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MONITORING MECHANISM FOR SPECIAL AND DIFFERENTIAL (S&D) TREATMENT PROVISIONS

Joint Communication from the African Group in the WTO

The following communication dated 22 November 2002 has been received from the African Group.

1. This communication builds upon some of the ideas already put forward by the African Group and is without prejudice to the urgency that the African Group attaches to finalising the Agreement-specific proposals. It needs to be clearly understood that the establishment of a monitoring mechanism cannot in any way take away the need and importance for the completion of the mandate of the Special Session of the Committee on Trade and Development (CTD), to review all special and differential (S&D) treatment provisions so as to ensure that they are made more effective and operationalized. In fact the monitoring mechanism should ideally come into force after the S&D treatment provisions have been strengthened and operationalized.

2. The monitoring mechanism should not be seen as an alternative to the Special Session of the CTD or even a successor body. The mechanism is to be established to undertake functions in relation to S&D treatment provisions that have undergone suitable changes after the exercise mandated by the Ministers, or new S&D treatment provisions that will be negotiated. In this regard, it is our firm understanding that the mandate to the Special Session of the CTD cannot be passed down or taken over by the negotiating bodies. These bodies should negotiate new S&D treatment provisions in accordance with the ministerial instructions relating to the negotiations, while the CTD completes the exercise of reviewing and strengthening the existing S&D treatment provisions, including an appropriate framework for including S&D treatment in the architecture of WTO Rules.

3. A monitoring mechanism for S&D treatment could have three joint and reinforcing elements, namely:

- a requirement that all WTO Committees keep S&D treatment as a standing agenda item for all their meetings, and that they produce regular reports on S&D treatment;
- the establishment of a sub-committee on S&D treatment as a subsidiary organ working under and reporting to the CTD; and
- the holding of special annual sessions of the General Council and scheduling dedicated agenda items at the biennial sessions of the Ministerial Conference;

4. The process would be that the different WTO bodies would keep S&D treatment on their agenda and feed their discussions into the sub-committee on the CTD. The sub-committee would report biannually to the CTD, which would finalise and approve both the report and the

recommendations, if any, for consideration by the General Council in Special or Dedicated annual Sessions.

I. SUB-COMMITTEE ON S&D TREATMENT

5. The proposal by the African Group suggested the establishment of a monitoring mechanism for S&D treatment. Other delegations received this proposal quite positively. There should be sufficient goodwill to formally establish the mechanism but as is to be expected the real test of its effectiveness will be in its actual operation.

6. The functioning and structure of the monitoring mechanism need to be clearly sorted out. In the discussion in the special sessions of the CTD, the keen interest of delegations in the proposal for a monitoring mechanism raised various questions, which received clarifications from the African Group. But this tended to portray the impression that there were details to be worked out, and led to the view that further work on the functioning and structure needed to be done.

7. The African Group is of the view that any Member which has any concern about the functioning of any S&D treatment provision, either because of its language or because of non-compliance by any developed country Member of its provisions should raise this in the sub-committee on S&D treatment, the same way Members raise such concerns in other relevant bodies.

II. SPECIAL ANNUAL SESSIONS OF THE GENERAL COUNCIL

8. The Least-Developed Countries (LDCs) Consultative Group in the WTO proposed that the General Council should be holding annual special sessions to review S&D treatment provisions, as a way of operationalizing the Decision on Measures in Favour of LDCs, and the other S&D treatment provisions.¹ The agenda of the special sessions, according to the proposal, would comprehensively address S&D treatment provisions in favour of LDCs, under three main headings, namely: the implementation of the Decision on Measures in Favour of LDCs, review of the implementation of specific S&D treatment provisions in all WTO instruments including decisions and declarations, and overall review of S&D treatment.

9. In the discussion of this proposal, as pointed out in the CTD's report², some delegations felt that if a monitoring mechanism on S&D treatment is established as proposed by the African Group, the proposed agenda items for the Special Sessions of the General Council would be addressed under the mechanism but without diluting the specificity of the interests and concerns of LDCs.

10. The monitoring mechanism should be established after the finalisation of the Agreement-specific proposals. While the monitoring mechanism is appropriate, this is not at all inconsistent with special annual sessions of the General Council dedicated to S&D treatment. The continuous review, at the highest level in the WTO architecture of organs, of S&D treatment provisions particularly in

¹ Paragraphs 22 to 24 of WTO document TN/CTD/W/4

² Paragraph 8 of WTO document TN/CTD/3:

"8.....The proposal for an Annual Special Session of the General Council on the participation of the LDCs in the multilateral trading system was made by the LDCs Group. They proposed that the agenda of such an annual session could encompass (i) the implementation of the Decision on Measures in Favour of Least-Developed Countries and its overall objectives in favour of LDCs; (ii) the review of the implementation of the specific special and differential provisions included in the WTO Agreements, Decisions and Declarations; and (iii) overall review of special and differential treatment. Some Members were of the view that should a monitoring mechanism be established its role and functions could encompass those sought through the proposed holding of an annual special session, although it was emphasized that this would have to be without dilution of the concerns of the LDCs. Others suggested that the various proposals and their role and functions would need to be assessed in the context of existing machinery such as the Sub-Committee on the Least-Developed Countries and the Integrated Framework."

relation to LDCs, is a standing obligation at the core of the WTO as an institution. In this regard the CTD would be required to make an annual report to the General Council, which would include recommendations for action on specific issues and specific proposals, including on Agreement-specific proposals.

11. The Marrakesh Declaration of 15 April 1994 states that the Ministers:

"... agree to keep under regular review by the Ministerial Conference and the appropriate organs of the WTO the impact of the results of the (Uruguay) Round on the least-developed countries as well as on the net food-importing developing countries, with a view to fostering positive measures to enable them to achieve their development objectives ...".³

12. Further, the Final Act Embodying the Results of the Uruguay Round states that the results of the negotiations, forming an integral part of the Final Act, are the WTO Agreement, the Ministerial Declarations and Decisions, and the Understanding on Commitments in Financial Services.⁴ The Decision on Measures in Favour of LDCs, is such a Ministerial Decision. In turn that Decision states that:

"The Ministers agree that the expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through *inter alia* regular reviews⁵"; and

"The Ministers 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".⁶

13. When the Ministers adopted such decisions, they were fully cognisant of the undesirability of unnecessary duplication of meetings and issues. In any case, concerns over duplication should be raised, if at all, on the basis that the issues are adequately covered by one committee or that they are not important in the overall ranking of issues for the WTO agenda. If development is to be at the core of the WTO as an institution⁷, S&D treatment is the face of development that should be seen and heard at all WTO meetings and in all the processes. A high political and technical profile for S&D treatment, are both equally important aspects that need not be chosen between; rather they should be seen as complementing each other.

III. THE CASE FOR A MONITORING MECHANISM

14. The case for a monitoring mechanism may be stated as follows.

- (a) Where S&D treatment provisions are mandatory in nature, and impose obligations on Members, they still largely remain un-operationalized. There are S&D treatment provisions that are already mandatory⁸, and after the review it is envisaged that all

³ Paragraph 5.

⁴ Paragraph 1.

⁵ Paragraph 2(i).

⁶ Paragraph 3.

⁷ Paragraph 2 of the Declaration of the 4th Session of the Ministerial Conference, WTO document WT/MIN(01)/DEC/1.

⁸ WTO document WT/COMTD/W/77/Rev.1/Add.1/Corr.1.

S&D treatment provisions will be mandatory or there will be additional mandatory S&D treatment provisions.

- (i) Mandatoriness in itself has not been sufficient to ensure that the provisions are implemented and complied with by Members. This means that the exercise of converting S&D treatment provisions into mandatory provisions, while important, should not be considered as the entire solution to the ineffectiveness of S&D treatment provisions. It is important that the provisions have a mechanism that monitors their operation and addresses any difficulties to ensure that they are utilized and practically beneficial to developing and least developed countries.
 - (ii) The various committees should be under an obligation to prepare reports on the implementation and utilisation of the S&D treatment provisions in the relevant Agreements. The reports could be prepared twice a year, to maintain a degree of quick continuity and ease of follow-up. In itself, this requirement, as an aspect of the monitoring mechanism, would assist to keep S&D treatment provisions high on the agenda of the various committees. Copies of the reports would be sent to a sub-committee of the CTD to be established specifically for monitoring S&D treatment provisions. The sub-committee, working under the authority of the CTD, would act as the central forum for all S&D treatment provisions in the various Agreements.
- (b) S&D treatment provisions have remained largely unimplemented in on-going WTO processes. Despite existing provisions, in the real practice on the ground in WTO committees and on-going work programmes, S&D treatment provisions have been mere anecdotes or in effect "any other business", rather than the basis for designing or formulating and conducting WTO business.
- (i) This applies, for instance, in the scheduling of meetings, selection and prioritisation of agenda items, informal consultations preceding the finalization of issues, the low or no importance attached to S&D treatment in negotiating and crafting obligations and rights in WTO instruments, and the unsatisfactory content of S&D treatment provisions where they are included in the instruments.
 - (ii) Another instance is that technical assistance and capacity building programmes, as designed and carried out, have not reflected the true objectives and principles of S&D treatment.⁹ While the CTD has to consider and approve the annual programmes, so far this in itself has not been sufficient to ensure that technical assistance and capacity building activities fully respond to the fundamental needs and concerns of developing countries.
 - (iii) A specialised open-ended body for this purpose is appropriate, to facilitate the focused consideration of issues arising and the preparation of specific recommendations for consideration by the CTD. The body would deal with all S&D treatment provisions. This should not be considered as an exercise in proliferating the number of WTO bodies or detracting from the functions of the CTD, for it would be an open-ended sub-committee of the CTD,

⁹ The principles and objective of S&D treatment need to be clarified and written down as rules to govern the adoption and operation of S&D treatment provisions. The African Group proposal contains suggestions for rules stating the objectives and principles of S&D treatment.

established solely to facilitate the work of the CTD. It may be noted that it was found appropriate to establish the Sub-Committee on LDCs, though the CTD's mandate covered issues of LDCs.

15. It was on this basis that the African Group proposed the establishment of an open-ended sub-committee of the CTD, to work under and report to the CTD, as part of the monitoring mechanism. The other aspect of the monitoring mechanism would be the requirement that all WTO committees or bodies keep S&D treatment as a standing item on their agenda, and periodically prepare reports on S&D treatment.

IV. FUNCTIONS OF THE MONITORING MECHANISM

16. The functions of the monitoring mechanism on S&D treatment, according to the African Group proposal, would be as follows¹⁰:

- Regular evaluation of the utilisation and effectiveness of the S&D treatment provisions, with a view to ensuring that the provisions are fully utilized and any problems arising effectively addressed;
- Provision of a framework for initiating and considering recommendations that the CTD could make to Members on complying with obligations under S&D treatment provisions, as well as on best practice for utilisation of the provisions;
- Accordingly, drawing on among others (a) the reports of the Trade Policy Review Mechanism; (b) reports to be prepared by other international organizations on areas within their remit particularly UNCTAD, the World Bank, the International Monetary Fund and the United Nations Development Programme; and (c) proposals, statements and reports by Members, the monitoring mechanism would periodically evaluate the utilization and effectiveness of S&D treatment provisions and prepare recommendations to be made by the CTD or through the General Council to Members;
- The monitoring mechanism could regularly prepare country profiles setting out detailed and quantified needs, as well as opportunities and benefits, relating to S&D treatment provisions in order to assist their full utilization;
- The CTD would regularly hold dedicated sessions on the utilisation and effectiveness of S&D treatment provisions, to among other things adopt and make appropriate recommendations to Members or the Secretariat;
- The monitoring mechanism would specifically have the function of preparing recommendations on whether proposed agreements and instruments to be adopted in the WTO framework, comply with the rules on S&D treatment (to be set out in the Decision under the Doha mandate and as set out in the WTO Agreement).

17. These functions of the monitoring mechanism would help to ensure that, S&D treatment provisions are operationalized and utilised, and any shortcomings noticed from time to time are redressed.

¹⁰ Paragraph 10 of WTO document TN/CTD/W/3/Rev.1/Add.1.

18. The Chairman's report summarised this proposal of the African Group and its discussion in the following terms¹¹:

The proposal for the establishment of a monitoring mechanism was made by the African Group. In the Group's view, among the main functions of the Mechanism would be (i) the regular evaluation of the utilization and effectiveness of the S&D treatment provisions, with a view to ensuring that the provisions are duly utilized and any problems arising effectively addressed, and (ii) provision of a framework for initiating and considering recommendations that the CTD could make to Members on complying with obligations under S&D treatment provisions, as well as best practice for utilization of the provisions. There was wide support for the concept, although it was clear that further discussions would be required on the functioning and structure of such a mechanism.

19. Perhaps the clearest tangible achievement of the Special Session of the CTD in its work between November 2001 and July 2002, the time the Ministerial Declaration prescribed, was the following recommendation in the Chairman's Report to the General Council¹²:

It is recommended that the General Council agree to establish a Monitoring Mechanism for special and differential treatment, and instruct the Special Session of the CTD to elaborate for the Council's approval, the functions, structure and terms of reference of such a Mechanism, taking into account the proposals made by the African Group, and the discussions that have taken place thereon in Special Sessions of the CTD.

V. WAY FORWARD

18. In terms of the way forward:

- (a) A specific decision formally setting up the monitoring mechanism should be prepared and adopted by the General Council after the finalization of the Agreement-specific proposals. The decision could be modelled along other decisions that have set up WTO committees or sub-committees.
- (b) Regarding the structure, the sub-committee would be an open-ended sub-committee of the CTD, working under and reporting to the CTD. But additionally, there would be a requirement that all WTO committees should periodically prepare reports on the operation of S&D treatment provisions, and send copies to the sub-committee.¹³
- (c) In line with the functions proposed by the African Group as reflected in the Chairman's report, the terms of reference of the sub-committee on S&D treatment, established as a permanent and standing open-ended sub-committee, would be to carry out the regular evaluation of all S&D treatment provisions, and preparation of recommendations for the CTD, with a view to ensuring the beneficial utilisation of the provisions. However, the S&D treatment provisions coming within the functions of the mechanism should be those that have undergone the mandate given to the Special Session of the CTD as well as those negotiated in the negotiating bodies. Further, the Special Session of the CTD alone has the mandate to undertake the

¹¹ Paragraph 7.

¹² Paragraph 17.

¹³ There is already an administrative arrangement where other WTO bodies send reports to the CTD on their activities relating to the CTD. The CTD's report to the General Council, in paragraph 15(b), recommends that the CTD may request and receive reports from other WTO bodies in carrying out its work during the extended period.

ministerial mandate to review and strengthen existing S&D treatment provisions; this mandate should not go to the negotiating bodies or even the mechanism.

- (d) To facilitate its functions, the powers of the sub-committee may be specified as including the competence to request and receive reports and other information from, other WTO bodies, Members, other organizations, and any expert sources; to monitor compliance with recommendations that are adopted by the CTD, the General Council, or the Ministerial Conference; and to make recommendations to the CTD. In this regard, the CTD shall make any appropriate recommendations to Members and for consideration by other WTO councils and committees.
 - (e) The Group is of the view that exhaustive discussions have taken place on this subject and expects action to be taken upon the finalisation of the Agreement-specific proposals.
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