Columbia Studies in WTO Law and Policy

# WTO Law and Developing Countries

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Developing countries make up the majority of the membership of the World Trade Organization. Many developing countries believe that the welfare gains that were supposed to ensue from the establishment of the WTO and the results of the Uruguay Round remain largely unachieved. Though they are often clumped together under the ubiquitous banner "developing countries," their mulilateral trade objectives, particularly the policy interests and the concerns they face, vary considerably from country to country and are by no means homogeneous. Coming on the heels of the 9/11 terrorist attacks, the ongoing Doha Development Round, launched in that Middle Eastern city in the fall of 2001, is now on "life support." It was inaugurated with much fanfare as a means of addressing the difficulties faced by developing countries within the multilateral trading system. Special and differential treatment provisions in the WTO agreement in particular are the focus of much discussion in the ongoing round, and voices for change have been multiplying because of widespread dissatisfaction with the effectiveness, enforceability, and implementation of those special treatment provisions.

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GEORGE BERMANN AND PETROS C. MAVROIDIS

# Developing Countries in the WTO System

In this volume, we have put together an internally coherent series of papers discussing the most crucial, to our mind, aspects of developing countries' participation in the WTO. Its timing was deliberate: The *Doha* Round, hailed as the development-round, was supposed to address issues of concern for developing countries. And there are many: preference erosion (as a result of tariff reductions during the Uruguay Round), asymmetric (across sectors) tariff liberalization, the onus of implementing the *TRIPs Agreement*, participation in dispute settlement procedures, and the current remedies régime, to name a few. *Special and differential treatment*, the cornerstone describing developing countries' participation in the GATT/WTO, is very much under discussion in the ongoing round. There is widespread (across developing countries) dissatisfaction with its current workings, and voices for change are multiplying.

One of the major challenges facing the WTO is how to facilitate the fuller integration of developing countries in the multilateral trading system. Although the share of developing countries as a group in world trade has increased to 30 percent in recent years, the majority of developing countries, particularly the least-developed countries (LDCs), have seen their share in world trade stagnate or even decline. The lack of active participation of LDCs in the multilateral trading system has been a source of concern. Historically, special and differential treatment, technical cooperation, and capacity building have been at the forefront of the GATT/WTO's efforts to facilitate the integration of developing countries into the multilateral trading system. In recent times, however, doubts have been expressed as to the effectiveness of special and differential treatment in assisting developing countries to participate actively and derive significant benefits from the multilateral trading system. Still, however, most developing countries dispute the assessment that preferences have not been helpful and that their integration into the multilateral trading system would have been achieved at a faster pace, had they accepted to follow WTO disciplines like other Members. Moreover, these developing countries have always insisted on the legal enforceability of special and differential treatment provisions like any other provisions

of the WTO Agreements. Developed countries, in contrast, have mostly taken a contrary view and argue that special and differential treatment-related provisions should be seen for what they are: voluntary commitments assumed by developed countries in favor of developing countries.

Our invited authors did a magnificent job in bringing out all those issues and more in the pages that follow.

We begin with the contribution by **Edwini Kessie**, who discusses the many provisions in the WTO contract regarding the special and differential treatment accorded to developing countries. This paper briefly examines the concept of special and differential treatment and how it has evolved in the multilateral trading system; it then identifies five classes of special and differential treatment provisions and discusses whether they are legally enforceable before offering some concluding remarks on the role of such provisions in the multilateral trading system. Kessie concludes that, in general, these types of provisions are not far reaching because they are often expressed in best-endeavors terms. There is, however, one very notable exception: the generalized system of preferences (GSP), whereby donors will accept products originating in beneficiaries at a preferential tariff rate, in contravention of the non-discrimination principle.

The paper by **Nuno Limão and Marcelo Olarreaga** offers us an assessment from an economic perspective of the value of the GSP to developing countries. They draw a parallel between preferential trading agreements (like free trade areas) and GSP schemes to make their point about preference erosion. The proliferation of preferential trade liberalization over the past 20 years has raised the question of whether it slows down multilateral trade liberalization. Recent theoretical and empirical evidence indicate that this is the case, even for unilateral preferences that developed countries provide to small and poor countries, but there is no estimate of the resulting welfare costs. Moreover, beneficiaries come to eventually oppose non-discriminatory (MFN) liberalization, because reduction of MFN rates equals erosion of their preferences. Hence beneficiaries become a stumbling block working against the function of the WTO. This stumbling block effect can be avoided by replacing the unilateral preferences by a fixed import subsidy, which the authors argue generates a *Pareto-improvement*. More importantly, they provide the first estimates of the welfare cost of preferential liberalization as a stumbling block to multilateral liberalization. By combining recent estimates of the stumbling block effect of preferences with data for 170 countries and more than 5,000 products, they calculate the welfare effects of the United States, European Union, and Japan switching from unilateral preferences to LDCs to an import subsidy scheme. Even in a model with no dynamic gains to trade, they find that the switch produces an annual net welfare gain for the 170 countries that adds about 10 percent to the estimated trade liberalization gains in the *Doha* Round. It also generates gains for each group: the United States, European Union, and Japan ($2,934 million); LDCs ($520 million); and the rest of the world ($900 million).

In the next chapter, **Frederick M. Abbott** shifts the focus to a very idiosyncratic developing country, China. He examines the legal and WTO governance implications of China's alleged failure to fulfill its obligations under the TRIPS Agreement. The significant escalation of interest by the United States and other developed countries in China's intellectual property rights enforcement activity merits, in the author's view, special attention because of its systemic implications. This subject matter forms a critical part of China's continuing WTO dialogue with the United States, European Union, Japan, and Switzerland and tests the capacity of the WTO dispute settlement system to constrain state behaviors. China appears to perceive that its national interest is not aligned with its TRIPS Agreement and Accession Protocol obligations. Though the United States may well initiate a WTO dispute settlement action, it seems unlikely that doing so will result in near-term changes to China's conduct. WTO dispute settlement is not designed to force immediate changes to government behaviors, particularly when the party under complaint is not overly concerned about the potential for withdrawal of concessions. Politicians and industry leaders who are demanding changes by China will almost certainly be frustrated at the WTO. This frustration raises two questions: First, will the United States be justified in imposing extra-WTO-legal sanctions on China? Second, if this action is justified, is it a good idea? The answers to these questions, explored in this paper, are "probably yes" and "probably no," respectively. To paraphrase the title of Olivier Long's classic work on the GATT, this case may help define the limits of the law in the WTO system.

With **Juan A. Marchetti's** contribution we shift focus yet again, this time to evaluate the impact of GATS on developing countries. In the author's view, the task in the months ahead in the *Doha* Round of multilateral trade negotiations is particularly challenging for developing countries in the services negotiations. This is an opportune time to assess what developing countries have done so far and what they should be doing to achieve (1) a deeper integration of their economies into the world trading system and the (2) advancement of higher and sustainable levels of economic growth. Trade liberalization is a necessary but not a sufficient condition to attain economic development. Many other factors, such as geography, resource endowments, the protection of property rights in its largest sense, and the quality of the institutional and regulatory frameworks, are determinants of success. It would be unfair to place all the expectations of success in only one aspect of any development policy like trade and even more myopic in only one subset of the trade in general (i.e., services). Nevertheless, services are essential for development, and further liberalization of trade in services can lead to improvements to human welfare. As such, developing countries should take the initiative (unilaterally) to liberalize their own trade regimes as they pertain to services within the context of multilateral negotiations on the further liberalization of trade in services. After an elaborate discussion on the significance of services for development and the costs of protection and an analysis of developing countries' overall negotiating positions thus far in the current round, the following basic

themes emerge from this discussion: first, the essential role of services for economic development; second, the high costs imposed by trade protection; third, the benefits of liberalization; fourth, the need to make use of the WTO forum to enhance credibility and sustain domestic regulatory reform programs; fifth, the challenges of regulatory reform and the importance of appropriate sequencing; and, finally, sixth, the benefits of seeking further market access overseas in those areas in which developing countries have a comparative advantage.

**Kal Raustiala** focuses on four interesting questions about trade in services raised by **Marchetti** in his contribution. First, why does the multilateral trading system not discipline protectionism in services as much as it does in goods? Ostensibly, services trade, which also encompasses professional services, will undoubtedly dramatically increase over the next decade. Although the structural barriers that keep some services purely local still exist, trade in services increasingly transcends these barriers through technology. On basic economic grounds, services trade should rationally have a larger part of the WTO agenda in the current round and perhaps an even larger part in future rounds of negotiations. Trade barriers in services tend to be in the form of complex nontariff barriers, which are more difficult to regulate effectively compared with more transparent barriers like tariffs. Moreover, unlike trade in goods, disciplines on services were only negotiated and later agreed to during the Uruguay Round, almost 50 years after GATT, in which membership was much less heterogeneous than that of the GATT CONTRACTING PARTIES. Second, what is the role of WTO negotiations in reducing regulatory barriers? Raustiala comments that the inference that the GATS has actually resulted in a decrease in the trade in services is unlikely, though it leads to speculation as to what evidence exists indicating that GATS is actually promoting rather than inhibiting trade in services. Third, what promotes or demands more unilateralism in the trade in services vis-à-vis other areas of WTO negotiation? In this context, the author borrows from cooperation theory to advance his conclusions that account for the particularities of services trade. Fourth, why has there been a lack of progress on mode 4? The comment suggests that in the final analysis political obstacles are at play, impeding serious liberalization in the movement of persons within the WTO, despite the enormous economic gains that would accrue to both migrants and their host countries.

**Jayashree Watal**'s contribution concerns the developing countries' adherence to the TRIPS Agreement, one of the most contested topics regarding their participation in the WTO. The TRIPS Agreement provides minimum standards for the protection of intellectual property rights and does not envisage harmonization of these rights among all WTO Members. It makes it clear that Members are not obliged to implement more extensive protection but does not prevent them from doing so. The *demandeurs* for the inclusion of an intellectual property agreement in the Uruguay Round of negotiations were developed countries. One of the reasons for inclusion of this subject in trade negotiations may well have been the attractiveness of the trade enforcement mechanism. However, more importantly,

developed countries saw the trade forum as one in which the chances of making progress from their perspective were higher because of the possibilities of making trade-offs with other areas. Even if not all developing countries participated in these negotiations in equal measure, it would be fair to say that their perspective was represented. As is widely acknowledged, the TRIPS Agreement, in an effort to strike a proper balance among the differing interests of the participating countries, provides for significant flexibility in the protection to be given (see examples in the Annex). This flexibility, which went considerably further than some of the *demandeurs* in the negotiations would have liked and were achieving in bilateral agreements at the time, resulted from a compromise achieved through negotiation by developing countries acting collectively and making issue-based alliances in a multilateral context.

The TRIPS Agreement continues to be the generally accepted point of reference for the protection that countries should give to the intellectual property of others. This does not mean that it is not criticized, but this criticism comes from both sides. On the one hand, some developed countries do not accept it as necessarily providing for adequate and effective protection of their intellectual property, and there has been a continuing effort to get trading partners to provide enhanced protection in important respects. On the other hand, developing countries have proposed, and in one important case – that of TRIPS and public health – achieved amendments to the TRIPS Agreement to improve the balance from their perspective.

The next five chapters discuss developing countries' participation in the WTO in general and in dispute settlement proceedings in particular. **Håkan Nordström** discusses participation of developing countries in the WTO. The WTO takes pride in being a member-driven organization, with decisions taken by consensus among all member states. But how active are the various member states in reality? In particular, to what extent do developing countries participate in the proceedings – and if not, why not? This chapter offers new evidence on this subject from the WTO official records for 2003. The data he put together show that the activity level is highly uneven and, further, is correlated closely with size and income levels. The poorest LDCs often lack WTO representation in Geneva. When it comes to *active* participation, the data are even more telling: the relative silence of smaller and poorer member states is especially telling at the technical level (Committees and Working Groups) where the substantive work is carried out. This paper suggests that there is a positive correlation between the income level of participants and the intensity of participation in the WTO in general.

**Jeffrey L. Dunoff**, in his comment, first congratulates **Nordström** for making at least two important contributions to the literature on developing state participation at the WTO. First, in his view, the author correctly directs our attention away from developing state participation in WTO dispute settlement and toward developing state participation in the WTO's legislative processes; second, the empirical research provides a large and suggestive body of data that can usefully

inform discussions of developing state participation. In the author's view, Nordström's data and his richly suggestive analysis could support an entire research agenda on developing state participation at international organizations. The comment further addresses the paradox that lies at the heart of Nordstrom's analysis and notes that elucidating that paradox points toward important methodological and normative questions that his paper does not address: Nordström's data perhaps misleadingly suggest that developing states played a relatively minor role in WTO processes during 2003, even though it would seem that they played a critical role then in the lead-up to the Ministerial Conference in Cancun. It is difficult to square these two accounts, and the tension between them suggests that there are difficult methodological questions about how to measure participation and influence at the WTO. Cancun's failure does suggest the need to think carefully about both the virtues and the drawbacks of increased developing state participation at the WTO.

**Marc L. Busch** and **Eric Reinhardt** discuss developing countries' participation in WTO dispute settlement proceedings. It has long been observed that developing countries made scant use of dispute settlement under the GATT. Some observers go so far as to suggest that developing countries will have greater recourse to the WTO dispute settlement system because of its more legalistic architecture compared with the GATT's power-based diplomatic system. Busch and Reinhardt argue that this conventional wisdom is wrong. In assessing how developing countries have fared in dispute settlement, two questions beg empirical attention. First, have developing countries secured more favorable trade policy outcomes in WTO versus GATT dispute settlements, and second, what explains any differences in the outcomes realized by developing, as opposed to developed countries? The authors dissent from the well-accepted view that the ushering in of a rules-based dispute settlement system would result in greater participation of developing countries than in the GATT power-based system. They argue that the Dispute Settlement Understanding (DSU) only serves to reinforce the (1) inability of developing countries to extract concessions from (mostly) developed country defendants in WTO litigation in light of the incentives to litigate and (2) developing countries' lack of capacity to push for early settlement. The authors argue that "early settlement" offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO, a pattern that has been less evident in cases involving developing countries. The data provided bear out their argument: on the one hand, poorer countries have not secured significantly greater concessions under the WTO than under GATT, and, on the other, the increasing gap between rich and poor Members in the performance of the dispute settlement stems from a lack of legal capacity, not a lack of market power with which to threaten retaliation. The main implication of their argument is that developing countries need more assistance before litigation commences.

**Niall Meagher's** chapter sets forth some thoughts based on the author's personal experience in representing developing countries in WTO dispute settlement

proceedings. There have been very many thorough statistical studies relating to the dispute settlement system and, in particular, developing country participation in it. This paper is not intended to duplicate that work. Rather than trying to draw empirical conclusions from the statistics about which developing countries have participated in the system and the rate at which they participate, the paper proposes instead to discuss some practical aspects of the resource constraints facing developing countries in participating in WTO dispute settlement. Any discussion of representing developing countries in WTO dispute settlement proceedings must probably begin and end with the question of the resources available to them and whether these resources enable them to participate on equal terms with developed countries. The question of resources is frequently approached simply from the point of view of developing countries' financial ability to obtain adequate legal advice. This is, of course, an important factor – and perhaps is the most important factor – but resource constraints are not limited simply to the ability of a developing country to retain good legal counsel. Instead, they can manifest themselves in many other ways and influence every aspect of the decision of whether to participate in dispute settlement proceedings. These resource constraints condition developing countries' ability to participate in and benefit from not just the dispute settlement system but all aspects of the WTO. This paper therefore reviews some of the practical ways in which these constraints – financial and otherwise – impede developing country participation in the dispute settlement system on an ongoing basis.

**Chad P. Bown** in his comment on **Meagher's** paper presents a very interesting, accessible, and poignant account of some of the practical problems facing poor countries (and the individuals who advise them) in WTO dispute settlement litigation. The comment focuses on three areas related to the provision of WTO litigation assistance to poor countries. It uses an economic perspective to expand on (and complement) some of the points that Meagher's analysis touches on only briefly. It first highlights the role that economics could play, before advocating for an increased role for the complementary and necessary services that economists should contribute to the lengthy process of WTO litigation. If the purpose of subsidized intervention on behalf of poor country governments is to more fully *inform* (as opposed to simply guide) the client's consideration of the WTO litigation tool, the author argues that providing poor country litigants with more economic information is extremely important. Finally, the comment considers a somewhat broader perspective by discussing some of the benefits to expanding legal assistance center services like the Advising Centre on WTO Law (ACWL), relative to alternative sources that might provide basic legal services to developing countries.

**Mateo Diego-Fernández's** contribution concerns the current remedies in the WTO. An unpopular remedy, retaliation is the last resort by which to enforce a WTO ruling and has often been criticized as being trade-disruptive and one that affects the Member that exercises it in the first place. It could also be an unworkable

tool in the hands of many, because of its associated costs. However, retaliation (or the threat thereof) is a key element for compliance or for reaching mutually acceptable solutions. In addition, it is the only tool for rebalancing the level of rights and obligations in the absence of compliance. The author collaborated in preparing Mexico's proposal to formally introduce tradable retaliation (remedies) in the WTO dispute settlement understanding (DSU), whereby the entitled-to-retaliate Member could auction off to another Member its right to do so. Mexico's proposal to amend the DSU aims at solving what it believes to be the central problems in the functioning of the DSU; namely, the period of time during which a WTO-inconsistent measure can be in place without consequences and the fact that retaliation is an empty shell in the hands of many. Accordingly, the proposal contains the following four suggested ways of dealing with this problem: first, early determination and application of nullification or impairment; second, retroactive (as opposed to prospective) determination and application of nullification or impairment so that retaliation is exercised taking into account the time that has elapsed since imposition of the measure; third, an injunction-like mechanism that allows Members to obtain relief where a measure causes or threatens to cause damage that would be difficult to repair; and, fourth, negotiable remedies, which offer the possibility of transferring the right to retaliate to third Member(s) that may use it more effectively. The paper also addresses the issue of how enhancing rules on retaliation would benefit developing countries above all and elaborates on how the Mexican proposal to amend the DSU might contribute to this end.

**Gene M. Grossman** and **Alan O. Sykes** deal with the most notorious GSP-related dispute submitted to the WTO so far. The WTO case brought by India in 2002 to challenge aspects of the European Community GSP brings fresh scrutiny to a policy area that has received little attention in recent years – trade preferences for developing countries. Preferential tariff treatment is inconsistent with the MFN obligation embedded in Art. I GATT. However, the legal authority to deviate from the MFN obligation was incorporated into the law of the WTO along with the GATT itself with the adoption of the so-called Enabling Clause by the GATT CONTRACTING PARTIES in 1979. Although trade discrimination favoring developing countries is the essence of any GSP scheme, India's WTO complaint raised the question of what type of discrimination is permissible – must all developing countries be treated alike, or can preference-granting nations discriminate among them based on various sorts of criteria? The WTO Appellate Body *formally* affirmed the ruling in India's favor in early 2004. However, in *substance*, by modifying the Panel's findings in a way that seemingly authorizes some differential treatment of developing countries based on their "development, financial and trade needs," this ruling gave India a pyrrhic victory, if at all. The purpose of this paper is to review the current state of the law in the WTO system and to ask whether economic analysis can offer any wisdom about the proper extent of "discrimination" through GSP measures. The issues are challenging ones, both from a legal and an economic standpoint. There are good economic reasons to

be concerned about discrimination and reciprocity in GSP schemes, as well as respectable legal arguments that they should be strictly limited. GSP benefits are "gifts" of a sort; however, tight limitations on their terms may put an end to them altogether. It is exceedingly difficult to say whether discrimination and reciprocity in GSP schemes make the trading community worse off or better off over the long haul. The authors take the view that, in the India case, Pakistan was paid by India's money due to the ensuing trade diversion. They go one step further though, and argue that, in light of substantial empirical evidence, it is probably the case that the candle (income) is not worth the flame (GSP schemes).

**Jeffrey Dunoff** also comments on the contribution by **Grossman** and **Sykes**. In his view, the authors provide an insightful analysis of the GSP dispute. Their contribution generates a number of conclusions, nearly all of which emphasize the difficulty of the issues raised by this dispute. The ultimate question raised by the authors' analysis is whether the GSP dispute is one of those hard cases that make bad law. The comment examines why conventional analyses cannot inform us as to whether the Appellate Report created good law and raises the following three questions about the report: first, the relationship between the exceptions to GATT disciplines found in the Enabling Clause and Art. XX GATT; second, the institutional role of the Appellate Body in "hard cases" like the GSP dispute; and, third, the purpose of GSP programs. As to the first question, the comment raises the point that there is possibility of a serious tension between the logic of Art. XX GATT and the logic of the Enabling Clause, which reflects a larger, unresolved tension over whose preferences count in the context of measures related to labor, environment, and other forms of conditionality. With respect to the second question, the comment states that it seems the Appellate Body's "middle course" effectively positions WTO adjudicatory bodies as the arbiters of evaluating preference programs, and as such they address fundamental policy questions on a case-by-case basis. Accordingly, the comment suggests that from an institutional standpoint the Appellate Body may have created bad law by carving out a continuing and primary role for itself in the highly politicized field of GSP. As regards the final question, the GSP dispute is a hard case because at some level it pits against each other two plausible approaches of international law: international law in general and international trade law in particular help states solve collective action problems, address externalities, and generate public goods, whereas the other approach, which the comment supports, is that a primary function of international law is to influence and improve the functioning of domestic institutions. In the final analysis, the comment concludes by stating that the Appellate Body may have avoided speaking to these conflicting visions of international law by deciding the case on procedural grounds and may have thus minimized the extent to which the GSP dispute was a hard case that made bad law.

In his comprehensive comment, **Jeffrey Kenners** first begins by tracing the contested provisions of the European Communities (EC) GSP scheme to the emergence, in the early 1990s, of a broader conception of EC development policy that

incorporated the promotion of democracy and human rights, including labour rights. Against this background, his comment evaluates the extent to which it has been possible for the European Community to confirm that there is now an objective process for granting special trade preferences in its reformed GSP following the Appellate Body rulings in *EC – Tariff Preferences*. In its remodeled GSP+ scheme, the EC, in principle, currently offers special incentives to an unspecified number of applicant countries for the purposes of encouraging "sustainable development" and "good governance" with reference to a list of international conventions. The GSP+ is open to all developing countries with "the same development needs." Accordingly, the European Community believes, and the author agrees, that it is able to demonstrate that it is pursuing its development policy priorities in a WTO-consistent manner.

**Anastasios Tomazos'** contribution aims at providing a critique of the Appellate Body's reasoning and its ultimate conclusion in the *EC – Tariff Preferences* dispute. After putting forth the argument that the Appellate Body's ruling cannot be supported on either legal and economic grounds, the paper advances the argument that the decision is also untenable on broader political/systemic grounds primarily because it maintains the status quo and squanders an opportunity to give WTO Members the impetus to thoroughly review whether the Enabling Clause, in whole or in part, still fulfills its original mandate.

Finally, **Patrick Low**, as the title of his paper suggests, argues that the contribution of the WTO to developing countries, be it negative or positive, is in the hands of others. The additional question posed in this paper presupposes that developing countries can also influence the contribution that the WTO makes to their growth and development. Both of these questions inform the paper's analysis. It has become increasingly obvious that important differences in interests and priorities exist among developing country WTO Members: they are different in fundamental ways and these differences are bound to be reflected in their priorities and interests. Accordingly, developed countries will not agree to uniform policy treatment for all developing countries in the multilateral trading system, and many developing countries have similar reservations. The paper employs the following four-fold characterization of the WTO for the practical purpose of ordering questions about potential and actual benefits derived by developing countries from the multilateral trading system: first, a system of rules; second, a negotiating forum; third, a dispute settlement mechanism; and fourth, a vehicle for reducing information asymmetries among nations with respect to trade policy. Before going into the details, the paper considers, at a slightly more abstract level, the theoretical cost-benefit set for developing countries arising from involvement in the WTO. The following basic questions are posed and subsequently addressed. Why does it make sense for developing countries to embrace a legally binding set of rights and obligations internationally? Why do countries simply not act autonomously in policy formulation? What are the supposed benefits of

international cooperation in trade policy matters? The paper attempts to address and provide some insight to some of these issues and questions raised.

**Wilfred J. Ethier** takes the view that **Low**'s contribution is a thoughtful and comprehensive discussion of the relationships and prospective relationships of developing countries to the WTO. The purpose of his comment is to place this discussion in the context of how the global economy has been changing in recent decades. The comment briefly examines the following three fundamental historical developments that emerged during the Uruguay Round: first, the South and the East undertook fundamental reform and now are trying hard to become part of that multilateral trading system; second, free-trade areas and customs unions were formed; and, third, foreign direct investment (FDI) began to accelerate and also began to flow into the South and the East (selectively) in significant amounts. Against this background, Ethier also looks at the question addressed by Low: what do the developing countries want from the WTO? The author concludes by asserting that in the final analysis the question is not whether the WTO is doing enough for developing countries, but rather what the developing countries are doing for themselves.

EDWINI KESSIE

# 1 The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements

## I. Introduction

Since the creation of the multilateral trading system about sixty years ago, developing countries as a group have not benefited significantly from it. Although their share in world trade has increased to 25 percent, the major beneficiaries are such countries as Brazil, Chile, China, India, and South Korea.[1] The majority of developing countries, especially the least-developed countries (LDCs), have seen their share in world trade stagnate or decline. According to the WTO Secretariat, the share of world trade held by the forty-nine countries making up this group has continuously declined over the years to less than 0.5 percent, confirming their marginalisation in the multilateral trading system.[2]

The lack of active participation of LDCs and of most developing countries in the multilateral trading system and the global economy has been a source of concern for the WTO. This concern is reflected in the second indent to the preamble of the WTO Agreement, which relevantly provides that Members of the WTO "[recognize] that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." The Director-General of the WTO, Dr. Supachai Panitchpakdi, has on numerous occasions expressed his commitment to the integration of developing countries into the multilateral trading system and the global economy. In that context, he has expressed support for improved market

[1] *See* generally (WTO Secretariat), *International Trade Statistics* (2005). *See* further, Pascal Lamy, Director-General of the WTO, "The Perspectives of the Multilateral Trading System," delivered in Lima Peru (31 January).

[2] *UNCTAD*, Statistical *Profiles of Least-Developed Countries* (2005).

The views expressed in this chapter are those of the author and do not represent the views of the WTO.

access for products of export interest to developing countries, particularly the LDCs.[3]

Historically, special and differential (S&D) treatment and technical cooperation have been at the forefront of the efforts of the GATT to facilitate the integration of developing countries into the multilateral trading system.[4] In recent times, however, doubts have been expressed by some commentators on the effectiveness of S&D as a tool for facilitating the integration of developing countries into the multilateral trading system. Critics often point to the fact that after being in force for almost 30 years, the Lomé/Cotonou Convention, which offers more generous concessions than most GSP schemes, has failed to improve the trade performance of most of the beneficiary countries[5]; hence, the decision by the European Communities (EC) to discard the non-reciprocal preferences under the Convention in favour of regional partnership agreements.[6]

Developing countries dispute the assessment that preferences have not been helpful and that their integration into the multilateral trading system would be achieved at a faster pace, were they to eschew most of the preferences given to them under bilateral and multilateral trade agreements.[7] They argue that there is nothing inherently wrong with S&D and that several reasons account

[3] *See* Pascal Lamy, Director-General of the WTO, "The Doha Development Agenda: Sweet Dreams or Slip Slidin' Away," delivered to the Institute of International Economics, Washington (17 February 2006). *See* further "Review of Developments and Issues in the post Doha Work Programme of Particular Concern to Developing Countries," delivered to the Trade and Development Board of UNCTAD (6 October 2005).

[4] According to one author, there are several conceptual premises underlying the concept of S&D treatment: The fundamental one is that developing countries are intrinsically disadvantaged in their participation in international trade, and therefore, any multilateral agreement involving them and developed countries must take into account this intrinsic weakness in specifying their rights and responsibilities. A related premise has been that the trade policies that would maximize sustainable development in developing countries are different from those in developed economies and hence that policy disciplines applying to the latter should not apply to the former. The final premise is that it is in the interest of developed countries to assist developing countries in their fuller integration and participation in the international trading system: Michalopoulos Constantinos, "Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries," paper presented at the WTO Seminar on Special and Differential Treatment for Developing Countries held in Geneva on 7 March 2000, p. 15.

[5] M. Davenport, A. Hewitt, and A. Koning, "Europe's Preferred Partners? The Lomé Countries in World Trade" (5–6 1995).

[6] *See, for example*, European Centre for Development Policy Management, "Lomé 2000 – Into the New Millennium" 3 (1999). The authors note, "The EU's position is that the trade advantages it provides through Lomé have not sufficiently benefited the ACP countries. Something different must be tried, something compatible with WTO rules."

[7] Robert Sharer, "Special and Differentiated Treatment and Economic Reforms in Developing Countries," paper presented to the WTO Conference on Special and Differential Treatment for Developing Countries, Geneva (7 March 2000). The author asserts that "successful integration of many developing countries in the world economy is linked to their own reforms, and that provisions and exemptions in international agreements which could retard necessary economic adjustments do not promote such integration" (p. 1).

for the low or non-utilisation of preferences by some developing countries. These reasons include "too many complications pertaining to restrictive, complex and varying rules of origins, quotas, designation criteria, exclusion of sensitive products which are of export interest to developing countries, mismatch between exports of beneficiaries and coverage of preferences, and non-economic conditionalities."[8]

It is not the objective of this paper to take a position on whether or not preferences are beneficial to developing countries,[9] but rather to determine the legal status of S&D provisions under the WTO Agreements. Developing countries have always insisted on the legal enforceability of all S&D provisions, whereas developed countries have mostly taken a contrary view.[10] For some developing countries, all the WTO Agreements are indivisible and should be seen as a package that strikes a careful balance between the rights of developing countries and those of developed countries. In other words, they argue that S&D provisions are an integral part of the WTO Agreements and as such are enforceable like all the other provisions. They argue further that if the true intention was that the provisions should not create any justiciable rights, then there would have been no point in inserting those provisions into the WTO Agreements in the first place. Furthermore, nothing prevented the drafters from stating clearly that S&D provisions are merely "best-endeavour" clauses that were not capable of being enforced. Some have even argued that they agreed to sign the Marrakesh Agreement because they believed that developed countries would honour the commitments they had assumed would be in their favour.

For their part, developed countries have argued that S&D provisions should be seen for what they are: voluntary commitments assumed by developed countries in favour of developing countries. They also argue that there is nothing in the language in S&D provisions that evinces the intention that they should create justiciable rights and that it would be inappropriate to coerce developed countries to grant preferential treatment to developing countries. In effect, the granting

[8] Onguglo, Bonapas, "Developing Countries and Unilateral Trade Preferences in the New International Trading System," in *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* 119 (eds Mendoza M. R., Low P., and Kotschwar B.) 1999.

[9] See, for example, Edwini Kessie, "Developing Countries and the World Trade Organization – What Has Changed?" (1999) 22 (2) World Competition 83 at pp. 92–94. *See* further Murray, Gibbs, "Special and Differential Treatment in the Context of Globalization," revised paper presented to the WTO Conference on "Special and Differential Treatment for Developing Countries," Geneva (7 March 2000).

[10] *See, for example*, the Working Party Report on *United States Temporary Import Surcharge*, L/3573, adopted on 16 September 1971, 18S/212, (1972) paras 37–38 at pp. 221–222, where a number of developing countries expressed the view that Article XXXVIII of GATT 1994 had legal force: "A number of representatives of developing countries . . . drew the conclusion that Article XXXVII was not being respected and stressed the fundamental importance to developing countries of this Article – the sole commitment of developed countries towards developing countries. In the view of some of these delegations, this Article should be considered as being parallel in application to other Articles in the GATT."

of S&D treatment should be seen as an altruistic measure. Finally, developed countries make the argument that, if the position of developing countries were to prevail, it would harden the negotiating positions of developed countries in the Doha Development Agenda (DDA) negotiations and make them insist on full reciprocity.

To some extent, the failure to make any substantive progress on the S&D issue in the DDA negotiations could be attributed to the philosophical differences between developed and developing countries over the nature and role of S&D in the multilateral trading system. Paragraph 44 of the Doha Ministerial Declaration mandated that "all [S&D] provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational." The deadline of July 2002 for recommendations to be made by the Special Session of the Committee on Trade and Development was missed. The extension of the deadline to December 2002 did not help them bridge the differences among Members. Further attempts to reach agreement in 2003 all failed to produce the desired results. At Cancún, developing countries refused to join the consensus to harvest the proposed decisions on 28 proposals that they had tabled, arguing that they lacked any economic value and would not facilitate their integration into the multilateral trading system. They expressed dissatisfaction with the loose language and accused their developed-country counterparts of holding up progress on the remaining 60 proposals, which had economic value and the potential for helping them increase and diversify their exports and safeguard their interests in the multilateral trading system.

This chapter is divided into four parts. Section II briefly examines the concept of S&D treatment and how it has evolved in the multilateral trading system. Section III identifies five classes of S&D provisions and discusses how they have been interpreted by GATT/WTO panels and the Appellate Body. Section IV offers some concluding remarks.

## II. The Concept of Special and Differential Treatment

### 1. Background

The cornerstone of the WTO Agreements is the non-discrimination principle, under which there are two main rules. The first is the most-favoured-nation (MFN) rule, which prohibits the granting of any benefit, favour, privilege, or immunity affecting customs duties, charges, rules, and procedures to a particular country or group of countries, unless they are made available to all like products originating in other WTO Members. The second rule is the national treatment principle under which WTO Members are prohibited under certain conditions from discriminating between imported products and domestic products. It follows from the non-discrimination principle that no group of countries may be favoured within the GATT/WTO legal framework. Indeed, the original GATT strictly observed this

principle, notwithstanding the fact that out of the original 23 countries, 11 were developing countries.[11]

It appeared to be the view of the signatory states that all countries that acceded to the GATT could gain from the multilateral trading system if they identified the sectors in which they had comparative advantage. The idea of giving trade preferences to developing countries did not have universal support because of the concern that the preferences could distort trade and reward inefficient producers. Increasing global welfare necessitated a rules-based non-discriminatory system in which all countries could compete on a level playing field. It was the assumption that the CONTRACTING PARTIES to the GATT would, to the fullest extent possible, maintain outward-oriented trade policies and resort sparingly to policies that restricted imports or exports. The very fact that 11 developing countries were among the original members of the GATT indicates, to some extent, that they did not initially strenuously oppose the basic thrust of the philosophy underlying the GATT. Had they done that, their interests would have probably been accommodated by the developed countries, which must have been conscious that, without their support, it would have been extremely difficult to establish the GATT and expect it to become the principal international institution responsible for regulating international trade.[12]

## 2. The Origins of Special and Differential Treatment

In the initial years of the GATT (1948–1955), developing countries participated in tariff negotiations and other aspects of the work of the organisation as equal partners. They were subjected to the same rules as their developed counterparts and had to justify the introduction of trade-restrictive measures.[13] The idea of relaxing the normal rules of the GATT and granting S&D treatment within the GATT legal framework gained force after the accession of a number of newly independent developing countries to the GATT in the 1950s. Most of these countries challenged the very basis on which the GATT was built; that is, as a rules-based, non-discriminatory multilateral trading system. They argued that it was not realistic

[11] The countries are Brazil, Burma (Myanmar), China, Ceylon (Sri Lanka), Chile, Cuba, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe), and Syria. The WTO does not have any set criteria for determining whether a country is developed or developing. In other words, it is a self-selection process. As regards least-developed countries, the WTO follows the classification of the United Nations, which currently indicates that there are 48 LDCs in the world.

[12] The view has been proffered that developing countries did not have much choice at that time and grudgingly accepted the General Agreement. Furthermore, the GATT disciplines at that time were not too onerous and permitted developing countries, *inter alia*, to have high and unbound tariffs and maintain quotas in a variety of situations.

[13] WTO Secretariat, "Developing Countries and the Multilateral Trading System: Past and Present," Background document for the High Level Symposium on Trade and Development, Geneva (17–18 March 1999), p. 11.

to expect newly independent countries with fragile economies to compete on a level playing field with established industrial countries at that time.

To create a more equitable multilateral trading system, developing countries initially pressed for measures that would enable them to nurture and protect their domestic industries. Their persistent demands led to the redrafting of Article XVIII at the 1954–1955 GATT Review Session.

The revamped Article permitted developing countries to disregard, under certain conditions, their tariff commitments and to implement non-tariff measures, such as quotas and other restrictive measures, to promote the establishment of particular industries within their territories and also deal with their balance-of-payment difficulties. The S&D treatment of developing countries within the GATT legal framework was extended by two other provisions: Article XVI:4 and Article XXVIII *bis*. The former exempted developing countries from the prohibition on export subsidies for manufactured goods, and the latter permitted a more flexible use of tariff protection.

A significant number of developing countries took advantage of these measures to erect high tariff walls to discourage imports and thereby encourage the growth of domestic industries. With time, developing countries started pressing for further concessions within the GATT legal system. They argued that, although previous S&D provisions had enabled them to build and shield their domestic industries from competition, they did not grant them preferential access in the markets of their trading partners. Therefore, internal measures taken by them to boost production of tradable products should be complemented by external measures to guarantee their easy access in the markets of their major trading partners.

There was some hesitation on the part of developed countries regarding the new demands by developing countries, as the demands had the potential to undermine further the rules-based, non-discriminatory multilateral trading system. The establishment of the United Nations Conference on Trade and Development (UNCTAD) as an alternative international trade and economic forum in 1964, however, influenced them to seriously consider those demands. UNCTAD derided the GATT rules and called for new multilateral trade rules that took account of the special position of developing countries. It argued that the status quo was inequitable and primarily served the interests of developed countries. As noted by Pillinini and Sampson, UNCTAD "confronted the developed members of the GATT with the idea of paying a higher price for attracting and keeping developing countries in the GATT system."[14] The result of the persistent demands of developing countries led to the adoption of Part IV of the General Agreement, which was entitled "Trade and Development."

Part IV was quite significant for it formalised acceptance by developed countries of the non-reciprocity principle under which developed countries gave

[14] Pillinini M., and G. Sampson, "What of Special Treatment for Developing Countries," unpublished paper with the authors, 1994, p. 5.

up their right to ask developing countries to offer concessions during trade negotiations to reduce or remove tariffs and other barriers to trade. In other words, this principle elevated and legitimised "free-riding." Insofar as developing countries could benefit from the concessions made by other countries through the application of the MFN principle, they did not see the need to offer reciprocal concessions. Offering reciprocal concessions was seen as anathema as it would have diluted the effects of the import substitution policies that were being pursued by them.[15] Part IV also exhorted developed CONTRACTING PARTIES of the GATT to implement measures to increase the trading opportunities of developing countries.

Subsequent to the incorporation of Part IV into the General Agreement, the CONTRACTING PARTIES to the GATT mandated the Committee on Trade and Development (CTD), which had been established in 1964, to monitor the application of the provisions of Part IV.[16] To improve the trading opportunities of developing countries, three waivers were granted from the provisions of Article I between 1966 and 1971. The first was the authorisation given to Australia to offer tariff preferences to developing countries on a specific list of products. The second was the permission granted to all developed countries to maintain Generalised System of Preferences (GSP) schemes in favor of developing countries, and the third was the permission granted pursuant to the Protocol for Trade Negotiations among Developing Countries for 16 developing countries to exchange trade concessions among themselves.

To have a secure legal basis for the granting of preferences to, and among, developing countries, the CONTRACTING PARTIES adopted the "Enabling Clause" during the Tokyo Round of Trade Negotiations. The Clause is important as it placed the concept of S&D treatment at the heart of the GATT legal system. It created a permanent legal basis for the following: (i) special and differential treatment with respect to tariff preferences accorded under GSP schemes; (ii) non-tariff measures governed by the Tokyo Round codes; (iii) tariff and, subject to the approval of the CONTRACTING PARTIES, non-tariff preferences among developing countries, in the framework of regional or global trade arrangements; and (iv) deeper preferences, in the context of GSP schemes, for LDCs.

The extension of S&D treatment to developing countries under the Enabling Clause failed to increase the participation of a majority of developing countries

[15] During the Kennedy Round, the phrase was interpreted as follows:

> [t]here will, therefore, be no balancing of concessions granted on products of interest to developing countries by developed participants on the one hand and the contribution which developing participants would make to the objective of trade liberalization on the other and which it is agreed should be considered in the light of the development, financial and trade needs of developing countries themselves. It is, therefore, recognized that the developing countries themselves must decide what contributions they can make: GATT, Com.TD/W/37, p. 9.

[16] Part IV, which was drafted by the Committee on Legal and Institutional Framework of GATT in Relation to Less-Developed Countries, was finalized in a Special Session of the CONTRACTING PARTIES between November 17, 1964 and February 8, 1965. It went into effect on a *de facto* basis on February 8, 1965, but legally on June 27, 1966.

in the multilateral trading system. This failure prompted the question, first in academic circles, whether it was worth retaining this concept in the GATT legal system. A number of commentators argued that S&D treatment had failed to achieve its basic objective and should be discarded, as in the following comment:

> [T]he developed countries have been allowing, or encouraging, the developing countries to become contracting parties to the GATT without requiring them to abide by the more important obligations of membership. What is more, they have acquiesced in the formal derogation from the principle of non-discrimination, which is the keystone of the GATT, to permit the Generalized System of Preferences (GSP) in favour of developing countries to be established and maintained.[17]

## III. Legal Status of S&D Provisions under the WTO Agreements

Before reviewing the legal status of S&D provisions in the various Uruguay Round Agreements, it is in order to discuss the fundamental shift in the attitudes of several developing countries toward S&D treatments during the negotiations. By the 1980s, a number of developing countries had started to question the overall effectiveness of import substitution and other restrictive policies. Although some held the view that these policies had assisted them in establishing and protecting some important industries, others felt that the associated costs far outweighed the benefits. The view was expressed in that context: the erection of high tariff walls and the imposition of quotas and other prohibitive restrictions had largely sheltered these economies from global competitive forces and in the process led to their stagnation and decline.[18]

Developing countries no longer seriously questioned the contribution that could be made by international trade in assisting countries to achieve sustainable growth and development. Before the Uruguay Round negotiations, a fair number had already implemented wide-ranging reforms under Structural Adjustment Programmes administered by the International Monetary Fund and the World Bank and had largely overcome their scepticism towards trade liberalisation.[19] The notable successes of countries, such as Korea, Singapore, and Hong Kong, China, made them reassess the value of pursuing protectionist policies that discouraged trade.

[17] Hugh Corbet, in Hudec, *Developing Countries in the GATT Legal System* (Hampshire: Gower Publishing Company Ltd; 1987), p. xvi.

[18] This is not to suggest that developing countries were very critical of the concept of S&D treatment. Although they were prepared to accept the shortcomings of import substitution policies, they have always defended the need for preferential access into developed country markets. *See* further Rohini, Hensman, "World Trade and Workers' Rights: To Link or Not to Link," *Economic & Political Weekly*, April 8, 2000, at p. 1249.

[19] Robert Sharer, *supra* note 7 at 3. *See* further, Murray, Gibbs, *supra* note 9 at 3.

The developed countries reasoned as followed: If the imposition of import substitution policies had failed to reverse their marginalisation from the multilateral trading system, then it was probably the appropriate time to consider narrowing the scope of the concept of S&D by limiting the application of the non-reciprocity principle and giving reciprocal concessions, where appropriate, to advance their trading interests.[20] The idea of developing countries giving reciprocal concessions to their trading partners was foreseen in the Punta del Este Declaration, which officially launched the negotiations in 1986. Although this declaration made it clear that the negotiations would take into account S&D treatment and non-reciprocity, it also stated that developing countries would be expected to undertake more obligations as soon as their capacity to do so improved.

One important factor that influenced developing countries to become active in the Uruguay Round negotiations was the effect the trade policies of some developed countries were having on their exports. They were concerned about the rampant resort to contingency protection measures – (grey-area measures, such as voluntary export restraints, orderly marketing arrangements, anti-dumping measures, countervailing measures, and safeguard measures – and the proliferation of regional trade agreements. To curb these abuses and level the playing field, developing countries saw the Uruguay Round as an opportunity to reinforce the multilateral trading system:

> [W]hile seeking to preserve the differential treatment in their favour, they also began to defend the integrity of the unconditional MFN clause, obtaining MFN tariff reductions, and strengthening the disciplines of GATT . . . so as to prevent the restriction and harassment of their trade. Particular emphasis was laid on an improved dispute settlement mechanism, as a means of defense against bilateral pressures from their major trading partners. At UNCTAD VI (Belgrade, 1983), all countries recognized the need to strengthen the international trading system based on the MFN principle.[21]

## 1. S&D Provisions in the Uruguay Round Agreements

As previously noted, it was a negotiating objective of developing countries during the Uruguay Round to accept a dilution of S&D treatment in exchange for better market access and strengthened rules. They had realised that they had nothing much to gain from keeping all the preferences accorded them in the GATT system by developed countries. They had implicitly accepted the view of the eminent

[20] The eminent group of persons were of the view that S&D treatment had done nothing to advance the interests of developing countries in the multilateral trading system. Rather it had encouraged "the tendency to treat them as being outside the system": F. Leutwiler et al., *Trade Policies for a Better Future: Proposals for Action* (Geneva: GATT Secretariat), p. 34.

[21] Gibbs, *supra* note 9 at 3.

group of persons that they had "allowed themselves to be distracted by the idea of preferences . . . and [that] developed countries [had] used preferences as an easy substitute for action in more essential areas."[22]

Bolstered by the exceptional performance of some Asian and Latin American countries, such as Chile, South Korea, Singapore, and Hong Kong, China, developing countries were convinced that they could gain more benefits from the multilateral trading system if developed countries abolished barriers to their trade. The perceived benefits of the S&D provisions in the GATT paled into insignificance when compared with the potential benefits that could be gained from improved access to products of export interest to them, especially agricultural and textile and clothing products.

Furthermore, developing countries became convinced that liberalisation at the multilateral level under the auspices of the GATT was much more secure than the unilateral preferences that were given them under GSP schemes. Benefits under such schemes and other arrangements such as the Lomé Convention were temporary and were linked to a country's level of economic development. Countries that showed economic promise were likely to be monitored and later graduated from such schemes, as soon as they reached a certain level of development.

Bearing in mind all these considerations, developing countries did not seek exemption from any of the multilateral trade agreements. In fact, the "single undertaking" approach adopted during the Uruguay Round foreclosed the possibility of developing countries picking and choosing which WTO Agreements they wanted to abide by.[23] Membership in the WTO entailed the acceptance of all the multilateral trade agreements, meaning that the concept of S&D was weakened from the very start by the approach that was chosen. According to the WTO Secretariat, Uruguay Round provisions conferring S&D treatment could be grouped under five main headings:

> The development dimension continues to be reflected in the WTO Agreement through provisions for special and differential treatment . . . [which] could be classed in five main groups: provisions aimed at increasing trade opportunities through market access; provisions requiring WTO Members to safeguard the interest of developing countries; provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; provisions allowing longer transitional periods to developing countries; and provisions for technical assistance.[24]

[22] *Supra* note at 44.

[23] The view has been expressed that developing countries did not have much of a choice. The "single undertaking" approach was an invention of the developed countries that was imposed on them. Thus, it is not entirely correct to assert that they voluntarily accepted a dilution of S&D treatment in exchange for better market access and strengthened rules.

[24] *Supra* note 12 at 18.

Before examining the legal status of these provisions, it is necessary to examine the relevant provisions of the Vienna Convention on the Law of Treaties and how they have been interpreted by WTO panels and the Appellate Body.[25]

## 2. Vienna Convention on the Law of Treaties

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) provide in relevant parts, as follows:

> Article 31
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> . . .
>
> Article 32
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

In *United States – Standards for Reformulated and Conventional Gasoline*, the Appellate Body held that it was enjoined by the provisions of Article 3.2 of the Dispute Settlement Understanding (DSU) to apply the provisions of the Vienna Convention so as to clarify the provisions of the General Agreement and the other covered agreements. The Appellate Body stressed that the direction given in Article 3.2 of the DSU reflected "a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[26] In *Turkey – Restrictions on Imports of Textile and Clothing Products*, in which the Panel had to interpret the provisions of Article XXIV of GATT 1994, it observed the following:

> [T]he Panel is [to be] guided by the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties. . . . As provided for in these articles and as applied by panels and the Appellate Body, we interpret the provisions of Article XXIV using first the ordinary meaning of the terms of that provision, as elaborated upon by the 1994 Understanding on Article XXIV,

[25] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331 (1969) 8 Int. L. Legal Materials 679.

[26] WT/DS2/AB/R, adopted by the DSB on 20 May 1996: see DSR, 1996:I, 16.

> in their context and in the light of the object and purpose of the relevant WTO Agreements. If need be, to clarify or confirm the meaning of these provisions, we may refer to the negotiating history, including the historical circumstances that led to the drafting of Article XXIV of GATT.[27]

It follows from the established case law of the WTO that, in interpreting provisions in the WTO Agreements conferring S&D treatment on developing countries, regard should first be had to the ordinary meaning of the words used, taking into account their context and in the light of the object and purpose of such provisions in the overall context of WTO Agreements. It is only when recourse to this basic principle does not lend itself to easy application or would produce manifestly absurd results that recourse may be had to supplementary means of interpretation, including the negotiating history of the provisions conferring S&D treatment on developing countries.[28]

We now turn to examine the legal status of each group of S&D provisions.

## 3. The Five Classes of S&D Provisions

### 3.1. *Provisions Aimed at Increasing Trade Opportunities*

A number of provisions in the various WTO Agreements encourage WTO Members to adopt measures that would increase trade opportunities for developing countries, particularly the LDCs. Others also permit developed countries to grant preferences only to developing countries so as to stimulate their export industry. Most of these provisions were carried over from GATT 1947 into GATT 1994. Article XXXVII of GATT 1994, for example, relevantly provides that

> [t]he developed . . . [Members] *shall to the fullest extent possible* . . . accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to . . . developing countries]. (emphasis added)

Given the language used, it can be plausibly argued that developed countries are not under a legal obligation to reduce or eliminate barriers to products of current or potential export interest to developing countries. The use of the words "shall to the fullest extent possible" indicates that the obligation on developed countries is qualified. If WTO Members had wanted the obligation to be mandatory, they could have dispensed with the words "to the fullest extent possible," as

[27] WT/DS34/R, p. 122. The DSB adopted the Appellate Body report together with the modified panel report on 19 November 1999.

[28] *See* United States – Sections 301–310 of the Trade Act of 1974, WT/DS152/R; report of the Panel circulated on 22 December 1999, para 7.21–7.22 at 305–306. *See* further *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R; report of the Panel circulated on 17 March 2000, at para 7.13–7.15 at 149–150.

was suggested by some delegations.[29] Moreover, the use of the words "accord high priority to" confirm that the obligation imposed on developed countries under this Article is not absolute.

The relevant case law on the legal status of S&D provisions falling under this heading is inconclusive. In *United Kingdom – Dollar Area Quotas*, the United States challenged the compatibility of the imposition of quantitative restrictions by the United Kingdom on certain products, including fresh grapefruit, grapefruit juice, and orange juice. The restrictions had originally been imposed for balance-of-payment reasons, but were being maintained on the grounds that they afforded valuable protection for the economic interests of the developing Commonwealth Caribbean countries. In support of the measures, the Caribbean countries argued that "the restrictions must be viewed in the context of the General Agreement as a whole and with particular regard to Part IV of the Agreement. . . . [T]he continued application of the quotas was justified in the light of Part IV which was designed to deal with the special circumstances of developing countries."[30]

The Panel refrained from ruling on the complaint, but "strongly requested the parties concerned to actively seek a mutually acceptable solution to the problem which especially would pay due regard to the importance to the Caribbean countries and territories."[31] It is arguable that, by suggesting that the parties seek a mutually satisfactory result, the Panel was inclined to rule in favour of the United States. Had it accepted the argument of the Caribbean countries as valid and legally plausible, it would have probably held that, notwithstanding the incompatibility of those measures with Articles and XIII, the measures could be justified under Part IV of the General Agreement.

In *Norway – Restrictions on Imports of Certain Textile Products*, Hong Kong challenged Norway's imposition of quantitative restrictions on certain textile products. Norway argued, *inter alia*, that the preferences that it had accorded to six developing countries were in conformity with the spirit and objectives of Part IV as it facilitated their exports. The Panel rejected Norway's argument by

[29] A number of developing country representatives opposed the inclusion of the words "to the fullest extent possible" in the draft Article, as they thought the words could be relied upon by developed countries to evade their obligations. The words were inserted only into the Article after the opposition by developed countries, which argued for flexibility. A 1976 GATT Secretariat note on the application of Part IV observes the following:

> The draft model chapter on trade and development prepared initially by the secretariat on the basis of proposals from delegations for incorporation as Part IV of the General Agreement did not contain any qualifying clause. The words, to the fullest extent possible, appear to have been inserted in the draft later as most of the developed countries considered that they would not be in a position to accept commitments in this area unless there were provisions for exceptions in appropriate cases. The developing countries, on the other hand, were concerned that the phrase . . . might be used by developed contracting parties 'in a way that would considerably detract from the effectiveness of this paragraph: see WTO, Analytical Index (Geneva, 2nd ed; 1995), Vol. 2 at 1061.

[30] GATT, Basic Instruments and Selected Documents (1974), 20th Supplement, para. 1, at 235. L/3843, adopted on 30 July 1973.

[31] *Id.*, para. 6 at 236.

noting that Part IV cannot be relied upon by a country to circumvent its obligations under Part II of the GATT.[32]

In *European Economic Community – Restrictions on Imports of Desert Apple*, the Panel approached the issue differently. Chile had argued, *inter alia*, that the European Community had infringed the provisions of Articles XXXVI and XXXVII of Part IV of GATT 1994, particularly Article XXXVII:1(b), which provides that "the developed contracting parties shall to the fullest extent possible . . . refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties"; and Article XXXVII:3(c), which requires developed contracting parties to "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect the essential interests of those contracting parties."

After reviewing the parties' arguments and the evidence, the Panel concluded that the import measures of the European Economic Community (EEC) on desert apples had negatively affected the export interests of Chile. It pertinently noted that, although the EEC had held consultations with affected suppliers and had amended its regulations, "these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV." The Panel went on further to hold that there was no evidence to indicate that the EEC had made "appropriate efforts to avoid taking protective measures on apples originating in Chile" and that obligations contained in Part IV were additional to those under Parts I to III of the GATT. The Panel failed, however, to state expressly whether the EEC was in breach of its obligations under Part IV:

> [T]he commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I–III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I–III. As . . . the EEC's import restrictions [were] inconsistent with [its] specific obligations . . . under Part II of the General Agreement, it . . . [was unnecessary] to pursue the matter further under Article XXXVII.[33]

Although the Panel found it unnecessary to rule on whether the EEC was in breach of its obligations under Part IV on the grounds of judicial economy, it could be inferred that it was inclined to hold that the EEC had not fulfilled its obligations under Part IV. Given the fact that the Panel comments were *obiter dicta*, no weight could be attached to them. In any case, subsequent panels are

[32] GATT, Basic Instruments and Selected Documents (1981), 20th Supplement, para. 15, 126. L/4959, adopted on 18 June, 1980.

[33] GATT, Basic Instruments and Selected Documents (1990), 36th Supplement, para. 12.32, 134. L/6491, adopted on 22 June, 1989.

not bound by interpretations of prior panels. As was observed by the Appellate Body,

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[34]

Article IV of the GATS also contains similar language to that used in Article XXXVII of GATT 1994. It relevantly provides that

> [t]he increasing participation of developing country Members in world trade *shall be facilitated through negotiated specific commitments* . . . relating to . . . the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia*, through access to technology on a commercial basis; . . . the improvement of their access to distribution channels and information networks; and . . . the liberalization of market access in sectors and modes of supply of export interest to them. (emphasis added)

At first sight, it would appear that the language used in Article IV of the GATS is tighter than that used in Article XXXVII of GATT 1994. However, on further reflection, it could be argued that it does not impose any positive obligations on developed countries. Perhaps, the only obligation it imposes on developed countries is to enter into negotiations with developing countries that specifically request market access in certain specific sectors. Apart from the fact that this right is generally available to all Members of the WTO under the GATS, it cannot be said with any certainty that negotiations would succeed in opening a developed country's market to services provided by the developing country. It is highly unlikely that an action under the dispute settlement mechanism of the WTO would succeed on the charge that negotiations failed to produce the results anticipated by a developing country.

Another issue that has been discussed is whether developed countries are obliged to give trade preferences to developing countries. Whereas the Enabling Clause permits developed countries to disregard their obligations under Article I of GATT 1994 to confer preferences on developing countries, it does not contain any language that suggests that is mandatory. In other words, the decision whether or not to give trade preferences to developing countries is entirely at the discretion of the developed country Member. In *EC – Conditions for the Granting of Tariff Preferences*, this right was recognised by both the Panel and the Appellate Body.[35] In this case, the Appellate Body held that the Enabling Clause did not

[34] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted by the DSB on 1 November 1996, DSR, 1996:1, 108.

[35] WT/DS246/AB/R and WT/DS246/R.

require preference-giving countries to make available identical tariff preferences to all developing countries and that it was permissible for these countries to be distinguished on the basis of an objective criteria. Put differently, preference-giving countries are required to provide identical treatment to only "similarly-situated GSP beneficiaries."

### 3.2. *Provisions That Require WTO Members to Safeguard the Interests of Developing Countries*

Quite a number of WTO Agreements require developed country Members of the WTO to take into account the special situation of developing countries before imposing any measures that might affect their trade interests. Some of these obligations are worded in legally enforceable language, whereas others do not create any rights in favour of developing countries. Among the legally enforceable obligations is Article 9.1 of the Safeguards Agreement, which provides as follows:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent, provided that developing country Members with less than 3 percent import share collectively account for not more than 9 per cent of total imports of the product concerned.

In the *Line Pipe* case, both the Panel and the Appellate Body held that this provision was legally enforceable and found that the United States had acted inconsistently by not exempting the required amount of Korea's exports from the application of its safeguard measure:

> [W]e start by observing that Article 9.1 obliges Members not to *apply* a safeguard measure against *products* originating in developing countries whose individual exports are below a *de minimis* level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product . . . we find that the line pipe measure has been applied against products originating in those developing countries whose imports into the United States are below the *de minimis* levels set out in Article 9.1. And, consequently, we uphold the Panel's findings in paragraphs 7.180 and 7.181 of its Report, that the United States acted inconsistently with its obligations under Article 9.1 of the *Agreement on Safeguards*.[36]

Among the provisions that may not be legally enforceable is Article 10(1) of the Agreement on Sanitary and Phytosanitary Measures, which provides, "In the preparation and application of sanitary or phytosanitary measures, Members

[36] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R.

shall take account of the special needs of developing country Members, and in particular of the least-developed country Members."

It could be argued that this provision obliges developed country Members to consider the effects that their intended sanitary or phytosanitary measures may have on developing countries, but does not compel them to change those measures even if there is the probability that they may have a negative impact on the interests of developing countries. The major issue, however, relates to this case: what if it is alleged that the developed country failed to consider the effects that its measures may have on developing countries before implementing the measures?

Arguably, if evidence could be adduced to establish that such a failure occurred, then in principle it could be argued that the developed country may have breached the provisions of Article 10.1. It would be extremely difficult, however, to positively prove in a case that a developed county had not taken into consideration the interests of developing countries before implementing its measures. A mere statement by a developed country that it had done so would be difficult to rebut, unless it is required to give a reasoned opinion why it believes that the imposition of the measures was warranted, notwithstanding the special circumstances of the developing country. It would appear that there is nothing in the language of Article 10.1 that would require developed countries to give such a reasoned opinion.

Even assuming for the sake of argument that evidence is adduced to establish that the developed country did not take into account the interests of developing countries, the question remains as to the appropriate remedy that could be given by the panel. By virtue of Article 19 of the DSU, a panel or the Appellate Body may recommend that "the Member concerned bring the measure into conformity with that agreement." Because the measure at issue may be in conformity with the SPS Agreement, the only option reasonably open to a panel may be to recommend to the developed country to make a mutually satisfactory adjustment.

The Agreement on Technical Barriers to Trade (TBT) contains a similar provision. Article 12.3 of the TBT Agreement provides as follows:

> Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

Whereas the language used appears not to be hortatory, it is doubtful if a successful action can be initiated against a developed country that asserts that it took into account the interests of developing countries in the preparation of its standards and technical regulations, but nevertheless the challenged measure was necessary to fulfill a legitimate objective within the meaning of Article 2 of the TBT Agreement.

The major problem with the two provisions that have been examined is that both the SPS and TBT Agreements only impose a duty on developed countries to consider what the impact of their measures would be on developing country Members. They do not specify that developed Members should refrain from implementing or withdraw their measures when it has been demonstrated by a developing country Member that the measures would harm its trade interests. A duty to consider something cannot be equated with a duty to accept it. In the *Hormones* case, the Appellate Body rejected the claim by the European Communities that the Panel did not take into account the evidence before it:

> We note that the Panel considered in detail each of the arguments and related evidence referred to by the European Communities on this particular point. Although the Panel did not agree with the arguments advanced by the European Communities, *we do not believe that in doing so, the Panel arbitrarily ignored or manifestly distorted the evidence before it.*[37] (emphasis added)

Another example of such provisions is Article 15 of the Anti-Dumping Agreement, which provides as follows:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping duties. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

Here too, developed country Members have an obligation to consider, for example, accepting price undertakings, instead of imposing anti-dumping duties. However, it appears that there is no positive obligation on them to accept such alternative remedies. *In European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India*, the Panel held as follows:

> In our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country. . . . In light of the expressed desire of the Indian producers to offer undertakings, we consider that the EC should have made some response upon receipt of the letter from counsel for TEXPROCIL dated 13 October 1997. The rejection expressed in the EC's letter of 22 October, does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand.[38]

[37] WT/DS26/AB/R, adopted by the DSB on 13 February 1998, para. 145 at p. 57.
[38] WT/DS141/R.