights to adjust their applied tariffs within the level bound at the WTO, or provide domestic support to agricultural producers, as such need arises for the purposes of agricultural development for long-term food security;*
- *The WTO Working Group on Trade, Debt and Finance shall regularly examine the coherence between WTO rules and national commitments under financial assistance from international financial institutions, and shall make recommendations regarding international policy coordination.*

Agreement on Trade-related Investment Measures (TRIMs)

Justification and rationale

31. S&D measures specific to LDCs is contained in Article 5.2 relating to transitional period that for LDCs expired on 1 January 2002. This provision should be reviewed with a view to and in the spirit of making it more effective in its operation (see paragraph 4 of Doha Ministerial Declaration and Task III for the Special Sessions of the CTD). It is not a mandatory provision but a **right** that LDCs may choose to exercise in addressing their development needs.

32. The LDCs have always argued that TRIMs continue to be an important policy tool for strengthening production and export supply base necessary to take full advantage of the market access concessions and preferential schemes made available to them by their trading partners. Flexibility to apply local content requirements assumes particular importance in this regard. As long as they are LDCs, the transitional period for the use of TRIMs is ineffective as a means to meet their development objectives including industrial policy objectives.

Proposal

LDCs should be exempted from the disciplines of the Agreement on TRIMs.

Agreement on Subsidies and Countervailing Measures

Justification and rationale

33. Under the TRIMs Agreement local content requirements (preference to domestic products over imported products) would seem to be prohibited once the transitional period has expired. But the Agreement on Subsidies and Countervailing Measures seems to allow import substitution subsidy for LDCs for a period of eight years from the date of entry into force of the WTO Agreement. It would seem that if such a subsidy is in connection with trade-related investment measures, it would be in violation of the Agreement on TRIMs.

Proposal

34. Remove the seeming contradiction between time-bound derogation in paragraph 27.3 from the obligation in paragraph 1(b) of Article 3 of the Agreement on Subsidies and Countervailing Measures (prohibition of subsidies contingent upon the use of domestic over imported goods) and

paragraph 1 of Article 2 of the Agreement on TRIMs which prohibits measures inconsistent with paragraph 4 of Article III of GATT 1994 (National Treatment).

One way of removing this contradiction and thus providing the intended rights to LDCs in the unrestricted recourse to the use of local content is to provide in both Agreements for the right as long as a country remains in the LDC status.

ITEM C of the Review. Overall Review of implementation of the Decision and S&D provisions in the WTO agreements

35. The implementation of the Decision on Measures in Favour of Least-Developed Countries will be achieved through: (i) a general assessment of the overall participation of the LDCs in the trading system and of the measures taken by the WTO members in favour of the LDCs; and (ii) an in-depth individual review and assessment of the following "development benchmarks" for ten LDCs selected at the previous annual Special Session:

- the volume of exports (goods and services) of the LDCs and the exports' increase or decrease in the past five years;
- the situation of the balance of trade in the past five years and the role of trade in the overall economic growth of the country;
- the diversification of the domestic production and exports (goods and services) of the LDCs;
- the investment flows received in the past five years and their role in the export sectors of the LDCs;
- the transfer of technology towards the LDCs, in particular in the development of the export sectors;
- the specific market access barriers (for goods and services) encountered by the LDC's national exporters and the problems faced in the utilisation of trade preferences by the LDC's exporters;
- the impact of fluctuations of commodity prices and other relevant external factors on the trade performance of the country;
- the evaluation of the trade-related technical assistance received by the LDCs (from all bilateral and multilateral agencies) as compared to its needs.

36. The assessment of these indicators will be undertaken on the basis of separate reports to be submitted by: (i) the LDC's national authorities; (ii) the WTO Secretariat; (iii) the World Bank and the International Monetary Fund; (iv) UNCTAD; (v) an independent source(s) selected by the LDC's authorities.

37. The Special Session of the General Council will consider these reports and *make concrete recommendations*, to:

- the relevant WTO bodies regarding the implementation of the WTO rules on S&D for the LDCs; and
- the international financial institutions and other development agencies on the complementary measures required to enhance the supply capacity, the competitiveness, the transfer of technology and the export capacity of the LDCs, as well as the necessary coherence between the trade obligations and the conditions applied by the financial institutions at the international or bilateral levels.

Assessment of implementation will be carried out at the next Special Session against the same "development benchmarks." The implementation of the specific S&D provisions in favour of LDCs included in the WTO agreements, decisions and declarations will also be reviewed at the

Special Sessions. The results of the work undertaken by the relevant WTO bodies on the implementation of these S&D provisions will be taken into account by the Special Sessions.
