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SPECIAL AND DIFFERENTIAL TREATMENT IN THE AREA OF TRADE FACILITATION

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ABSTRACT

Annex D of the July 2004 Decision of the WTO General Council indicates that "*the principle (of special and differential treatment for developing and least-developed countries) should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members.*" The objective of this study is to offer reflections on how special and differential treatment for trade facilitation may be shaped by the cost implications of measures included in the future agreement. It is based on findings of OECD work on the costs of trade facilitation measures, which confirms that different countries - even at an equivalent level of development - face different situations and present differing implementation capacities, and points to the relative complexity of implementation of the different measures proposed for inclusion in a future trade facilitation agreement.

Keywords: special and differential treatment, trade facilitation, developing countries, least developed countries, implementation, capacity building, costs, benefits.

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SPECIAL AND DIFFERENTIAL TREATMENT IN THE AREA OF TRADE FACILITATION

1. The importance of understanding and accommodating the concerns and particular circumstances of developing countries in the area of trade facilitation was explicitly acknowledged in the July 2004 Decision of the WTO General Council. In Annex D of the Decision WTO Members "... recognize that the principle (of special and differential treatment for developing and least-developed countries) should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members." Yet, although the issue of special and differential treatment has been central to the debates since the establishment of the WTO Negotiating Group on Trade Facilitation, specific proposals on the most appropriate special and differential treatment provisions in the context of a new agreement have been tabled only recently¹.

2. The objective of this document is to offer reflections on how the cost implications of measures in a future trade facilitation agreement may shape special and differential treatment in the context of such agreement, as mandated by the Working Party at its January meeting. These reflections should be seen as a platform for an exchange of views among Delegates and is not intended to prejudge in any way related discussions in the WTO.

I. The challenges of existing special and differential treatment provisions

3. Considerable discussion has taken place over the last years about the utility and value of existing provisions in various WTO agreements and about possible options for strengthening these provisions. Such discussion is well beyond the scope of this note. However, Annex D clearly states that a future trade facilitation agreement should go beyond "traditional" special and differential treatment provisions. Annex D does not specify what would be appropriate SDT provisions in the context of the new agreement, although it does indicate that the principle of special and differential treatment should be formulated in a way that would allow linking the extent and timing of commitments to the implementation capacities of developing and least-developed countries. A brief overview of SDT provisions in a number of existing WTO agreements and of the main criticisms attracted by these provisions may offer indications about possible ways forward.

4. Uruguay Round agreements, such as the Customs Valuation agreement, the SPS agreement, or the TRIPS agreement have introduced novel approaches to SDT compared to earlier approaches. Breaking with previous paradigms of static differentiation between developed and developing countries, the basic assumption was that the principal benefits of the multilateral trading system will be derived through integration into the system; developing countries need assistance in integrating into the system, not provisions for staying away from it. The assumption suggests that the costs of adjustment are "different" depending on conditions in the countries concerned. When the role of trading rules, including domestic

¹ These are, by order of submission, a Communication from the African Group (TN/TF/W/33), a Communication from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Uruguay (TN/TF/W/41) and a Communication by the European Communities (TN/TF/W/46). Also relevant are a Communication from the People's Republic of China and Pakistan (TN/TF/W/29) and a further Communication from the African Group (TN/TF/W/56).

legislation, became more prominent in the WTO, the “need for adjustment” focussed on the fact that legal adjustments take time, especially in countries with insufficient numbers of trained people and resulted in provisions allowing for transitional periods².

5. This, in turn, raised the question of how to implement transitional periods in a way that takes into account commitment-specific needs, capacities and domestic circumstances of developing countries. Costs of adjustment to institutional and regulatory changes such as those required by some Uruguay Round agreements depend heavily on the specific capacities, limitations and needs of each country in given policy areas. This is equally true in the area of trade facilitation, where overviews of recent endeavours have shown that *different countries –even at an equivalent level of development – face different situations and, hence there cannot be “one-size-fits-all” solutions*³. A number of Uruguay Round agreements provided for the possibility to request an extension of transitional periods and this possibility was widely used by developing and least-developed countries.

6. In some cases prior to the conclusion of the agreements countries had not fully measured the difficulties they were likely to face. But the need to extend transition periods also reflected the difficulty in tackling institutional adjustment in the absence of appropriate institutional, human and financial resources. In the case of the Customs Valuation Agreement several countries reported that the real challenge was to overcome persistent inadequate implementation after the enactment of domestic legislation to give effect to those countries’ commitments. When transition periods fail to achieve their purpose because of insufficient resources or inadequate monitoring of government action to support adjustment, the risk emerges of further marginalising developing and least-developed countries and compromising their future integration into the multilateral trading system. Moreover it can be argued that by further deferring the implementation of commitments, beneficiary countries miss the opportunity to engage in reforms necessary for institutional enhancement favourable for their development.

7. Several developing countries complained that adjustment difficulties could not be overcome over time without appropriate assistance to tackle the lack of domestic resources. While Uruguay Round agreements provided for technical assistance, there has been considerable frustration about the effectiveness of these provisions in generating the necessary support. The non-mandatory nature of technical assistance provisions was largely blamed, but an overview of trade-related assistance programs strongly points to a problem of efficient articulation between trade-related assistance and reforms undertaken with its support. Although many assistance programs now start off by assessing trade-related needs⁴, such needs do not always correspond to recipients' priorities and demands in the context of overall development strategies. Donors cannot pledge funding for trade related priorities if such priorities are not the focus of the recipient country's national development or poverty reduction strategy. It has been argued that the notable increase in technical assistance was not enough to give countries the resources to comply with all the rules. However, the question here is how can the optimal level of technical assistance be defined in the absence of a thorough evaluation of the situation in concerned countries and of milestones to assess whether assistance is efficiently contributing in closing the gap?

² Transitional periods vary between agreements, arguably depending on the level of difficulty for adjusting to the new provisions. The SPS Agreement offered a transition of three years for developing countries and six years for LDCs, while the Customs Valuation agreement allowed five years for developing countries and an additional three years for the computed value methodology, considered particularly complex to implement.

³ JOB(04)53 from 19 May 2004 "Trade facilitation negotiations: perspectives on scope, implications and development aspects", Joint communication from Canada, Colombia, Costa Rica, Hong Kong China, Japan and Switzerland

⁴ One prominent example is the Diagnostic Trade Integration Studies (DTIS) undertaken in the context of the Integrated Framework for Trade-Related Assistance to Least Developed Countries (IF).

II. The specific rationale of a trade facilitation agreement

8. An overview of the proposals already put on the negotiating table by a number of WTO Members – and which will presumably shape the future trade facilitation agreement – show that the agreement will involve a number of -sometimes complex- regulatory issues and that the supporting mechanisms can be resource intensive. Special and differential treatment provisions will thus mainly aim at relating “*the extent and timing of entering into commitments ... to the implementation capacities of developing and least-developed Members.*” They should be considered as responding to the same rationale developed during the Uruguay Round, i.e. assisting WTO Members to integrate into the system by facilitating adjustment⁵. However, the question is to identify possible approaches for doing this in a way that would reflect more closely individual needs and capacities without compromising the effectiveness and consistency of the future agreement.

9. The experience of developing countries having undertaken trade facilitation reforms in the recent past⁶ shows that the design of trade facilitation reforms must be tailored closely to reflect particular circumstances and needs, so as to ensure ownership and sustainability. At the same time, a holistic approach to customs and border procedures reform can yield more sustainable results than can a piecemeal approach. Narrow-focus reforms cannot necessarily be sustainable outside a more comprehensive modernisation programme aiming to enhance the capacity of the administration to cope with the change. The research on the costs of introducing and implementing trade facilitation measures clearly indicated that the introduction and efficient implementation of some trade facilitation measures requires other measures to be up and running. It also showed that, as a result of improved revenue collection and of staff and time savings, the measures generated additional resources which can partly be devoted to further promoting trade facilitation. There are clear links between measures, which may not realize their full potential if implemented in isolation or without due regard to the appropriate sequencing of measures.

10. Because of the high benefit potential of trade facilitation measures⁷ and the efficiency links between measures, SDT provisions in a future trade facilitation agreement should not aim at excluding some countries indefinitely from the system and its anticipated payoffs but rather at incorporating them gradually to a common system of rights and obligations, in a way that reflects their specific capacities,

⁵ In addition to SDT provisions aimed at facilitating adjustment, it is also possible to envisage SDT provisions that aim to improve the market access opportunities of developing countries, as found in some rules agreements. However, no such proposals have so far been tabled in the negotiations; therefore they will not be further investigated in this paper. Nevertheless, examples can be found in the TBT and SPS agreements: e.g. SPS Article 10.2 provides for phased introduction of new SPS measures on products of export interest to developing countries, while SPS Article 9.2 provides for specific technical assistance to help developing countries fulfil SPS requirements of importing countries. Likewise, TBT Article 11.5 provides for technical assistance regarding the steps that should be taken by developing country producers wishing to have access to conformity assessment systems operated in the territory of the Member receiving the request. In the context of a trade facilitation agreement, provisions following that model could take the form of specific mechanisms established by developed countries to provide more information to developing countries regarding their domestic requirements and procedures. Such mechanisms could also include measures aimed at reducing any difficulties developing country exporters may have in complying with such requirements. Additional SDT provisions could take the form of more favourable measures for certain categories of countries such as LDCs or landlocked countries (enquiry points that also provide “market access assistance” for products of interest to those countries? lower fees and charges? further simplifications in transit procedures?).

⁶ Documents TD/TC/WP(2003)11/FINAL "Trade Facilitation Reforms in the Service of Development" and TD/TC/WP(2004)4/FINAL "Country Case Studies"

⁷ See, in particular documents TD/TC/WP(2003)31/FINAL "Quantitative Assessment of the Benefits of Trade Facilitation" and TD/TC/WP(2005)12/FINAL "The Economic Impact of Trade Facilitation".

limitations or needs in given areas covered by the agreement. A first, very important step is to properly identify needs, priorities and implementation capacities based on 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. These could be drawn from diagnostic tools currently being developed by a number of international organisations and donors. They would not only allow assessing where countries stand and measuring the gap between their current situation and the steps they need to undertake in the context of a trade facilitation agreement; they would also provide a platform for designing and implementing appropriate technical assistance and capacity building and allowing the necessary time periods to make these steps possible.

11. A proper assessment of each country's individual needs and priorities would allow a more clearly articulated relationship between the extent of commitments, the lengths of transitional periods for assuming commitments, and the provision of technical assistance to help meet those commitments in cases where the necessary capacity is not available. Measures that genuinely require more difficult or more costly transitions for developing countries should be recognised in terms of longer periods, more flexible rules and specific offers of technical assistance. In this regard, a number of WTO Members have stressed the need for a co-ordination mechanism that would ensure coherence between identified needs and capacity building and complementarity among donor support⁸.

12. Finally, trade facilitation provisions should be accompanied by review mechanisms in order to ensure their effectiveness in "*support(ing) the implementation of the results of the negotiations*". To prevent longer transition periods from being used merely to put off adjustment, developing countries should agree to phased transitions with monitorable mileposts, so that both the international community and their own citizens can see that adjustment is actually occurring.

III. What do the costs and benefits of trade facilitation measures mean for SDT?

13. The generally shared view that different countries – even at an equivalent level of development – face different situations and need tailor-made solutions is confirmed by the outcomes of the work on the costs of trade facilitation. In the context of trade facilitation it is important to adequately reflect developing countries' specific capacities, limitations or needs. The country studies showed that implementation capacities are not only a matter of the country's overall economic situation, but also reflect various other factors, the most important of which seem to be its geographical situation and trade patterns (proximity and accessibility of major trading markets, composition of imports and exports) and the priority accorded to customs modernisation and trade facilitation in the context of the country's political process. Among developing countries some LDCs seem to have already achieved more progress towards trade facilitation than some more advanced developing countries.

14. On the other hand, the need to safeguard coherence of agreed trade facilitation measures and ensure that links and sequencing between measures are properly taken into account may call for trade facilitation commitments shared by, and binding to, all, but allowing for a gradual implementation in a way that corresponds to capacities that are available or generated with the support of technical assistance. Linkages between interrelated measures should be factored in: some measures are only one part of the customs process and given the initially weak situation in some developing countries, addressing them without, or prior to, addressing prerequisite measures is not likely to improve the predictability and efficiency of the customs process. Rather than dedicating all efforts on certain facilitation aspects and completely ignoring others, a less ambitious but more thorough implementation would ensure a more efficient and sustainable use of available resources and effort.

⁸ Communication from the African Group, TN/TF/W/56; Communication from Argentina,, TN/TF/W/41

15. The OECD costing work has provided indications on measures that are relatively elementary and straightforward and others that would be more costly and/or technically demanding to implement. It should not be anticipated that the difficulties some reviewed countries may have experienced in putting in place selected measures and the approaches they have followed to overcome the difficulties will be exactly the same for all other countries; however, it could be reasonably expected that challenges would be of a similar nature. Considering their relative complexity of implementation, the analysis points to four broad categories of measures:

- a. measures that can or should be implemented immediately by all countries;
- b. measures that would have financial or other resource implications and which may call for technical assistance in order to be introduced;
- c. measures that, although not necessarily costly, would need time, because of the complexity of their implementation; and
- d. measures that would require resources to be introduced and the implementation of which would also have to be spread over time.

16. For many of the measures appropriate SDT provisions will also be a matter of the extent of implementation (or level of ambition) concerning a given measure. A typical example is "single window", which can be put in place in a very simple way, or be supported by an electronic network linking concerned agencies, with very different resource implications. This also means that provisions for SDT and technical assistance cannot be finalised without a clearer idea about individual countries' needs and priorities or due reference to the specific terms of each commitment as they will be defined by the upcoming text-based negotiations in the WTO.

a. Measures that can be implemented immediately⁹

17. Among the reviewed measures, some are longstanding practices which should not raise particular cost concerns for most countries because they are already well incorporated into the Customs administration's operational budget (for instance, publication of applicable laws and regulations, advance rulings on origin, consultation and feedback mechanisms at the domestic level, co-operation between border agencies). These measures typically belong to the first, basic "increments" within a future trade facilitation agreement. In the case of consultative arrangements, even countries that have still little experience with these measures stress that the central role they play in the operation of Customs and in building long term confidence relations between Customs and traders argues in favour of according them a very high priority in trade facilitation endeavours. The costing work also points to some measures which are not currently implemented by all countries but which do not present additional complexities and should be possible to implement relatively quickly, such as the publication of internal procedures and guidelines.

b. Measures with financial implications

18. A number of reviewed measures may generate additional costs for their introduction and implementation but are relatively straightforward to operate. This is the case for setting up websites or for value-added services related to provision of information. For some measures that are providing a service to

⁹ Points a through d draw on findings presented in document TD/TC/WP(2005)27, The Costs of Introducing and Implementing Trade Facilitation Measures. References to specific measures illustrate observations made in the countries surveyed in that document, but should not be applied to other countries without an assessment of those countries' individual needs, circumstances and priorities.

Customs users and for which there is a market, countries often pass on the costs to the users, or even contract out to private operators. Related provisions could be part of more advanced level of ambition, depending on the willingness of the private sector in a country to finance their introduction.

c. Measures requiring time for implementation

19. Among the measures which are not yet widespread among developing countries, some measures do not seem to call for additional resources, or can be introduced by reallocating resources that were assigned to other tasks. However, their introduction requires time for on-the-job training of concerned staff and for adapting to new ways of doing business. This is the case for instance with advance rulings on valuation, or with the principle of separation of release from clearance, which presents difficulties for some countries still in the process of building confidence between traders and border authorities.

d. Measures with financial and time implications

20. Some measures (for instance provisions on due process, risk management techniques, post-clearance audits, single windows) may translate in some countries into requirements for legislative reforms or infrastructure development, more personnel in relevant departments and training to acquire additional expert skills. Depending on the starting point of each country such provisions may be part of the most ambitious elements of a trade facilitation agreement, calling for technical and financial assistance in order to be introduced and allowing for additional time after their introduction in order to be properly implemented.

21. Other measures may require the prior availability of capacities, including infrastructure development, the scope of which is broader than proposals actually on the negotiating table. This is for instance the case with advance lodgement and processing of data, the efficient implementation of which requires a certain degree of automation of Customs systems. Building capacity in these broader areas belongs to wider assistance projects put together by the donor community, rather than to technical assistance provided in the context of a WTO trade facilitation agreement. However, any transitional periods granted for implementing such measures would have to take into account whether prerequisite capacity building has already taken place or not.

22. This categorisation in terms of relative complexity of introduction and implementation should also be viewed against the demonstrated or anticipated benefits of the reviewed measures in the context of a given country. Considerations related to benefits could lead countries to consider a given measure at a later stage despite the fact that its resource implications are not out of reach, or, on the contrary, speed up its introduction notwithstanding its complexity. These considerations would relate in particular to:

- measures which have moderate cost implications but which many poor countries find of relatively low priority considering available resources (for instance availability of information to a foreign, widely used, language);
- measures which have resource or time implications partly or totally offset by savings generated in relation to other customs tasks (for instance setting up enquiry points);
- complex or costly measures bearing potential benefits that not only would justify bringing those measures up most countries' priority list but which would also generate resources for sustaining further advances in that and in other areas (for instance risk management techniques, post-clearance audits, advance lodgement and processing of data);

- measures that involve in some countries broader institutional reforms going beyond border procedures or trade facilitation (for instance, the publication of the underlying objectives supporting enacted laws and regulations, or the provision of security for duties and taxes in countries where the banking system does not offer the necessary support).

23. It should be kept in mind that developing countries have an important stake in ensuring streamlined and simplified procedures in each other's markets. However, the improvement of transit provisions in favour of landlocked countries may be complicated by the lack of necessary capacity in neighbouring transit countries. Such problems may be, at least partially, overcome through co-operation among concerned countries, but regionally-focussed assistance may also be necessary in order to achieve satisfactory solutions.