

WTO'S MC9: ANALYSIS OF THE TEXT ON THE MONITORING MECHANISM

SYNOPSIS

The text on the Monitoring Mechanism (JOB/TNC/34) which has been transmitted from Geneva to the Bali Ministerial is extremely disappointing. It

- Does not allow for the strengthening of S&D provisions
- Will be about reviewing the implementation of existing S&D provisions, not strengthening S&D provisions themselves
- Is not a place where negotiations will be able to take place since 'in carrying out its functions, the Mechanism will not alter or in any manner affect, Members' rights and obligations under WTO Agreements... or interpret their legal nature'. i.e. the Mechanism is toothless.
- Can only ask other negotiating bodies to review the implementation of S&D provisions.
- Even so, in asking the other bodies, it cannot give them specific instructions of the outcome since it cannot 'define or limit' the 'final determination' of these bodies. I.e. it cannot be specific and mandate these bodies to improve a provision.

In short, the Mechanism is ineffective and will not serve the purpose the demandeurs had wanted - to strengthen S&D provisions.

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I. INTRODUCTION

1. The Monitoring Mechanism (MM) agreed to be established by WTO Members in 2002 was brought back on to the WTO's agenda. The following should be noted:
 - i. The mandate for all the Special and Differential Treatment negotiations in the Doha Round is Paragraph 44 of the Doha Declaration, that '*all Special and Differential Treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational*'. This mandate therefore also applies to the Monitoring Mechanism. Unfortunately, there have been very strong efforts to marginalise this mandate in the MM negotiations. In the 25 November text, the mandate that the MM should be a Mechanism to strengthen S&D provisions no longer appears.
 - ii. The MM mooted by the African Group and LDCs was intended to be established after S&D provisions had been strengthened. The Africa Group noted in 2002 that

'The monitoring mechanism should be established after the finalisation of the Agreement-specific proposals' (para 10, TN/CTD/W/23, 11 December 2002). This was to ensure that the S&D provisions would be strengthened.

The LDCs were also clear that the MM would have to allow for the strengthening of S&D provisions (see LDC submission para 25 TN/CTD/W/4/24 May 2002).

2. Given that S&D provisions have not yet been strengthened, it remains critical that the MM not only monitors the implementation of S&D provisions, but provides the platform where these S&D provisions can be strengthened.
3. This however is unlikely to be the outcome of the MM if the 25 November text is adopted as is.

II. ANALYSIS OF THE 25 NOVEMBER MONITORING MECHANISM TEXT (JOB/TNC/34)

A. MM Will Not Strengthen S&D Provisions

4. This is evidenced in **paragraphs 3 and 4** of the text. Both paragraphs clearly talk about reviewing implementation of S&D provisions.
5. It does not capture para 44 of the Doha Declaration on strengthening S&D provisions. It also does not adhere to what African Ministers had agreed to in Addis (2013).

B. Monitoring Mechanism PROCESS is CTD-Minus: the Language is So Weak that It is likely Nothing Will Come of the MM Process

6. Both bodies have similar terms of reference in the sense of reviewing implementation of S&D provisions. The Committee on Trade and Development (CTD) mandate (WT/L/46) says 'to review periodically...the application of special provisions' (para 3). Para 4 of the CTD mandate says 'To consider any questions which may arise with regard to either the application or the use of special provisions...'.
7. However, the process in the CTD is much better. The CTD is envisaged to be *the* body that specializes and oversees all S&D provisions i.e. the negotiations during the review will take place in the CTD. It only gets inputs, where appropriate, from other WTO bodies – para 3 of CTD mandate says 'review periodically' these S&D provisions 'in consultation as appropriate with the relevant bodies of the WTO' and report to the General Council.
8. In contrast, no negotiations are envisaged in the MM. It can only 'make recommendations' to other bodies to look into an S&D provision – to improve its implementation or to initiate negotiations to improve it.
9. It is not clear how the other bodies will proceed and whether they would even take up the recommendations of the MM! **Paragraph 7** limits the MM from giving clear instructions to the other bodies! 'Such recommendations will inform the work of the relevant body, but not define or limit its final determination'.
10. Para 8 says that 'The relevant body *should* consider a recommendation from the Mechanism...'. It is not even a 'shall' provision! I.e. the body could also do nothing.

C. MM: Dispersing S&D provision Discussions Through Different Bodies Will Disperse Attention and Energy from Work on these Provisions

11. By distributing the discussions into the different bodies, the reality that negotiations tend to drag on over years, as well as the limited capacities of developing country delegations to follow the work in all committees, there is a real danger that the energy and work on S&D provisions will be dispersed and maybe even forgotten. This is the danger in the MM process.

D. MM is Likely to Disable para 3 and 4 of the CTD mandate i.e. It is Likely to Disable a Key Component of the CTD

12. Paragraphs 3 and 4 of the CTD mandate is as follows (see Annex 1 for the terms of reference of the CTD)

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| 3. To review periodically, in consultation as appropriate with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the |
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General Council for appropriate action.

4. To consider any questions which may arise with regard to either the application or the use of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members and report to the General Council for appropriate action.

13. However, the MM in **Paragraph 3** says:

The Mechanism ‘shall act as a **focal point** within the WTO to analyse and review the implementation of S&D provisions’. I.e. with this, any attempts to review S&D provisions is likely to be directed to the MM, rather than the better process offered in the CTD.

III. TEXT-BASED ANALYSIS OF THE MONITORING MECHANISM (25 NOVEMBER TEXT)
(South Centre's analysis is provided in the boxes between the text)

25 November 2013 (JOB/TNC/34)

MONITORING MECHANISM ON SPECIAL AND DIFFERENTIAL TREATMENT

The Ministerial Conference,

Recalling the General Council decision of July 2002 to establish the Monitoring Mechanism;

Decides that:

1. The scope, functions, terms of reference and operation of the Monitoring Mechanism (hereinafter referred to as "Mechanism") shall be as follows:

SCOPE

2. The coverage of the Mechanism shall extend to all special and differential provisions contained in multilateral WTO Agreements, Ministerial and General Council Decisions.

FUNCTIONS/TERMS OF REFERENCE

3. The Mechanism shall act as a focal point within the WTO to analyse and review the implementation of S&D provisions. The Mechanism will complement, not replace, other relevant review mechanisms and/or processes in other bodies of the WTO.¹

Even though it says that the MM will not replace other bodies, for example, the CTD, it also says that the MM will act as a 'focal point' in the WTO. This is a problem since the MM is CTD-minus (see below). In future, when a review is sought on an S&D provision, it could be argued that the MM is THE body to do this work, not the CTD. I.e. in effect, it would have disabled a part of the functions of the CTD.

Notice that the MM is about reviewing the implementation of S&D provisions, not the provisions themselves.

4. The Mechanism shall review all aspects of implementation² of S&D provisions with a view to facilitating integration of developing and least developed Members into the multilateral trading system. Where the review of implementation of an S&D provision under this Mechanism identifies a problem, the Mechanism may consider whether it results from implementation, or from the provision itself.

¹ Members will have the discretion to avail themselves of the Mechanism as well as other relevant review mechanisms or processes in other bodies of the WTO.

² During the review, the Mechanism may consider how the provision is being applied and the overall effectiveness of its implementation.

This is again about looking at implementation of S&D provision. It is not about opening up the provision itself for improvement. The footnote reinforces this – ‘overall effectiveness of its implementation.’

Unfortunately, paragraphs 3 and 4 are the same. This has been the struggle between developed and developing countries. Developing countries wanted language in at least one of these paragraphs to give the mandate that the mechanism can review the S&D provision itself, and strengthen it (according to para 44 of the Doha Declaration: ‘We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.’)

This has not been achieved. This mandate is exactly the same as the mandate already available in the Committee on Trade and Development (CTD) – which allows for periodic review of the application of special provisions for developing countries and their utilisation. The problem is that the process in the CTD is much better and stronger than the review process offered in the MM (see below).

5. In carrying out its functions, the Mechanism will not alter, or in any manner affect, Members’ rights and obligations under WTO Agreements, Ministerial or General Council Decisions, or interpret their legal nature. However, the Mechanism is not precluded from making recommendations to the relevant WTO bodies for initiating negotiations on the S&D provisions that have been reviewed under the Mechanism.

This paragraph effectively makes the MM toothless and ineffective. The MM cannot negotiate and improve on any S&D provision. It cannot take decisions that would change the nature of any S&D provision since that would alter the rights and obligations and the legal nature of the provision.

All that the MM can do is to be a ‘post office’ – to make recommendations to the relevant WTO bodies so that negotiations are initiated in these other bodies.

Contrast this to the CTD – according to the mandate, the CTD would be the body where, during the review, the negotiations would take place there. Where appropriate, the CTD would consult with other bodies – i.e. it has the authority to undertake the negotiations. It does not have the kind of language as the MM, that it is not to affect members’ rights and obligations. Also, in the CTD, the recommendations of its deliberations are then reported to the General Council, the highest decision making body in the WTO.

6. The Mechanism can, as appropriate, make recommendations to the relevant WTO body that propose:

- the consideration of actions to improve the implementation of an special and differential provision;
- or the initiation of negotiations aiming at improving the special and differential provision(s) that have been reviewed under the Mechanism.

'Can as appropriate' is very weak language. It should be 'shall, as appropriate'. 'Can' means that it could recommend other bodies to look into an S&D provision. But it need not do so.

This language can be used by some members not wanting the review to take place, to more easily stop a review from being initiated.

7. Such recommendations will inform the work of the relevant body, but not define or limit its final determination.

This is very dangerous language. It effectively means that not only can negotiations not take place within the MM (para 5), but when it is asking other bodies to undertake the negotiations, it cannot tell those bodies the type of outcome it wants! For instance, it cannot tell the body that it wants the end result to be an improvement in a certain S&D provision. Note that this makes completely ineffective the language on 'improving the S&D provision' in para 6 above since the MM cannot only inform but cannot enforce such a mandate to the other bodies!

It is very possible then that the negotiations in the other bodies could lead to the weakening of the S&D provision – and this would not be in the control of the MM!

This language provides for the creation of a dedicated session of the CTD that could in fact lead to the weakening of S&D provisions!

8. The relevant body should consider a recommendation from the Mechanism at the earliest opportunity. The status of recommendations emerging from the Mechanism shall be included in the annual report of the Committee on Trade and Development to the General Council.

'Should consider a recommendation' is very weak. It is not even a 'shall'. I.e. a body could be asked by the MM but if there is opposition to take this up within that body, no action may be taken. We now have a 'focal point' in the WTO system overseeing the implementation of S&D provisions where despite its appeal to other bodies to consider an S&D provision, the other bodies may not respond.

The process is not clearly set out. It does not say what is to be done after the other bodies have considered the issue. Presumably, the recommendations go back to the MM, which directs these to the CTD that reports to the General Council.

The other feature of this 'post office' MM system is that these S&D provision negotiations will be dispersed. They will not be negotiated in one central place. Given developing countries' limited resources to follow all committees, and the fact that negotiations take place over several years, this is a recipe for dispersing the energy and momentum in these negotiations.

OPERATIONS

9. The Mechanism shall operate in Dedicated Sessions of the Committee on Trade and Development. The Mechanism shall meet twice a year. Additional meetings may be convened, as appropriate. When in session, the Mechanism shall follow the same rules and procedures applied by the Committee on Trade and Development.

10. Monitoring of special and differential provisions in the Mechanism shall be undertaken on the basis of written inputs or submissions made by Members, as well as on the basis of reports received from other WTO Bodies to which submissions by Members could also be made.

11. Where the substantive matter falls within the purview of another WTO body, the Mechanism shall bring it to the attention of that WTO body so that the latter is in a position to provide input.

As noted above, the process outlined is not entirely clear. Do the inputs from the WTO body then go back to the MM?

If so, is the MM limited by para 5 – ‘in carrying out **its functions**, it cannot alter the legal nature of provisions or affect Members’ rights and obligations? If for example, the body has recommended strengthening the S&D provision, and this recommendation goes back to the MM, can the MM then recommend this to the General Council? Would doing so be seen as impinging on the legal nature of the provision and affecting Members rights and obligations in the carrying out of its functions?

REAPPRAISAL OF THE MECHANISM

12. The Mechanism shall be reviewed three years after its first formal meeting, and thereafter when necessary, taking into account its functioning and evolving circumstances.

What does ‘evolving circumstances’ mean? We are now moving into an era where it is more and more difficult for developing countries to attain meaningful S&D provisions in any negotiations. Can this be used in the future to further limit the scope of what the MM could do?

IV. CONCLUSION

14. The MM was to be created *after* the S&D provisions had been strengthened. It is better for developing countries to hold off agreeing to this weak and ineffective MM text. Instead, they can put their attention to pursuing the strengthening of S&D provisions as provided in the Doha Work Programme (para 44) and only thereafter operationalize the MM. Para 44 of the Doha Work Programme can be a priority issue after Bali. To adopt the MM text now is likely to divert attention from the para 44 Work Programme and also result in an MM that is toothless and ineffective for our purposes.

WORLD TRADE ORGANIZATION

WT/L/46
23 February 1995

(95-0379)

WTO COMMITTEE ON TRADE AND DEVELOPMENT Decision by the General Council on 31 January 1995

At its meeting on 31 January 1995 the General Council established the WTO Committee on Trade and Development with the following terms of reference:^{*}

1. To serve as a focal point for consideration and coordination of work on development in the World Trade Organization (WTO) and its relationship to development-related activities in other multilateral agencies.¹
2. To keep under continuous review the participation of developing country Members in the multilateral trading system and to consider measures and initiatives to assist developing country Members, and in particular the least-developed country Members, in the expansion of their trade and investment opportunities, including support for their measures of trade liberalization.²
3. To review periodically, in consultation as appropriate with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the General Council for appropriate action.
4. To consider any questions which may arise with regard to either the application or the use of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members and report to the General Council for appropriate action.
5. To provide guidelines for, and to review periodically, the technical cooperation activities of the WTO³ as they relate to developing country Members.
6. The Committee will establish a programme of work which may be reviewed as necessary each year.

^{*}Upon adoption of the terms of reference the General Council took note of the accompanying statement or understanding to the text referred to in paragraph 40 of the report of the Preparatory Committee contained in document PC/R.

¹It is understood that matters relating to activities in other multilateral agencies will come under the guidance of the General Council.

²The Committee would give consideration, inter alia, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the "Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries" and Article XVI of the Agreement on Agriculture.

³The technical cooperation activities referred to in this provision do not include technical assistance for accession



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