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TRANSITIONAL ARRANGEMENTS IN A TRIPS AGREEMENT

Communication from a Number of Participants

The following communication has been received from the delegations of Australia, Hong Kong, New Zealand and the Nordic countries (Finland, Iceland, Norway and Sweden), with the request that it be distributed to members of the Negotiating Group.

Introduction

1. This paper discusses the kinds of transitional arrangements that might conceivably form part of a GATT TRIPS agreement. The paper is deliberately neutral and makes no recommendations. It does not represent a particular position of its authors, but is intended simply as an aid to discussion.
2. By transitional arrangements we mean arrangements that are temporary and timebound in nature, leading in due course to the assumption of the full rights and obligations contained in a TRIPS agreement. It is arguable whether such arrangements could be considered a kind of special and differential treatment (to use the conventional GATT language), or whether they are an alternative to it. It may be possible however to incorporate some special and differential treatment within the bounds of transitional arrangements. This is discussed further in paragraph 8 below.
3. The MTR decision states that negotiations on TRIPS should encompass inter alia, transitional arrangements aiming at the fullest participation in the results of the negotiations. There is thus a possibility that a future TRIPS agreement will require, in some form or degree, certain transitional arrangements. Any TRIPS agreement is likely to require most, if not all, countries, to make certain changes in their legislation, enforcement régimes, and administrative practices, all of which takes time and demands resources. Most countries are going to need time, or a grace period, in order to carry out the domestic changes necessary to fall into line with the provisions of any TRIPS agreement.

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Who Should Benefit from Transitional Arrangements?

4. Traditionally, transitional arrangements are adopted to facilitate the accession of developing and least developed countries to international agreements. In the case of TRIPS however, it is certainly arguable that some developed countries would need to avail themselves of transitional measures since the types of obligations one might conceive of in a TRIPS agreement may not only be resource consuming, but may involve changes in legislation - which naturally take time. The question is whether transitional arrangements should be open to all - developed and developing countries - or applicable only to the latter. One potential difficulty with making them open to all, without any differentials to take account of stages of development, is that developing country governments interested in participating in the TRIPS agreement might find such an arrangement less "marketable" domestically. They would be unable to point to anything which gave them, uniquely, any benefit, which recognized their particular economic circumstances or assisted them in making a smooth passage to full rights and obligations.

5. This difficulty could perhaps be avoided if a reasonable period were allowed between the making of the agreement and its coming into force. Some of the Tokyo Round Codes (e.g. the Customs Valuation Code, the Government Procurement Code) had quite a long time lapse, of one to one and a half years between making and entry into force. Developed countries might find such a time lapse sufficient to make their own domestic changes without recourse to any transitional arrangements applicable after the TRIPS agreement came into force. It is conceivable that the same effect might be achieved in a TRIPS agreement which is part of the GATT through some mechanism of deferred applications. (The Tokyo Round Codes are referred to here solely as illustrations).

What Form Might Transitional Arrangements Take?

6. At least the following options are possible:

- (a) A single cut-off date by which countries acceding to the TRIPS agreement would ensure their conformity with the provisions of the agreement by that cut-off date. The delegation of Hungary, in their paper MTN.GNG/NG11/W/56 have in fact suggested a cut-off date of 1 January 2000. Such an approach has the merit of simplicity and would make for transparency in monitoring countries' compliance with their obligations.
- (b) Different base-line cut-off dates for countries in different stages of economic development. The GATT often makes a distinction between developing countries and least developed countries, and in certain areas provides for differential arrangements for these two categories, however defined. A TRIPS agreement could possibly establish different cut-off dates for different categories of countries, e.g. developing countries should assume full rights and obligations within three years, and least developed countries within five years. This approach has the advantages of (a) above, but provides an extra degree of flexibility according to individual countries' needs.

- (c) Individual country schedules. Under such an option, each individual country acceding to the TRIPS agreement would provide a schedule according to which it would phase in its assumption of obligations, subject presumably to an ultimate cut-off date when every country would be expected to have assumed full membership.

This option could of course operate in tandem with (b), i.e. different categories of countries would have different final cut-off dates, but within that timeframe would be free to determine the timing and order of the phase-in of obligations. It is for consideration whether such schedules would be unilaterally decided, or whether they would be the subject of negotiations. There are several possible permutations of this "individual schedule" approach - e.g. multilaterally agreed participant schedules according to a set of pre-negotiated formulae or criteria, bilateral or plurilateral "request and offer" followed by multilateral ratification, unilateral offers which are vetted multilaterally, etc.

The advantage of the above approach would be that it would give maximum flexibility to individual participants to assume TRIPS agreement obligations according to their own circumstances and needs. Such flexibility could be attractive domestically. A further advantage is that individual schedules would enable the multilateral surveillance of implementation, to the extent that participants concerned can be "reminded" at different stages before the final cut-off date. The drawbacks would be that monitoring of each country's compliance with its schedule might be complicated, time consuming and unhelpful to the needs of transparency. Moreover, if country schedules were the subject of negotiations, such negotiations might prove unmanageable within the time available, would be even more time and resource consuming and could lead to disputes over interpretation and implementation of the schedules.

- (d) Time-bound exceptions or lower-level obligations. A fourth option, which could be combined with any of the preceding options, would be to provide for time-bound exceptions or derogations from particular obligations in the TRIPS agreement. For example, countries could assume at the beginning only base-level obligations as specified in the agreement, or alternatively it could be provided that particular clauses of the agreement need not be assumed immediately. Examples of such an arrangement can be found in the Customs Valuation Code and the TBT Code.
- (e) A last option, which could conceivably be combined with some of the earlier options, might be to provide for different transitional provisions for different sub-sets of the final agreement (just for the sake of example - a different transitional period for obligations in the field of patents than for industrial designs).

7. A further consideration might be the possibility of an undertaking by countries not to worsen their IPR régimes during the transitional stage, i.e. a standstill commitment.

The Balance of Rights and Obligations

8. An important and related question is what rights should be accorded to a participant which in the transitional period has not yet assumed the full obligations of the TRIPS agreement. One delegation suggested at the last meeting of the Negotiating Group that a country in such a position should nevertheless be accorded the full rights under the agreement. If one assumes that the TRIPS agreement will be an integral part of the General Agreement, then in line with the requirements of Articles I and III, this would seem to be a logical approach.

9. An equally common concept however is that one's rights under any GATT agreement should only correspond to one's obligations. Put simply, if Country A enters into a transitional arrangement whereby - for example - it has a five year grace period before having to accord full protection of copyright, should it then be denied full copyright protection of its own intellectual property by other participants until it assumes the obligation itself? Such a system has the obvious merit of providing an incentive for a country to honour its commitments early, i.e. as soon as it enters obligations, it will benefit from the rights extended.

10. A further example - for the sake of exploring the implications - would be if the TRIPS agreement included a provision whereby participants agreed to refrain from any kind of unilateral action. Should a transitioning country which had not yet assumed any obligations nevertheless benefit from such an important commitment? On the face of things, the answer would seem to be in the affirmative. Incentives have to be provided for accession, and the initial commitment of accession is in itself a form of obligation which would seem to merit some commensurate recognition, whether or not the country in question is in a position immediately to shoulder the full obligations of the agreement. A further example might be whether or not the country in transition should have the rights to seek dispute settlement under the dispute settlement provisions under the GATT. The other side of the coin is that participants in transition may be subjected to dispute settlement and suffer the consequence of trade sanctions, if there were to be an agreement that countermeasures under TRIPS were not to be limited to suspension of benefits under the TRIPS agreement itself.

11. Other relevant issues which would need to be addressed include:

- (a) What safeguards should be available against countries which failed to live up to their commitments during a transitional period; and
- (b) What should be the obligations of countries which entered the Agreement at the last moment, rather than assume transitional obligations from the very beginning.