WORLD TRADE ORGANIZATION

RESTRICTED

WT/COMTD/W/77/Rev.1/Add.3
4 February 2002

(02-0515)

Committee on Trade and Development

NON-MANDATORY SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN WTO AGREEMENTS AND DECISIONS

Note by the Secretariat

Addendum

I. INTRODUCTION

1. WTO Members adopted the Decision on Implementation-Related Issues and Concerns[1] at the Fourth Ministerial Conference in Doha. Paragraph 12.1 of that Decision instructs the Committee on Trade and Development to carry out a work programme on special and differential treatment. Pursuant to that Decision, the Committee on Trade and Development adopted a process for its work. The process is set out in document WT/COMTD/36. This note responds to the request by delegations, in paragraph 1(b) of document WT/COMTD/36 that the Secretariat "compile factual information on the legal implications for the WTO agreements of making non-mandatory special and differential treatment provisions mandatory". It should be read in conjunction with Secretariat note WT/COMTD/W/77/Rev.1/Add.4 (to be issued) which provides information on utilisation of special and differential treatment provisions.

2. This note has been prepared by the Secretariat on its own responsibility and is intended only for the purpose of discussion in order to assist delegations in their work on special and differential treatment provisions. In particular, the description in this note of specific provisions of the WTO Agreement as "mandatory" or "non-mandatory" as well as the statements pertaining to these provisions are without prejudice to the exclusive right of Members to adopt authoritative interpretations of their rights and obligations under the WTO Agreement.

3. In response to an earlier similar request, the Secretariat had identified mandatory and non-mandatory special and differential treatment provisions WT/COMTD/W/77/Rev.1/Add.1/Corr.1. In that note, the Secretariat used six categories of special and differential treatment provisions: (i) provisions aimed at increasing the trade opportunities of developing country Members; (ii) provisions under which WTO Members should safeguard the interests of developing country Members; (iii) flexibility of commitments, of actions, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; and (vi) provisions relating to least-developed country Members. The focus of that note was on categories (i), (ii) and (v) above, as well as certain provisions falling under category (vi) for which the distinction between mandatory and non-mandatory was considered relevant. It was noted that that distinction between "mandatory" and "non-mandatory" provisions did not apply to provisions under categories (iii) and (iv), and some corresponding provisions within category (vi) as those provisions specified levels of flexibility and transition time periods that developing countries may choose to exercise should they so wish. The mandatory provisions were distinguished from the non-mandatory provisions on the basis of the rule that mandatory provisions used "shall" language and that non-mandatory provisions used "should" language.

4. It might be worthwhile to keep in mind that some special and differential treatment provisions which are mandatory in the strict legal sense of the term (i.e., the term "shall" is used), are nevertheless characterized by a considerable flexibility of the obligations laid down in these provisions. A mandatory provision might therefore not necessarily be effective.[2] An example of such a provision is Article XXXVII:1 of GATT. For a discussion of mandatory provisions, please refer to Secretariat note WT/COMTD/W/77/Rev.1/Add.2. As specified in the request, this document, which adds to the Secretariat's work on the mandatory provisions, relates only to the non-mandatory provisions, identified as such in document WT/COMTD/W/77/Rev.1/Add.1/Corr.1. The first question is then how the non-mandatory special and differential treatment provisions can be made mandatory.

5. Basically, there would appear to be two ways in which non-mandatory special and differential treatment provisions could be made mandatory or confirmed to be mandatory:

---

[1] WT/MIN(01)/17

[2] Where this is the case, the effectiveness of mandatory provisions might be enhanced by amending them so that the flexibility of those provisions is reduced or disappears.

- through **amendment** of the provisions of the WTO agreement in question;

- through **authoritative interpretation** of the provisions of the WTO agreement in question.

6. **Amendment** of the special and differential treatment provisions of a WTO agreement would convert non-mandatory provisions into mandatory ones. In essence, amendment of the relevant provisions would involve replacing the term "should" with the term "shall", while leaving the rest of the provisions unchanged. The WTO rules on amendments of a WTO agreement are laid down in Article X of the WTO Agreement. Any Member or the Councils listed in Article IV of the WTO Agreement may initiate a proposal to amend the provisions of a WTO Agreement. Normally, amendments must be formally accepted by Members. Whether an amendment takes effect and whether it does so for all Members or only those which have accepted it, depends on the WTO agreement at issue and the precise provisions in question. No such amendment has been made since the entry into force of the WTO Agreement. It can be assumed that the most logical time to reach agreement to amend a provision would be in the course of a round of negotiations. However, it might be difficult to reach agreement to reopen existing WTO agreements as some Members might argue that the text of each existing agreement reflects a negotiated balance of interests and that to renegotiate one provision would require renegotiation of the entire agreement.

7. **Authoritative interpretation** of the special and differential treatment provisions of a WTO agreement would not convert non-mandatory provisions into mandatory ones. Indeed, Article IX:2 of the WTO Agreement, which lays down the WTO rules on authoritative interpretation, specifically states that authoritative interpretation may not be used in a manner that would undermine the amendment provisions of Article X. However, in the case *Canada - Measures Affecting the Export of Civilian Aircraft*, the Appellate Body appeared to suggest that, in some instances and depending on the context, a provision that used the word "should" could imply a "duty" rather than a mere "exhortation"[3]. It should be noted that the Appellate Body stated to this effect when interpreting a provision of a procedural nature.[4] If it were felt that one or other of the non-mandatory special and differential treatment provisions which use the term "should" implied a duty rather than exhortation, an authoritative interpretation could be used to confirm that the relevant provisions are, in fact, meant to be mandatory in nature. Only the Ministerial Conference or the General Council have the authority to adopt interpretations of the provisions of a WTO agreement. Decisions to adopt an interpretation must be taken by a three-fourths majority of the Members.

8. Part II of this note contains the non-mandatory provisions in the order of the Legal Texts of the Results of the Uruguay Round of Multilateral Trade Negotiations. It provides, for each identified special and differential treatment provision, the actual text for reference and comments by the Secretariat on the provision in question.

---

[3] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft* "), WT/DS70/AB/R, adopted 20 August 1999, para. 187.

[4] At para. 187 of *Canada - Aircraft*, the Appellate Body stated as follows:

We note that Article 13.1 of the DSU provides that "A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." (emphasis added) Although the word "should" is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used "to express a duty [or] obligation". The word "should" has, for instance, previously been interpreted by us as expressing a "duty" of panels in the context of Article 11 of the DSU. Similarly, we are of the view that the word "should" in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU. (footnotes omitted)

II. SPECIAL AND DIFFERENTIAL TREATMENT: INFORMATION BY AGREEMENT

A. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Part IV - "Trade and Development"

Article XXXVI: "Principles and Objectives"

<table>
<tr><th>Provision</th><th></th></tr>
<tr><td>2. There is need for a rapid and sustained expansion of the earnings of the less-developed contracting parties.</td><td rowspan="4">Paras. 2-7 of Article XXXVI contain agreed objectives and principles. Paras. 2-7 do not, in themselves, mandate specific action. The question of how effect is to be given to the objectives and principles set forth in paras. 2-7 of Article XXXVI is dealt with in Article XXXVI:9. Thus, in view of the structure of Article XXXVI, the crucial provision is para. 9 of Article XXXVI.

If it were considered that one or other objective or principle mentioned in paras. 2-7 has not been reached, the objectives and principles contained in those paragraphs could be converted into specific obligations which mandate concrete action. Alternatively, the situation might be improved through an appropriate modification of the provisions of Article XXXVI:9.</td></tr>
<tr><td>3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.</td></tr>
<tr><td>4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.</td></tr>
<tr><td>5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.</td></tr>
</table>

Provision	
6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.	
7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.	

1979 Decision of the Contracting Parties on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: "The Enabling Clause"

Provision	
1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries,[5] without according such treatment to other contracting parties.	This is an enabling provision. It confers rights and is not meant to impose obligations. The issue of converting para. 1 of the Decision into a mandatory obligation does not, therefore, appear to arise.
2. The provisions of paragraph 1 apply to the following:[6]	Para. 2 defines the scope of application of the Enabling Clause. It is not meant to impose specific obligations. The issue of converting para. 2 of the Decision into a mandatory obligation does not, therefore, appear to arise.
(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.[7]	
(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.	

[5] The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[6] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[7] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries."

B. AGREEMENT ON AGRICULTURE:

Provision	
Preamble Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;	The preambular text of an agreement is not meant to create specific obligations. Preambular text is designed instead to set out the objectives and principles underlying an agreement and to help guide the interpretation of the rights and obligations laid down in the agreement. The issue of converting the preamble into a mandatory obligation does not, therefore, appear to arise. If it were decided to convert this into an operational provision, it could be made mandatory by replacing the word "would" with "shall", but this by itself would not ensure that this obligation is actually translated into improved conditions of access.

C. SANITARY AND PHYTO-SANITARY MEASURES.

Provision	
Article 10.2 Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.	This provision could be made mandatory by replacing the term "should" by the term "shall". This would require a formal amendment of Article 10.2 in accordance with the provisions of Article X of the WTO Agreement. If it were felt that in the specific context of Article 10.2 the term "should" should be read to express a duty rather than mere exhortation, this could be clarified through an authoritative interpretation pursuant to Article IX:2 of the WTO Agreement. Particular mechanisms for this to happen are not defined.
Article 10.4 Members should encourage and facilitate the active participation of developing country Members in the relevant international organisations.	This provision could be made mandatory by replacing the term "should" by the term "shall". This would require a formal amendment of Article 10.4 in accordance with the provisions of Article X of the WTO Agreement. If it were felt that in the specific context of Article 10.4 the term "should" should be read to express a duty rather than mere exhortation, this could be clarified through an authoritative interpretation pursuant to Article IX:2 of the WTO Agreement. Particular mechanisms for this to happen are not defined

D. AGREEMENT ON TEXTILES AND CLOTHING

Provision	
Article 1.2, footnote To the extent possible, exports from a least-developed country Member may also benefit from [Article 1.2: Members agree to use the provisions of paragraph 18 of Article 2 and paragraph 6 (b) of Article 6 in such a way as to permit meaningful increases in access possibilities for small suppliers and the development of commercially significant trading opportunities for new entrants in the field of textiles and clothing trade.	The footnote to Article 1.2 appears to give least-developed country Members the conditional right to benefit from the provisions of Article 1.2. It does not seem that the legal nature of the footnote would change if the text were amended so that it would use the term "shall" rather than "may". The precise operational content of the words "to the extent possible" is not defined.

E. DECISION ON TEXTS RELATING TO MINIMUM VALUES AND IMPORTS BY SOLE AGENTS, SOLE DISTRIBUTORS AND SOLE CONCESSIONAIRES.

Provision	
Decisions on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaries: Minimum values:	
Text II A number of developing countries have a concern that problems may exist in the valuation of imports by sole agents, sole distributors and sole concessionaires. Under Article 20:1 (mentioned in Section 2.7 of this document), developing country Members have a period of delay of up to five years prior to the application of the Agreement. In this context, developing country Members availing themselves of this provision could use the period to conduct appropriate studies and to take such other actions as are necessary to facilitate application. In consideration of this, the Committee recommends that the Customs Co-operation Council assist developing country Members, in accordance with the provisions of Annex II, to formulate and conduct studies in areas identified as being of potential concern, including those relating to importations by sole agents, sole distributors and sole concessionaires.	In view of the fact that the Customs Co-operation Council (World Customs Organization) is an international organisation separate from the WTO, it is arguable that the Customs Valuation Committee could not direct the Customs Co-operation Council to take specific action. If that is correct, there would appear to be no need to convert this paragraph into a mandatory obligation.

F. AGREEMENT ON IMPORT LICENSING PROCEDURES.

Provision	
Article 3:5(a)(iv) Non-automatic Import Licensing Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account.	The last sentence of this provision uses the phrase "would not be expected". This phrase could be understood to mean that developing country Members are not required to provide all relevant information if this would entail additional administrative or financial burdens. If, on the other hand, the interpretation of the phrase "would not be expected" were considered to be unclear, an authoritative interpretation of this phrase might be envisaged.
Article 3.5 (j) Non Automatic Import Licensing In allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members.	The fifth sentence of Article 3.5(j) could be made mandatory by amending the text of the sentence in such a way that it would use the term "shall" rather than "should". Such an amendment would be subject to the rules laid down in Article X of the WTO Agreement.

G. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Provision	
Article 27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members	Article 27.1 contains an agreed principle, and not a specific obligation. The specific rights and obligations derived from this general principle are laid down in the other paragraphs of Article 27. If it were considered that the principle mentioned in Article 27.1 needed to be given greater effect, it is arguable, in view of the nature of Article 27.1, that this goal may best be achieved through additions to or modifications of the other paragraphs of Article 27.

H. GENERAL AGREEMENT ON TRADE IN SERVICES

Provision	
Members, *Recognizing* the growing importance of trade in services for the growth and development of the world economy; *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries; *Desiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives; *Recognizing* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right; *Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness; *Taking* particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs; Hereby *agree* as follows:	The preambular text of an agreement is not meant to create specific obligations. Preambular text is designed instead to set out the objectives and principles underlying an agreement and to help guide the interpretation of the rights and obligations laid down in the agreement. The issue of converting the preamble into a mandatory obligation does not, therefore, appear to arise. The content of the provisions of the preamble is reflected in S/L/93 "Guidelines and Procedures for the Negotiations on Trade in Services", particularly Section I ("Objectives and Principles"), paragraphs 1-2.
Article XII Restrictions to Safeguard the Balance of Payments 1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development	Article XII:1 authorizes Members to adopt, subject to certain conditions, restrictions on trade in services to safeguard the balance-of-payments. In other words, Article XII:1 lays down a right rather than an obligation. The issue of making Article XII:1 mandatory does not, therefore, appear to arise.

Provision	
or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.	

I. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES.

Provision	
Article 4.10 During consultations Members should give special attention to developing country Members' particular problems and interests.	This provision could be made mandatory by replacing the term "should" by the term "shall". This would require a formal amendment of Article 4.10 in accordance with Article X of the WTO Agreement. If it were felt that in the specific context of Article 4.10 the term "should" should be read to indicate a duty rather than mere exhortation, this could be clarified through an authoritative interpretation pursuant to Article IX:2 of the WTO Agreement. The precise operational content of the phrase "give special attention" is not defined.
Article 21 Surveillance of Implementation of Recommendations and Rulings 2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.	This provision could be made mandatory by replacing the term "should" by the term "shall". This would require a formal amendment of Article 4.10 in accordance with Article X of the WTO Agreement. If it were felt that in the specific context of Article 21 the term "should" should be read to indicate a duty rather than mere exhortation, this could be clarified through an authoritative interpretation pursuant to Article IX:2 of the WTO Agreement. The utility of Article 21.2 as a mandatory provision could be increased by by clarifying the phrase "matters affecting the interests of developing country Members".

J. LEAST-DEVELOPED COUNTRIES

Decision on Measures in Favour of Least-Developed Countries

Provision	
Paragraph 2 (ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries.	The first sentence of para. 2(ii) does not appear to mandate autonomous implementation. If that is a correct interpretation, then the first sentence could be made mandatory by replacing the term "may" by the term "shall". The precise operational content of the words "to the extent possible" is not defined. The second sentence of para. 2(ii) is mandatory. The precise operational content of "consideration" and "further improve" are not defined.
Paragraph 2 (iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries. To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees.	The first sentence of para. 2(iii) could be made mandatory by replacing the term "should" by the term "shall". This would require a decision by the Ministerial Conference or the General Council. If it were felt that in the specific context of para. 2(iii) the term "should" should be read to indicate a duty rather than mere exhortation, this could be clarified through an authoritative interpretation pursuant to Article IX:2 of the WTO Agreement. However, it could also be argued that the first sentence of para. 2(iii) is meant to lay down a general principle. It could be said that the second sentence of para. 2(iii) gives effect to the general principle set forth in the first sentence. If it were considered that the principle mentioned in the first sentence of para. 2(iii) needed to be given greater effect, it is arguable, in view of the nature of the first sentence of para. 2(iii), that this goal may best be achieved through additions to or modifications of the second sentence of para. 2(iii).