TRADE AND DEVELOPMENT IN THE WTO: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES IN THE WTO

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1. INTRODUCTION

The integration of developing countries into the multilateral trade system has greatly evolved over the last fifty years, as has the thinking about the nature of trade policies appropriate for development. The purpose of this paper is to trace the evolution of developing countries' participation in the multilateral trade system, and to link this evolution to the changing consensus on the international trade policies that may be conducive to development.

This paper is confined only to the concept of Special and Differential treatment for developing countries in the context of their rights and obligations in the GATT/WTO and to its changing content over time. Historically, Special and Differential treatment provisions were used to facilitate the integration of developing countries in the multilateral trade system. Recently however, doubts have been expressed over its effectiveness especially with regard to the enforceability of Special and Differential treatment provisions in the various WTO Agreements.

The paper is divided into six parts. Part 2 briefly examines the concept of Special and Differential Treatment and the justification for its inclusion in the GATT/WTO. Part 3 reviews the main principles and practices of developing country participation in the GATT from its establishment in the GATT 1947 up to the Uruguay Round and the WTO and outlines also other developments during this period. Part 4 identifies six classes of Special and Differential treatment provisions in the various WTO Agreements. Part 5 deals with the concerns of developing countries regarding Special and Differential treatment and provides solutions to these concerns. Part 6 is the concluding section and points out some priorities for the future to ensure the full integration of developing countries in the multilateral trade system.

2. SPECIAL AND DIFFERENTIAL TREATMENT (S & D)

2.1. The Concept of "special and differential" treatment.

According to Gibbs, special and differential treatment is "the product of the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of international economic relations."[1]

Based on this definition of special and differential treatment (S & D), it is clear that only developing countries that are members of the WTO can claim S & D treatment. This therefore brings us to the classification of a "developing country".

2.2. The concept of "developing country".

Among the original twenty three Members of the GATT 1947, eleven were developing countries and today, developing countries probably account for over two thirds of the 135 Members of the WTO.[2] In the WTO framework there is a two-tiered classification of the developing country membership – namely that of a developing country member and a least developed country member.[3] A very extensive set of provisions addressing the rights and obligations of developing and least developed countries are contained in the various WTO Agreements. To this end however, there is still no official definition in the WTO of what constitutes a "developing country". Nevertheless, developing countries can be said to be countries whose economies are undergoing a process of industrialization to correct an excessive dependence on primary production, as well as those, which have just started their economic development.[4] Jackson defines developing countries as "countries that have low living standards and usually low wages."[5]

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[1] Gibbs. M. 1998. "Special and Differential Treatment in the Context of Globalization." Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998, UNCTAD. p.1.

[2] On 11 April 2000 Jordan became the latest member of the WTO. See WTO Press Release 174 (11 April 2000).

[3] Qureshi Asif H, "The World Trade Organization: Implementing International Trade Norms" Manchester University Press, Manchester, New York. p.37.

[4] See Report of Panel on applications by Ceylon, *BISD* 6S/112 (1958), at 113.

[5] See Jackson J.H, *The World Trading System – Law and Policy of International Economic Relations,* MIT Press Cambridge, Massachusetts, 1997. p.319.

Countries in general use the designation on the basis of self-selection. As a consequence, Ghana with a per capita income of $390 and Singapore with a per capita income of $32,810[6] are both supposed to benefit from the same provisions. On the other hand, there is a United Nations designated official list of 48 least-developed countries of which 29 are currently members of the WTO.[7] With the exception of Maldives and Vanuatu, all the least developed countries have a GDP per capita that is below US$ 1, 000.

2.3. Justification for S & D.

The question of S & D treatment for developing and least developed countries has been engaging the attention of the negotiators from the days of the 1947-48 Havana Conference onwards.[8]

Since the introduction of GATT 1947 already, developing countries (mainly Latin America at the time) challenged the assumptions that trade liberalization on a most-favoured nation basis (MFN)[9] would automatically lead to their growth and development. Their position gained even greater political force when developing countries like Asia and Africa gained independence. They argued that the peculiar structural features of the economies of developing countries and distortions arising from historical trading relationships constrained their trade prospects. They argued that there was a need to improve the terms of trade, reduce dependence on exports of primary commodities and correct balance-of-payments volatility and disequilibria.[10]

[6] World Bank 1999b. World Development Indicators, Washington DC.
[7] The following 48 countries are defined by the UN as among the most poorest of the developing countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burindi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Dem. Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Cambodia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lae People=s Demo. Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Sierra Leane, Solomon Islands, Somalia, Sudan, Togo, Tuvalu, Uganda, Vanuatu, United Republic of Tanzania, Yemen and Zambia.
[8] See Michalopoulos. 2000. "Trade and Development in the GATT and the WTO: The Role of Special and Differential Treatment for Developing Countries."
[9] The most-favoured nation principle (MFN) 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 Members of the WTO.
[10] See Gibbs. M. 1998. p.1.

Of course their arguments were completely justified. Even today, developing countries are intrinsically disadvantaged in their participation in international trade. The increased frequency and depth of financial crises over the past quarter century[11]- has shown how hard it is to establish financial institutions, even in developed countries. Therefore, any multilateral agreement involving them and developed countries, must take account of this intrinsic weakness in specifying their rights and responsibilities. Trade policies that would maximize sustainable development in developing countries are also different from those in developed economies. For this reason, policy disciplines that apply to developed economies should not apply to developing countries.

Least developed countries on the other hand account for less than half of one per cent of world trade, and get less than one per cent of foreign direct investment.[12] Taken together, they are the most marginalized group of countries in world trade. They need free access to markets of both developed and other developing countries.[13] Even more importantly, they need assistance to build up their institutional and human capacity, and their infrastructure, in order to produce and trade a diversified range of goods and services.

2.4. Arguments against S & D.

At the same time however, while there are justifications for S & D, there are also arguments against S & D.[14] Some scholars argue that S & D has not worked in the past. The way forward is thus to let developing countries implement all the WTO disciplines because doing so will help them lock-in their domestic reforms and send out a clear signal that they are committed to policy reform. It is argued that S & D treatment makes developing countries complacent, and prevents them from making difficult choices, which would guarantee long term, sustainable growth. Other arguments tend to emphasize the differences among developing countries with respect to their production

[11] See World Bank 1999. *World Development Report 1999/2000:* Entering the 21st Century. Washington DC: World Bank.
[12] Keynote address by Mike Moore, Director General of the WTO, "Back on Track for Trade and Development" UNCTAD X, Bangkok, 16 February 2000.
[13] Trading into the Future: The Introduction to the WTO; Questions and Answers.
[14] Gibbs M. 1998. p.4.

capabilities, their economic and social institutions, their resource endowments and their capacities for growth and development.[15]

It is claimed that while some developing countries are economically weak, lacking the human and the material resources on which to base a sustained strategy of economic and social development, others have reached a stage where the economy begins to generate its own investment and technological improvement at sufficiently high rates so as to make growth virtually self-sustaining. Other developing countries again are seen to advance even further to a stage of increasing sophistication of the economy. [16] These categories are therefore used to justify graduation and to abandon S & D treatment.

It should however be noted that what appears to have changed is more the political attitudes to S & D than the underlying reality. On the one hand, it is true that some developing countries are joining the group of those economies, which are advancing to a stage of increasing economic sophistication and, the economic disparity between them, and developed countries are shrinking. However, in general, the disparity in per capita income between developed and developing countries have actually increased since 1980, and many developing countries have fallen into the "least-developed" category. In addition, many newly independent "countries in transition" would fall into the GATT definition of a "less developed" country because they "can only support low standards of living".[17]

After therefore having determined that there are several conceptual premises that justify S & D, it is necessary to trace the evolution of S & D from the initial introduction of GATT 1947 uptil and including the Uruguay Round and the WTO.

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[15] Ibid.
[16] Ibid.
[17] World Bank 1999b. World Development Indicators, Washington DC.

3. HISTORICAL REVIEW OF GATT PROVISIONS RELATING TO TRADE AND DEVELOPMENT: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

3.1. GATT (1947).

When GATT initially came into being in October 1947, it contained no explicit provisions regarding the unique situation of developing countries. Developing countries were treated as equal partners and were subjected to the same rules as their developed counterparts. The thread running through the Agreement was that rights and obligations contained therein should apply uniformly to all contracting parties.[18] The Preamble of the Agreement made it significantly clear that the reduction of discriminatory treatment is of utmost importance as is reciprocal and mutually advantageous arrangements.[19]

The principle of non-discrimination was given effect by means of two main rules. The first one was the most-favoured nation principle (MFN), 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 other Members of the WTO.[20] The second rule is the national treatment principle under which, Members of the WTO are prohibited under certain conditions from discriminating between imported products and domestic products. It therefore follows from the non-discrimination principle that no group of countries could be favoured.

It was the view of the signatory states that all countries, which accede to the GATT, would gain from the multilateral trading system, if they identified and exploited their comparative advantages in the sectors in which they had their strengths. The idea of giving preferences to a certain group of countries was not seen favourably at the time, as it was likely to distort trade and reward inefficient procedures.[21] Increasing global welfare necessitated a rules-based system, which guaranteed a level playing field on

[18] See Michalopoulos, 2000. p.2.
[19] GATT. 1948. *Preamble to the Establishment of GATT*, Geneva.
[20] See Hudec, R. 1987. *Developing Countries in the GATT Legal System.* London: Trade Policy Research Center. p.3.
[21] Michalopoulos, 2000. p.2.

which international trade could be conducted. It was the assumption of the Contracting Parties to the GATT that they would all maintain outward-oriented trade policies and resort to policies that restricted imports or exports sparingly. It is also evident that, the very fact that eleven developing countries[22] became original Members of the GATT indicates, to some extent at least, that they did not oppose, at least not initially, the basic thrust of the philosophy of the GATT.

However, during the Havana Conference in 1947-1948, developing countries (mainly Latin America) started to raise concerns and identified the special challenges that they faced in international trade. They argued that it was not realistic to expect barely independent and newly independent countries to compete on a level playing field with well-established countries. This led to a provision in the Havana Charter entitled "Government Assistance to Economic Development and Reconstruction".[23] This provision allowed Contracting Parties to obtain permission from other Contracting Parties to use protective measures which otherwise would be in conflict with the Havana Charter. These measures would then be used to promote the establishment and development or reconstruction of particular industries or branches of agriculture. GATT adopted this provision by way of an amendment in 1948.

Developing countries participated in the GATT as equal partners during 1948-1955. Article XVIII, which dealt with governmental assistance to economic development was however used to request releases from their obligations under GATT, which would enable them to nurture and protect their domestic industries.

Developing countries nevertheless requested changes in the multilateral trading system in four main areas:

(i) flexibility in the application by developing country Members of the GATT and later WTO disciplines;

[22] The countries include Brazil, Burma, Ceylon, Chile, China, India, Lebanon, Pakistan, Rhodesia and Syria.
[23] See High Level Symposium on Trade and Development, Geneva, 17-18 March 1999. Background Document (Job No 1232) p.11.

(ii) stabilization of world commodity markets;

(iii) non-reciprocity or less than full reciprocity in trade relations between developing countries, in order to permit developing countries to maintain protection that was deemed necessary to promote development; and

(iv) improved market access for developing country exports of manufacturers to developed markets through the provision of trade preferences, in order to overcome the inherent disadvantages developing countries were facing in breaking into these markets.[24]

3.2. THE REVIEW SESSION (1954-1955).

The persistent demands of developing countries resulted in the overhaul of Article XVIII of GATT; the idea being to give developing countries additional flexibility as regards their obligations under GATT.[25] Article XVIII was then termed "Government Assistance to Economic Development" as opposed to "Government Assistance to Economic Development and Reconstruction". Only developing country Contracting Parties could have recourse to sections A, B and C of Article XVIII[26] and for the purposes of this Article, a developing country was one which could support only low standards of living and was in the early stages of development. This applies to countries whose economies are undergoing a process of industrialization to correct an excessive dependence on primary production, as well as to those, which have just started their economic development.[27]

Section A made provision for the withdrawal or modification of negotiated concessions, in order to promote the establishment of a particular industry so as to raise the general standard of living. Developing countries could negotiate with Contracting Parties with whom concessions have been negotiated or who had a substantial interest in it.[28]

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[24] High Level Symposium on Trade and Development, 1999. p.11.
[25] See Hudec, R. 1987. pp. 26-28.
[26] GATT. 1955. *BISD*, 3rd Suppl., 1955, pp. 179-89.
[27] Art.XVIII:4 and Note. See Report of panel on applications by Ceylon, *BISD* 6S/112 (1958), at113.
[28] GATT. 1955. *BISD*, 3rd Suppl., 1955, pp. 179-89.

Section B recognized that less-developed Contracting Parties experience balance-of-payment difficulties when undergoing rapid development. It therefore contained a provision allowing developing country Contracting Parties to control the general level of imports by restricting the quantity or value of imports. There was however a proviso that restrictions do not exceed the level required "to forestall the threat or stop a serious decline in monetary reserves", or, where a Contracting Party has inadequate reserves, to achieve a "reasonable rate of increase" in its reserves. Provision was also made for developing country Contracting Parties to give priority to certain categories of imports deemed "more essential" in the light of development policies while imposing import restrictions, provided that "unnecessary damage" to the interests of the other Contracting Parties was avoided.[29]

Section C made provision for a developing country Contracting Party to deviate from the provisions of GATT (except Articles I, II and III) if governmental assistance was required in order to promote the establishment of a particular industry and no measure consistent with the other provisions was practicable to achieve that objective.[30]

In addition, a new Article XXVIII(bis) was introduced at the Review Session, which provided for periodic rounds of multilateral negotiations. It was agreed that these negotiations should be conducted on a basis that would take into account the needs of developing countries for a more flexible use of tariff protection to assist their economic development as well as their special needs to maintain tariffs for revenue purposes.[31]

The Review Session amendments did however not result in major changes in the legal relations between developed and developing countries. Probably the most significant result was that, once a negotiation existed, there had to be something for developing countries to "gain". The Review Session also repeated the lesson that the easiest concession to "give" is a little more legal freedom.[32]

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[29] Ibid.
[30] Ibid.
[31] GATT. 1955. *BISD,* 3rd Suppl., 1995, pp. 205-22.
[32] See Hudec, R. 1987. p.28.

3.3. THE HABERLER REPORT (1957-1964).

With time, developing countries started insisting on further concessions within the GATT legal system. According to Karin Kock, the Swedish expert on GATT affairs, the issue became critical once it became clear that a large number of British and French colonies were soon to achieve independence.[33] Developing countries were no longer content with the S & D provisions, which allowed them to protect their domestic industries from competition. They wanted preferential access in the markets of their trading partners. They argued that the ability to boost production of tradable products domestically had to be complemented by measures that ensured easy access into the markets of trading partners, especially the established markets.

During 1957 and 1964, serious efforts were made to accommodate developing countries. In 1957, a Ministerial Session of the Contracting Parties established an expert panel consisting of Gottfried Haberler, James Meade, Jan Tinbergen and Oswaldo Compos and headed by Professor Gottfried Haberler.[34] In particular, the panel had to examine the failure of the trade of less-developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protectionism. The panel submitted a report in 1958 wherein it came to the conclusion that "there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavorable to them".[35]

After having examined the short-term and long-term trends in commodity issues and the factors influencing them, the Haberler report came to a number of conclusions. It found that high levels of agricultural protection in industrialized and established countries exacerbated the problems faced by primary producing countries. The panel called upon industrialized countries to moderate the protection afforded to agriculture so as to help developing countries to produce commodities like sugar and tobacco. It also

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[33] Kock. K, *International Trade Policy and the GATT 1947-1967, op. cit., p.236.*
[34] For an overview of the Haberler Report, see Srinivasan, T.N. 1998. *Developing Countries and the Multilateral Trading System,* Westview Press, Oxford. p.23.
[35] GATT (1958), *Trends in International Trade*, Geneva.

recommended that the internal taxation of primary products like tea and tobacco be reduced because revenue duties in a number of countries were so high that it negatively interfered with import demand and consumption.[36]

3.3.1 The Declaration on the Promotion of Trade of Less Developed Countries.

In December 1961, the GATT adopted a Declaration on the Promotion of Trade of Less Developed Countries, which was part of a larger "Programme for Expansion of International Trade".[37]

The Declaration recognized:

(i) the need for the rapid and sustained expansion in export earnings of less-developed countries if their development was to proceed at a satisfactory pace;

(ii) the need for a "conscious and purposeful effort" on the part of all governments to promote an expansion in the export earnings of less-developed countries "through the adoption of concrete measures to this end", and that contracting parties should reduce to a minimum, restrictions on exports facing less-developed countries. Governments of industrialized areas also had to recognize a particular responsibility in this respect;

(iii) the need for diversification in structure of the trade of less-developed countries, for achieving which objective governments should give "special attention to ways of enlarging" opportunities of less-developed countries to sell in world markets industrial goods they can produce.

The Declaration also called for action in the following areas:

- the removal or considerable reduction of fiscal duties in developed countries;
- limitation of subsidies on production or export of primary products;
- careful observance of GATT or UN-mandated limitations on disposal of commodity surpluses or strategic stocks;
- improved access for developing countries in purchases made by state agencies;

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[36] GATT, 1958. supra.
[37] GATT. 1961. *BISD*, 10th Suppl., 1962, pp. 28-32.

- speedy removal of quantitative restrictions which affect the export trade of less-developed countries;
- special attention to tariff reductions of direct and primary benefit to less-developed countries, including the elimination of tariffs on primary products important in the trade of developing countries and reduction of tariffs that differentiate disproportionately between processed products and raw materials; and
- preferences in market access for developing countries not covered by the preferential tariff systems which were in operation when the GATT came into being or by the preferences in customs unions or free trade areas which were subsequently established (the first mention in GATT of what would later become the Generalized System of Preferences (GSP)).

There was also a call for the expansion of trade among developing countries themselves and there was an agreement among Contracting Parties to establish programmes of action to reduce and eliminate barriers as far as developing country exports were concerned.[38]

3.3.2 Opening of the Kennedy Round

In May 1963, a Ministerial Meeting laid down principles, which was later known as the Kennedy Round of Negotiations. The Ministerial Meeting agreed: "That in the trade negotiations every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries".[39] The Meeting also agreed that the contribution of the less-developed countries to the over-all objective of trade liberalization should be considered in the light of the development needs of these countries.

3.4. THE KENNEDY ROUND: PART IV

In 1964, the GATT adopted a specific legal framework within which the concerns of developing countries could be addressed: Part IV, which specifically dealt with Trade and

[38] *BISD*, 10th Suppl., 1962, pp. 28-32.
[39] *BISD*, 13th Suppl., 1962, pp. 1-12.

Development. The importance of Part IV is however not easy to describe because, from a technical point of view, it added nothing to the existing legal relationship between developed and developing countries. The language of Part IV was a bit more legalistic, giving the illusion of greater commitment but in fact, the text contained no definable legal obligations.[40] Nevertheless, Part IV contained three new Articles, XXXVI to XXXVIII.[41]

Article XXXVI entitled "Principles and Objectives" gives specific recognition to the following needs of developing countries:

- need for a rapid and sustained expansion of export earnings of less-developed contracting parties;
- need for positive efforts designed to ensure that the share in the growth of international trade enjoyed by less-developed contracting parties is commensurate with the needs of their economic development;
- need to provide, in the largest possible measure, more favourable and acceptable conditions of access to world markets for primary products, and wherever appropriate, to devise measures designed to stabilize and improve conditions of world markets;
- need to provide in the largest possible measure increased market access for developing country exports of manufacturers and processed products; and
- given the important inter-relationships between trade and financial assistance to development, the need for collaboration between contracting parties and international lending agencies.

The non-reciprocity principle was also formally recognized in paragraph 8 of the Article, which states that "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed contracting parties."[42] An interpretive note clarifies that developing Contracting Parties "should not be expected" to make contributions in the

[40] Hudec R. 1987. pp. 56-59.
[41] GATT. 1964. Part IV (*BISD*, 13th Suppl., 1965, pp. 1-12).
[42] Ibid.

course of trade negotiations, which are inconsistent with their level of development in the process of trade negotiations taking into account past trade developments.[43]

During the Kennedy Round this provision was further interpreted as follows:

> "There 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 contribution they can make".[44]

Article XXXVII entitled "Commitments" provides that developed Contracting Parties "shall, to the fullest extent possible"; give effect to the following provisions:

(a) accord high priority to the elimination of restrictions which differentiate unreasonably between primary and processed products;

(b) refrain from introducing or increasing the incidence of customs duties or non-tariff barriers on products currently or potentially of particular export interest to less-developed contracting parties;

(c) refrain from imposing new fiscal measures, and in any fiscal adjustments accord high priority to the reduction and elimination of fiscal measures hampering the consumption of primary products in raw or unprocessed forms produced in the territories of less-developed contracting parties.

Article XXXVII also contained a provision for consultation by the Contracting Parties upon the request by any interested Contracting Party with a view to reaching solutions, which are satisfactory to all Contracting Parties concerned in order to further the objectives set forth in Article XXXVI. Doubts have however been expressed about its

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[43] The Decision on Tropical Products approved the objective of duty free access for Tropical Products in Developed Country markets (GATT, 1964). Article XXXVI stopped short of extending the total non-reciprocity affirmed in this decision to other aspects of trade between developed and developing country Members.

[44] GATT, COM.TD/W/37, p.9.

effectiveness. In 1980, the panel investigating a Brazilian complaint about EC export subsidies for sugar found that the Community had not observed it.[45]

Developed contracting parties are also required in terms of Article XXXVII to:

(a) make every effort to ensure that trade margins are maintained at equitable levels for products wholly or mainly produced on the territory of a less-developed contracting party, in cases where a government directly determines the resale price of such product;

(b) give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties;

(c) 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 affect the essential interests of those contracting parties.

Developing Contracting Parties must also take appropriate action in the implementation of the provisions of Part IV for the benefit of the trade of less-developed countries, insofar as such action is consistent with their individual, present and future development, financial and trade needs, taking into account past trade developments as well as trade interests of less-developed Contracting Parties as a whole.

Article XXXVIII entitled "Joint Action", mandated Contracting Parties, through international agreements, to improve market access for products of export interest to developing countries. There was an agreement to collaborate with the United Nations and its organs on matters of trade and development policy, and to continuously review the development of world trade, especially with regard to the rate of growth of the trade of developing Contracting Parties.

Contracting Parties had to:

[45] Report of panel on EC refunds on exports of sugar – complaint of Brazil, *BISD* 27S/69 (1981), at 95.

(a) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as deemed appropriate;

(b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies; and

(c) establish institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provisions of Part IV.

3.4.1 The Committee on Trade and Development.

In 1964, the Committee on Trade and Development (CTD) was established,[46] with the mandate to review the application of the provisions of Part IV. It had to carry out or arrange any consultations required in the application of the provisions of Part IV and formulate proposals relating to the furtherance of the provisions of Part IV. It had to consider any question on the eligibility of a Contracting Party to be considered as a less-developed Contracting Party. It also had to consider modifications of or additions to Part IV and carry out any other function assigned to it.

It is important to note here however, that as far as improved access to developed country markets and commodity price stabilization is concerned, GATT did not take action or make legally binding commitments. Nowhere in Part IV are developed countries legally bound to undertake specific actions in favour of developing country Contracting Parties. The CTD was primarily created to discuss issues affecting developing countries and not to negotiate legal commitments in their favour.[47] This is still the case today.

3.4.2 The United Nations Conference on Trade and Development.

With the aim of promoting trade of developing countries and effectively addressing the trade concerns of developing countries, the United Nations Conference on Trade and Development (UNCTAD) was established in 1964. A Generalized System of Preferences (GSP) was established under UNCTAD. The system was voluntary which meant that

[46] GATT. 1964. *BISD*, 13th Suppl., 1965, p.75.
[47] Michalopoulos, 2000. p.6.

developed countries were not legally bound under the GATT to maintain it. A GATT waiver from MFN obligations was however granted in 1971, initially for 10 years together with another waiver, which allowed developing country Contracting Parties to grant preferences amongst themselves.[48]

As far as Part IV of GATT was concerned however, developing countries still felt that it did not adequately influence the course of negotiations during the Kennedy Round so as to satisfy their needs. In a joint statement at the conclusion of the negotiations, they maintained that the most important problems of most of them in the field of trade, taken up within the framework of those negotiations, still remained unresolved.[49]

3.5. FURTHER INITIATIVES IN FAVOUR OF DEVELOPING COUNTRIES (1965-1972).

Due to the dissatisfaction of developing countries with Part IV, further developments took place, which would benefit developing countries.

3.5.1 Special procedures for disputes by developing countries.

In April 1966, the Contracting Parties adopted special procedures for disputes by developing counties. If consultations between developed and developing Contracting Parties did not lead to a satisfactory settlement, the developing Contracting Parties complaining of the measures could refer the matter to the Director-General, who in his official capacity could try to facilitate a solution. If within two months no mutually satisfactory solution were reached, the Director-General would, at the request of one of the Contracting Parties concerned, bring the matter to the attention of the Contracting Parties or the Council. Upon receipt of the report, the Contracting Parties or the Council would appoint a panel of experts. The panel would then submit to the Contracting Parties or the Council its findings and recommendations within 60 days for consideration and decision. Within 90 days from the date of the decision, the Contracting Party, to which a

[48] GATT, 1972.
[49] GATT Press Release 994.

recommendation has been directed, would have to report on the action taken by it in pursuance of the decision.[50]

The new procedure was however not viewed by developing countries as a very significant victory hence the reluctance to initiate complaints.[51] The above innovation nevertheless foreshadowed the improvements made later in the WTO Dispute Settlement Understanding resulting from the Uruguay Round.

3.5.2 Modification of Balance-of-Payments Consultation Procedures.

In 1972, simplified consultation procedures were adopted for developing countries maintaining balance-of-payments restrictions. Under these procedures, the developing country would present a concise written statement, covering information on the nature of its methods of restrictions, effects of restrictions and prospects of liberalization. The Balance-of-Payments Committee would then consider whether full consultation was necessary. If this was not so, it would recommend that the Contracting Party concerned be deemed to have fulfilled its consultation obligations for that year.[52]

3.6. THE TOKYO ROUND (1973-1979).

The Declaration that launched the Tokyo Round of Multilateral Trade Negotiations provided that the negotiations must aim to secure additional benefits for the international trade of developing countries so as to achieve the following:

(i) a substantial increase in developing countries' foreign exchange earnings;

(ii) the diversification of developing countries' exports;

(iii) the acceleration of the rate of growth of developing countries' trade;

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[50] Decision regarding Procedures under Article XXIII (for developing countries) GATT. 1966. *BISD*, 14th Suppl., 1966, p.18.

[51] Israel invoked the special procedure in 1972 in a complaint involving the United Kingdom textile restrictions. A panel was appointed, but the case was settled before any ruling was made. See *BISD*, 20th suppl. (1974), p.237 (panel report of settlement). The next instance was Chile's invocation in a 1977 complaint concerning export subsidies of the European Community on malted barley. The complaint was later withdrawn before a panel was appointed. See GATT Document C/M/123 (1977) (referral to consultations).

[52] GATT. 1972. *BISD*, 20th Suppl., 1972-3, p.47.

(iv) an improvement in the possibilities of developing countries to participate in the expansion of world trade; and

(v) better balance between developed and developing countries in benefits resulting from this expansion through, in the largest possible measure, a substantial improvement in the conditions of access of the products of interest to the developing countries and, where appropriate, measures designed to attain stable, equitable and remunerative prices for primary products.[53]

3.6.1 The Enabling Clause.

Many specific provisions for the benefit of developing countries were included in the Tokyo Round agreements.[54] The most important of these however was the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (usually described as the "Enabling Clause").[55] The Clause provided for:

(i) the preferential market access of developing countries to developed country markets on a non-reciprocal, non-discriminatory basis;

(ii) "more favourable" treatment for developing countries in other GATT rules dealing with non-tariff barriers;

(iii) the introduction of preferential trade regimes between developing countries;

(iv) and the special treatment of least developed countries in the context of specific measures for developing countries.

The establishment of the Enabling Clause thus gave a stronger legal basis for the S & D treatment of developing countries within the rules of the multilateral trading system. It should however be noted that while the clause formally embodies the concept of S & D treatment, it did so in discretionary and permissive terms and not legally binding terms.

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[53] GATT. 1973. *BISD,* 20th Suppl., 1974. p.19.
[54] See: GATT, *The Tokyo Round of Multilateral Trade Negotiations*, Report of the Director-General, 1979, chap 6.
[55] GATT. 1979. *BISD*, 16th Suppl., 1980, p.203.

The clause for example made possible the introduction of preferential and non-reciprocal market access schemes but the extent of preferences and the level of reciprocity were left to the discretion of each country that extended them. The permissiveness of S & D was also reflected in the non-participation of developing countries in a number of agreements negotiated during the Tokyo Round for example, Export Subsidies and Countervailing, Technical Barriers to Trade and Government Procurement. These Agreements contained specific S & D measures for developing countries, but most developing countries failed to join on the premise that when they were invited to join, the negotiation process had almost come to an end without them having participated therein to the fullest extent.

The clause therefore failed to draw participation from the majority of developing countries in the multilateral trading system. The question thus arose as to whether the concept of S & D was worth retaining in the GATT legal system. According to Hugh Corbet:

> "[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".[56]

As a counterweight to the S & D provisions of the Enabling Clause, the Contracting Parties agreed to the principle of "graduation" in terms of which it was expected that the capacity of developing countries to accept obligations under GATT would improve with their economic development. Developed countries were therefore in a position to phase out non-reciprocal preferential market access measures to Contracting Parties, which, over time were considered or rather deemed to have attained a sufficient level of progress.[57]

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[56] Quoted from Hudec, Developing Countries in the GATT Legal System (Hampshire: Gower Publishing Company Ltd; 1987) p.xvi.
[57] GATT, 1980, p.205.

Developed countries therefore did not accept any legal obligation to accord preferences,[58] or bind themselves to any particular scheme. Due to preferences permitted under the Enabling Clause being permissive and non-binding, developing countries could have no legal recourse in the GATT against such action.

3.6.2 The Declaration on Trade Measures Taken for Balance-of-Payments Purposes.

This Declaration was also adopted during the Tokyo Round in 1979. In its Preamble, it recognizes "that developed contracting parties should avoid the imposition of restrictive trade measures for balance-of-payments purposes to the maximum extent possible."[59] While Contracting Parties are required to give preference to the measure which has the least disruptive effect on trade in applying restrictive import measures for balance-of-payments purposes, the footnote states that "It is understood that the less-developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied".[60]

3.6.3 The Decision on Safeguard Action for Development Purposes.

Another result of the Tokyo Round was the Decision on Safeguard Action for Development Purposes. It stated that "in unusual circumstances", where delay in the application of measures under Article XVIII:A and XVIII:C by a less-developed Contracting Party "may give rise to difficulties in the application of its programme of policies of economic development", the less-developed Contracting Party "may deviate" with Contracting Parties, and impose measures on a provisional basis immediately after notification.[61]

3.6.4 The 1982 Ministerial Declaration.

In 1982, the Ministerial Meeting again took up development concerns. In view of the prolonged adverse economic conditions, the Contracting Parties resolved to do the following:

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[58] See e.g., UNCTAD, *Agreed Conclusions of the Special Committee on Preferences*, doc. TD/B/330, 1970; 10 ILM 1083 (1971).
[59] *BISD,* 26th Suppl., 1980, p.205.
[60] GATT. 1979. *BISD*, 26th Suppl., 1980, p.205.
[61] GATT. 1979. *BISD*, 26th Suppl., 1980, p.209.

- ensure the effective implementation of GATT rules and provisions, and specifically those relating to developing countries, with a view to furthering the dynamic role of developing countries in international trade;
- ensure S & D treatment of least developed countries to improve their grave economic situation;
- implement more effectively Part IV and the provisions of the Enabling Clause;
- urge Contracting Parties to work towards the further improvement of GSP and MFN treatment on products of export interest to developing countries, and to eliminate or reduce non-tariff measures affecting such products;
- strengthen the GATT technical co-operation programme;
- the CTD had to examine the prospects of increased trade between developed and developing countries, as well as possibilities for GATT for facilitating this objective; and
- further liberalization of trade in raw, semi-processed or processed tropical productions.[62]

3.7 THE URUGUAY ROUND AND THE WORLD TRADE ORGANISATION.

On 1 January 1995, the Marrakesh Agreement Establishing the World Trade Organization entered into force. The package of legal texts resulting from the Uruguay Round of Trade Negotiations (1986-1995) is an impressive document because the legal texts as such cover more than 700 pages and the whole instrument consists of more than 26 000 pages.

The multilateral trading system was greatly strengthened during the Uruguay Round especially with regard to the integration of developing countries. Most of the Agreements concluded during the Uruguay Round contain special provisions for developing countries and least developed countries.[63] In particular, the WTO Agreement states, "the least developed countries recognized as such by the United Nations are required to undertake

[62] GATT. 1982. *BISD*, 29th Suppl., 1983, pp. 9-26.
[63] See Blackhurst R, A. Enders and J.F. Francois "The Uruguay Round and Market Access: Opportunities and Challenges for Developing Countries" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries,* (Cambridge University Press, Cambridge, 1996.) p.146.

commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."[64]

Two aspects of the Uruguay Round Agreements were of great potential to developing countries namely, the strengthening of the dispute settlement mechanism and, significant market access improvements in areas of interest to developing countries. The Uruguay Round has significantly strengthened dispute settlement procedures. A unified dispute settlement process now covers goods, investment and services. Rights to a panel are virtually automatic; panel reports must now be rejected (rather than accepted) by consensus and, strict time limits apply to each stage of the procedures, which eliminates blocking and delay tactics. The contracting parties have also made an explicit commitment to conform to panel reports.[65] Market access negotiations on the other hand now cover areas such as Agriculture and Textiles and Clothing, which were not previously subject to GATT disciplines.

The Uruguay Round also saw an evolution of developing country attitudes regarding S & D treatment. By the 1980's, most developing countries had accepted that the pursuit of import substitution policies had largely been responsible for the economic crises that they were facing. They had realized the important contribution that could be made by international trade in rejuvenating their economies. They reasoned that, if S & D treatment had failed to reserve their marginalisation from the multilateral trading system, then it was probably the appropriate time to consider narrowing its scope by limiting the application of the non-reciprocity principle and giving reciprocal concessions where appropriate to advance their economic interests.[66]

[64] Article XI.2.
[65] Whalley J, "Developing countries and system strengthening in the Uruguay Round" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries,* (Cambridge University Press, Cambridge, 1996.) p.421-422.
[66] See High Level Symposium on Trade and Development, 1999. p.17.

4. "SPECIAL AND DIFFERENTIAL" TREATMENT PROVISIONS IN THE VARIOUS WTO AGREEMENTS.

According to Laird, the Uruguay Round provisions conferring S & D treatment on developing countries 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 classified 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 time periods to developing countries; and provisions for technical assistance".[67]

Additional provisions within these five groups relate specifically to the least developed countries.[68]

It is necessary to evaluate the provisions presently available in the various WTO Agreements with a view to determining whether changes are necessary and whether the intentions of the negotiators have been fully translated into practice. This therefore brings us to a discussion of each group individually.

4.1. PROVISIONS AIMED AT INCREASING TRADE OPPORTUNITIES.

The WTO Agreements contain a number of provisions encouraging WTO Members to adopt measures, which would increase trade opportunities for developing country Members, particularly the least-developed ones among them. Certain provisions also permit developed countries to grant preferences to developing countries with a view to stimulating their export industry. Most of these provisions were carried over from GATT 1947 into GATT1994.

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[67] Laird, Developing Countries and the Multilateral Trading System: Past and Present, (1999) p.44.
[68] To view the list of UN-mandated least developed countries, See Ibid at p.6, footnote 6.

Article XXXVII of GATT for example, requires developed Members to accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to developing countries.

Article IV of the Agreement on Trade in Services (GATS), provides that the increasing participation of developing country Members in world trade must be facilitated through the negotiations of specific commitments, relating to the strengthening of their domestic service capacity and its efficiency and competitiveness 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.

The Enabling Clause also permits developed Members to grant preferential treatment to developing countries, and allows developing country Members to enter into regional or global arrangements among themselves for the mutual reduction or elimination of trade barriers.[69]

4.2. PROVISIONS THAT REQUIRE WTO MEMBERS TO SAFEGUARD THE INTERESTS OF DEVELOPING COUNTRY MEMBERS.

There are a number of WTO Agreements that require developed country Members to take into account the special situation of developing countries before imposing any measures, which might affect their trade interests.

Examples of general preambular statements include "the need for positive efforts designed to ensure that developing countries and especially the least-developed, secure a share in the growth in international trade commensurate with the needs of their economic development".[70] The Preamble of the Agreement on Agriculture also provides that "in implementing their commitments on market access (in agriculture), developed country members would take fully into account the particular needs and conditions of developing

[69] GATT. 1979. *BISD*, 26th Suppl., 1980, p.203.
[70] Preamble to the Agreement Establishing the WTO.

country members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these members".

The Agreement on Subsidies and Countervailing Measures provides for countervailing duty investigations against a product originating in a developing country Member to be terminated if the level of subsidization or the share of imports is less than the prescribed levels.[71] The Agreement on Technical Barriers to Trade (TBT) provides that in the preparation and application of technical regulations, standards and conformity assessment procedures, Members must take account of the special development, financial and trade needs of developing country Members.[72]

The Agreement on Safeguards similarly provides for the non-application of safeguard measures on imports from developing country Members if the import share is less than prescribed percentages.[73] The Agreement on Sanitary and Phytosanitary Measures (SPS) provides that in the preparation and application of sanitary and phytosanitary measures, Members must take account of the special needs of developing and least developed country Members.[74] There is a similar provision in the Agreement on the Implementation of Article VI (Anti-Dumping) that provides that, constructive remedies provided for by the Agreement must be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.[75]

4.3. FLEXIBILITY OF COMMITMENTS.

Many of the WTO Agreements afford developing countries flexibility in the implementation of certain rules and commitments. The most general and fundamental way, in which developing countries continue to be exempted from WTO disciplines regarding market access policies, is the recognition of the principle of non-reciprocity in trade negotiations with developed countries to reduce or remove tariffs and other barriers to trade.

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[71] See Article 27.9-10.
[72] See Article 12.3 and 12.7.
[73] See Article 9.1, footnote2.
[74] See Article 10.1.
[75] See Article 15.

The General Agreement on Trade in Services (GATS) for example, allows developing country Members to open fewer sectors and liberalize fewer types of transactions, while progressively extending market access in line with their level of development.[76] The Agreement on Agriculture contains a variety of measures which exempt developing countries and, to an even greater extent, least developed countries from disciplines and obligations that apply generally, and/or provides longer timetables or more modest reductions in government support and subsidies than apply to other Members. For example, investment subsidies or input subsidies to low-income producers are exempted from the calculation of aggregate measures of support (AMS). In agricultural export subsidies, developing countries are not required to undertake commitments in respect of subsidies for marketing costs as well as internal transport and freight charges on export shipments during the implementation period.[77]

It is clear that the provisions in the Agreement on Agriculture have legal force because, a developing country Member cannot be compelled by any other Member of the WTO to undertake more obligations than are actually provided for under the Agreement. On the other hand, it is open to any developing country Member to challenge any developed country Member that does not meet its obligations under the Agreement.

The WTO Agreements also contain a number of other provisions, which permit developing country Members greater flexibility in meeting requirements. The Enabling Clause for example, calls for greater flexibility in determining adherence to the GATT provisions regarding the formation of free trade areas and customs unions among developing countries. The Agreement on Trade-related Investment Measures (TRIMS) on the other hand permits a temporary deviation for developing countries applying balance-of-payments measures; and the Understanding on Rules and Procedures Governing the Settlement of Disputes provides for special procedures for least developed countries. Flexibility is also given to developing country Members to attach conditions to the

[76] See Article XIX:2.
[77] See High Level Symposium on Trade and Development, 1999. p19.

establishment of foreign suppliers,[78] introducing a new dimension to trade and to S & D treatment within the context of the multilateral trade system.

The Agreement on Subsidies and Countervailing Measures permits countries with a per capita income of less that $1000 and least developed countries to maintain certain kinds of export subsidies, which are otherwise prohibited, provided that they do not attain export competitiveness in a particular product for two consecutive years.[79]

4.4. PROVISIONS RELATING TO TRANSITIONAL TIME PERIODS.

With the notable exception of the Agreement on the Implementation of Article VI (Anti-Dumping) and the Pre-shipment Inspection Agreement (PSI), almost all the major WTO Agreements make provision for the extension of time frames for developing countries to comply with their obligations. This flexibility generally takes the form of an agreed delay, on the part of developing countries, of certain or all provisions of the Agreement concerned.[80]

Under the Agreement on Agriculture for example, developing countries are given ten years to implement their obligations, while developed countries are given six years.[81] The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) allows developing countries to delay application of most of its provisions for a period of two years following the entry into force of the WTO.[82] The Agreement on the Implementation of Article VII (Customs Valuation) gives developing countries, which were not parties to the Tokyo Round Code on Customs Valuation, five years within which to comply with their obligations under the Agreement.

[78] For instance the Annex on Telecommunications states provisions for placing reasonable conditions of access to public communications transport networks and services consonant with the needs to strengthen domestic telecommunications infrastructure and increase the participation (of the developing country member) in international trade.
[79] A country will be deemed to have attained export competitiveness in a given product, when its share reaches 3.25 per cent of world trade for two consecutive years.
[80] Laird supra at p.23.
[81] See Article 15.2 and Schedules.
[82] See Article 14.

The Agreement on Trade-related Investment Measures (TRIMS) gives least developed countries, developing countries and developed countries seven years, five years and two years respectively after the coming into force of the WTO Agreement to phase out all their inconsistent trade-related investment measures.[83] The Agreement on Subsidies and Countervailing Measures allows for a transition period of eight years within which subsidies must be phased out, preferably in a progressive manner.[84]

In the case of the Agreement on Textiles and Clothing, flexibility must take the form of an accelerated phasing out of Multifibre Arrangement (MFA) quotas for developing countries, where the restrictions imposed by the developed Member accounts for less that 1.2 per cent of all restrictions imposed on the developing Member. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the other hand, allows for a transition period of five years as well as a further five-year extension in cases where the Agreement requires extending product patent protection to areas of technology not so protectable by the end of the general transitional period.[85]

The above provisions relating to transitional time periods are legally enforceable in the sense that if a developing country is within the transitional period, it is, in principle, insulated from any actions that may be brought by a developed country. In *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products,*[86] the issue was not whether India could avail itself of the provisions of Article 65 of the TRIPS Agreement, but rather, whether it complied with the conditions specified in Article 70.8.

As noted by the panel:

> "A critical part of the deal struck was that developing countries that did not provide product patent protection for pharmaceutical and agricultural chemicals were permitted to delay the introduction thereof for a period of ten years from the entry into force of the WTO Agreement. However, if they chose to do so, they were required to put in place a means by which patent applications for such inventions could be filled so as to allow the

[83] See Article 5.2.
[84] See Article 27.2(b).
[85] See Articles 65.2 and 65.4.
[86] WT/DS50/R.

preservation of their novelty and priority for the purposes of determining their eligibility for protection by a patent after the expiry of the transitional period."[87]

4.5. PROVISIONS RELATING TO TECHNICAL ASSISTANCE.

Here, we deal with the provision of trade-related technical assistance by developed countries to developing country Members of the WTO, either on a bilateral basis or through the WTO or other relevant international organizations. In general, the idea is to inform developing country governments about their rights and obligations under the WTO Agreements and to help build their capacity to apply the Agreements and participate in WTO discussions.

Under the Agreement on Technical Barriers to Trade (TBT),[88] Members must, if requested to do so, advise other Members, especially developing countries, and must grant them technical assistance on mutually agreed terms and conditions regarding:

- the establishment of national standardizing bodies and participation in the international standardizing bodies and must encourage their national standardizing bodies to do likewise;
- the steps that should be taken by their producers to have access to conformity assessment systems within the territory of the Member receiving the request.

Under the TBT Agreement, Members must also, in preparing and applying 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 unnecessary obstacles for developing countries are not created. Technical assistance must be provided to Members to that end, taking account of the stage of development of the requesting Members.

Article 20.3 of the Agreement on the Implementation of Article VII (Customs Valuation) similarly provides for the provision by developed countries of technical assistance to developing country Members on mutually agreed terms. Article 27.2 of the

[87] WT/DS50/R.
[88] See Articles 11.2; 11.5; 12.3 and 12.7.

Understanding on Rules and Procedures Governing the Settlement of Disputes provides for provision by the Secretariat of services of qualified legal experts from the WTO technical cooperation services to any developing country Member that so requests.

In a similar vain, the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), in Article 67, provides for the provision by developed Members of technical and financial cooperation to developing country Members. Also the Agreement on Pre-shipment Inspection provides that exporter Members must offer to provide technical assistance to user Members, if requested to do so. Such assistance must be directed towards achieving the objectives of the Agreement on mutually agreed terms and the assistance may be given either on a bilateral, plurilateral or multilateral basis.[89]

The provisions relating to technical assistance stems from the institutional constraints faced by developing countries. Developing countries face enormous weaknesses in their human and physical infrastructure and institutions related to international trade. While it may therefore be relatively easy to promulgate policies to liberalize trade, it is far more difficult for developing countries to develop the capacity to take advantage of the opportunities international trade provides. Technical assistance support by developed countries and international institutions have therefore been recommended as a means to address these problems.[90]

4.6. SPECIAL MEASURES CONCERNING LEAST DEVELOPED COUNTRIES.

As far as least developed countries (LDCs) are concerned, it should be born in mind that the provisions of the WTO Agreements for differential and more favourable treatment of developing country Members also apply to LDCs. The Enabling Clause of 1979 provided the basis for the special treatment of LDCs "in the context of any general or specific measures in favour of developing countries". The Uruguay Round Agreements contain 17

[89] See Article 3.3.
[90] See UNCTAD/WTO, 1996, for a discussion of the specific structural weaknesses in Developing Country trade, which would justify differential treatment and policies.

provisions applicable specifically to LDC Members, in addition to those that are applicable to all developing country Members.[91]

The Understanding on Rules and Procedures Governing the Settlement of Disputes states that, as far as dispute settlement is concerned, "Particular consideration" must be given to the special situation of LDC Members at all stages in the determination of causes of dispute and of dispute settlement. Members must "exercise due restraint" in raising matters under the dispute settlement procedures involving a LDC Member and if nullification or impairment is established, Members must "exercise due restraint" in seeking compensation or authorization to suspend concessions or any other obligation pursuant to these procedures. If a satisfactory solution is not found, the Director-General or Chairman of the DSB may offer their good offices upon the request by the LDC in order to find an acceptable solution prior to the request for a panel.[92]

The Preamble to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) gives recognition to the special interest of LDC in respect of maximum flexibility in the implementation of domestic regulations in order to enable the creation of a sound technological base. Article 66 allows for a delay of up to ten years for most TRIPS obligations with the possibility of an extension following a duly motivated request. In addition, Article 66.2 states that developed country Members must provide incentives to enterprises and institutions in their territories for the purpose of encouraging the transfer of technology to LDCs.

Provisions for a more extended transitional period than applicable to developing countries are provided for in the Agreements on Sanitary and Phytosanitary Measures (SPS) and Trade-related Investment Measures (TRIMS). The SPS Agreement provides in Article 14 that LDCs may delay for up to five years, implementation of the provisions of the Agreement and TRIMS makes provision for a seven-year transitional period.

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[91] Michalopoulos, 1999a. "Developing Country Strategies for the Millennium Round", *Journal of World Trade,* Vol.33 (5). p.27.
[92] See articles 21.8; 24.1 and 24.2 of the DSU.

Under the Agreement on Agriculture, LDC Members are not required to undertake reduction commitments and certain notifications need only be submitted every other year.[93] The Agreement on Subsidies and Countervailing Measures allows for an extended phasing out of subsidies once export competitiveness is established;[94] and the Annex on Telecommunications to the GATS contains a provision seeking to encourage private suppliers in enabling the transfer of technology and training to LDCs with a view to developing the Telecoms sector.[95]

A number of initiatives have also been adopted with regard to LDCs since the establishment of the WTO.

4.6.1 The Decision on Measures in favour of Least Developed Countries (1994).

The Decision (1994) provided in its Preamble that the participation of LDCs in the multilateral trading system "should be seen in the light of their special financial, development and trade needs".

The Ministers agreed that:

- the expeditious implementation of all S & D measures must be ensured through regular reviews;
- to the extent possible, MFN concessions on tariff and non tariff measures agreed to in the Uruguay Round on products of export interest to LDC must be implemented autonomously, in advance and without staging;
- Uruguay Round rules and transitional provisions should be applied in a flexible and supportive manner for LDCs;
- special consideration must be given to the export interests of LDCs in the application of import relief and other measures permitted by the GATT;
- LDCs must be accorded substantially increased technical assistance in development, strengthening and diversification of their export and production

[93] See Article 15.2 and Schedules and the Notifications.
[94] See Article 27.5 and 27.6.
[95] See para 6(d).

bases, including those of services as well as in trade promotion, to enable them to maximize benefits from liberalized market access;

- the Ministers also agreed to keep under continuous review the specific needs of the LDCs and to continue to seek the adoption of positive measures facilitating the expansion of trade opportunities in favour of these countries.

4.6.2 The WTO Sub-Committee on Least Developed Countries.

In 1995, the WTO Sub-Committee on Least Developed Countries was established[96] and its terms of reference were the following:

- to give particular attention to the special and specific problems of LDCs;
- to review the operation of the special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of LDCs;
- to consider specific measures allowing for the expansion of LDCs' trade and investment opportunities, with a view to enabling them to achieve their development objectives;
- to report to the CTD for consideration and appropriate action.

4.6.3 The WTO Plan of Action for Least Developed Countries.

In 1996, a comprehensive and integrated WTO Plan of Action for LDCs was adopted. The Plan "envisaged a closer cooperation between the WTO and other multilateral agencies assisting least developed countries" in the area of trade.[97] The purpose of the Plan was to improve the trade opportunities of the LDCs as well as their integration in the multilateral trade system. The main components of the Plan were the following:

(i) more effective implementation of the decisions in favour of LDCs;

(ii) human and institutional capacity building; and

(iii) market access.[98]

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[96] Adopted by the Committee on Trade and Development, document WT/COMTD/2.
[97] WTO document WT/MIN/96/14, dated 7 January 1997.
[98] Ibid.

4.6.4 The High Level Meeting on Integrated Initiatives for Least Developed Countries' Trade development.

In pursuance of the WTO Action Plan of 1996, a High Level Meeting on Integrated Initiatives for LDCs' Trade and Development was held in October 1997. The Meeting was organized by the WTO in close collaboration with the International Monetary Fund (IMF), International Trade Center (ITC), UNCTAD, United Nations Development Programme (UNDP), and the World Bank and welcomed the announcements of the new additional preferential market access measures for LDCs taken or proposed to be taken by a number of WTO Members.

The High Level Meeting also launched the Integrated Framework for Trade-Related Technical Assistance for LDCs. This framework seeks to address shortcomings relating to technical and institutional capacity, particularly in the areas of trade policy, human resources, export supply capability and regulatory regimes. It seeks to increase the benefits, which LDCs derive from technical assistance so as to help them to enhance their trading opportunities.[99]

The Framework aims to:[100]

- ensure that trade-related technical assistance activities are demand-driven by the LDCs and meet their individual needs effectively,
- enhance ownership by each LDC over the trade-related technical assistance activities being provided;
- enable each agency involved to increase its efficiency and effectiveness in the delivery of trade-related technical assistance activities;
- keep under review trade-related technical assistance activities in individual LDCs, evaluate periodically their success in meeting the country's needs, review how those needs change, and adapt the programme of activities accordingly;
- provide comprehensive information about the specific needs of each LDC and about the trade-related technical assistance of the six agencies involved to other

[99] See http://www.ldcs.org/intframe.htm.
[100] See http://www.ldcs.org/intframe.htm. pp. 1-2.

relevant multilateral and regional intergovernmental organizations, to bilateral development partners and to the private sector.

Among other things, trade related technical assistance might encompass:[101]

- institution-building to handle trade policy issues (e.g., assistance to LDCs in acceding to the WTO; enhancing capacities to make and implement trade policy consistently with WTO obligations);
- strengthening of export supply capabilities (e.g., improving competitiveness of enterprises; increasing investment in productive sectors);
- strengthening trade support services (e.g., trade efficiency involving trade facilitation; advice on standards, packaging, quality control, marketing and distribution channels);
- training and human resource development.

5. DEVELOPING COUNTRY CONCERNS REGARDING S & D TREATMENT.

Application of the same set of rules to countries, which are at widely differing stages of economic development, would create inequitable results. For this reason it is imperative that S & D treatment provisions incorporated in the WTO Agreements must be effectively implemented. However, while the principle of S & D treatment has been imbedded in many of the agreements that cover the rules of conduct of trade relations under the WTO, the practice of S & D continues to suffer shortcomings. The experience of implementing these provisions has been on the whole disappointing.[102]

What follows is a discussion dealing with the problems regarding implementation of the various WTO Agreements and possible solutions.

[101] See http:///www.ldcs.org/intframe.htm. pp. 2-3.
[102] Michalopoulos, 2000. p.23.

5.1. AGREEMENT ON THE IMPLEMENTATION OF ARTICLE VI (ANTI-DUMPING).[103]

Article XV of the Agreement provides that "It is recognized that special regard must be given to developing country Members when considering the application of anti-dumping measures under the Agreement. 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."

Despite this provision, developed countries use anti-dumping measures as weapons in order to deny access to developing country products. Developed countries repeatedly initiate anti-dumping action and this has created instability and unpredictability in the market, which militates against the very basic principles of GATT.[104] Also, problems arise not only in the anti-dumping laws, but also in their implementation process, which puts developing countries at a disadvantage. The information requirements imposed on firms charged with dumping are particularly onerous for developing countries.[105] The default, namely the reliance on "best information available" – typically meaning the information supplied by the party alleging dumping – puts developing countries at a further disadvantage.[106] Thus, a comprehensive trade negotiation must deal not only with the principles underlying the laws, but also with the details of their implementation.

While Article XV provides for constructive remedies to be explored before applying anti-dumping duties where these would affect the essential interests of developing countries, it has never been implemented because it has not been clearly defined.[107] It has therefore become important to lay down clear guidelines for making sure that the provision in Article XV is translated into practice. Members who have reasons to take anti-dumping action should do so with care and responsibility and ensure that any action is in

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[103] See GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations,* 1994.
[104] Communication from India, "Concerns regarding the Implementation of Provisions Relating to Differential and More Favourable Treatment of Developing and Least Developed Countries in Various WTO Agreements," 13 November 1998. (WT/GC/W/108 at p.3.)
[105] WT/COMTD/W/66, p.22.
[106] Stiglitz, J.E. 1999. "Two Principles for the Next Round, Or How to Bring Developing Countries in from the Cold" WTO Speech, Geneva, September 21. p.28.
[107] WT/TPR/M/33.

compliance with the Agreement so as not to unnecessarily disrupt trade between Members.

The following are some areas where S & D treatment can be considered for exports from developing country Members.

- A dumping margin limit of 2% of the export price has been prescribed and no anti-dumping duty can be imposed if the dumping margin is below this threshold limit. This limit is the same for both developing and developed countries. Many of the exports of developing countries are however produced by labour intensive small and medium enterprises. The imposition of anti-dumping duties or even the threat of imposition of such duties has a serious adverse effect on the functioning of these units. The result is a fall in production, heavy unemployment, decline in economies and increase in poverty levels. Due to the high sensitivity of these sectors to any export disruption, it is suggested that the dumping margin of 2% be enhanced.[108]

  India has suggested that the level of enhancement in respect of each developing and least developed country reflect the disadvantage that the industry in such country suffers *vis a vis* comparable production in developed countries. The extent of disadvantage would however vary from country to country and its assessment could be a cumbersome and contentious issue. For this reason it is better to have an across the board de minimis which could be prescribed *vis a vis* all developing countries to adequately reflect the higher price levels which prevail in such countries.[109]

- Article 5.8 of the Anti-Dumping Agreement provides that the volume of dumped imports shall normally be regarded as negligible, if the volume of dumped imports from a particular country is found to account for less than 3% of imports

[108] WT/GC/W/108, p.3.
[109] WT/GC/W/108, p.4.

of the like product, unless countries which individually account for less than 3% of the imports of the like product, collectively account for more than 7% of the imports into the importing member.

It should however be noted that in view of the liberalization of global trade and in view of the fact that more and more developing countries are entering into what were earlier untapped markets for them, it has become necessary to increase these percentages with a view to helping developing countries. The percentages can be increased to 7% in the case of imports from a developing country into a developed country.[110]

- The Anti-Dumping Agreement has also severely limited the role of panels in disputes relating to anti-dumping. Article 17.6 states that if the facts have been adequately established and the investigative evaluation has been objective, decisions by national authorities cannot be overturned even though, on the basis of the same facts, the panel itself would have decided differently. In other words, dispute settlement panels can only decide whether the actions of the anti-dumping authorities were consistent with the procedures laid down in the Agreement and not whether the finding is economically justifiable.[111]

  It should however be born in mind that since developed countries are increasingly resorting to the use of anti-dumping duties against developing countries, it has become necessary that the same standard of review that is applicable to disputes related to other covered agreements be made applicable to disputes relating to anti-dumping.[112]

- Since anti-dumping investigations are against specific exporters, the impact of investigations and the resulting duties (if any) are mostly felt by the exporters

[110] Ibid.
[111] Martin, Will and L. Alan Winters, "The Uruguay Round: A Milestone for the Developing Countries", in W Martin and L.A. Winters Eds. *The Uruguay Round and Developing Countries* (Cambridge University Press, Cambridge, 1996). p.18.
[112] WT/GC/W/108, p.5.

from developing countries who, more often than not, are very small in size and operations. It has therefore been argued by India that investigations should be initiated against developing country Members only if the petition has the support of at least 50% of the domestic industry of the developed country Member.[113] It was also suggested that no investigation should be initiated for a period of 365 days from the date of finalization of the previous investigation for the same product resulting in non-imposition of duties. If however it is established by the complainants that the circumstances have changed drastically subsequent to the finalization of the case, such investigation should be initiated only if it has the support of at least 75% of the domestic industry of the developed country Member.[114]

- Article 9.1 of the Agreement allows the investigating authorities to impose anti-dumping duties where all the requirements for imposition have been fulfilled. The Article further states that it is desirable that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry. It is however a concern that a large number of developed countries apply duties to the full extent of the margin of dumping.[115] While the Agreement does not make it obligatory for the investigating authorities to follow the "lesser duty rule", the application of duties to the full extent of the dumping margin invariably leads to higher level of protection to the domestic industry, which is in excess of the duty required to negate the injury caused to their domestic industry.

  It would thus be appropriate to have a special provision that the application of the lesser duty rule is made mandatory when a developed country Member is investigating the alleged dumped imports from a developing country Member.

[113] WT/GC/W/108, p.4.
[114] Ibid.
[115] WT/GC/W/108, p.4.

Also, norms and criteria should be established to operationalise the "lesser duty" route in terms of "adequacy" to remove "injury".[116]

5.2. UNDERSTANDING ON THE RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU).

If one goes through the DSU,[117] one will be impressed by the fact that a number of provisions in this Understanding deal with the possible concerns of developing countries.[118] However, the articulation of these provisions is not in specific terms and generalizations are used. The following are examples of such provisions.

Article 1 of the DSU deals with surveillance of implementational recommendations and rulings. Paragraph 2 of the Article reads: "Particular attention should be paid to matters affecting the interest of developing country Members with respect to measures which have been subject to dispute settlement." While the provision appears very attractive, it has neither operational value nor legal enforceability because concrete details are not provided.

In a similar vain, the DSU annexure relating to working procedures can be quoted: "The party complained against gets 2-3 weeks time to respond to the first submission". It has however been argued by India that during the dispute settlement review process, its delegation tried to increase the time limit by about 2 weeks when the party complained against was a developing country. Its proposal however met with stiff resistance from the major trading partners.[119]

Article 4.10 of the DSU relating to consultations requires that members should give special attention to the particular problems and interests of developing country Members. However, how this is to be achieved is not indicated. One developing country has complained that its request for consultation with another Member (developed) had been

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[116] Ibid.
[117] See GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations,* 1994.
[118] See Articles 4.10; 8.10; 12.11; 21.2; 1.7; 21.8; 24; 27.1; and 27.2.
[119] Statement by Ambassador Narayanan of India, 4th Session of the Seminar on Special and Differential Treatment for Developing Countries, Geneva, 7 March 2000. p.4.

disregarded thus discriminating against and impairing its interests in deviation of the provisions of Article 4.10 of the DSU.[120]

Article 24.2 of the DSU provides that while the Secretariat assists members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. The Article provides that the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert would assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

The need has however arisen to review the application of Article 24.2 to make it more operational and effective in extending assistance with regard to dispute settlement matters to developing countries. Most developing countries do not have the expertise, knowledge and other resources to formulate a case process and bring it before the DSB, and carry it through.[121] It has been suggested that the budget of the Secretariat be further supplemented to enable the Secretariat to hire full time consultants and to upgrade the posts of legal officers so that experienced personnel can be employed for this purpose. The legal advisors should constitute an independent legal unit within the Secretariat in order to ensure the neutrality of the Secretariat itself.[122] The concept of "neutrality" of the WTO also needs to be more clearly defined and perhaps more loosely implemented. This is so because a strict implementation of neutrality limits the nature and scope of legal services made available to developing country Members and prevents legal advisors of the WTO from effectively helping developing country Members in defending or pleading a case.[123]

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[120] WT/DSB/M/7, p.2.
[121] O'Krueger A, T.N. Srinivasan, N.K. Singh, B.K. Zutshi, December 1999, "The Seattle Ministerial Conference: Road Ahead for Developing Countries", Indian Council for Research on International Economic Relations – Panel Discussion.
[122] WT/COMTD/W/66, p.33.
[123] Ibid.

Finally, on 1 December 1999 the ministers of various countries[124] joined in a ceremony to sign the "Agreement Establishing the Advisory Center on WTO Law". Membership was open to WTO Members and those in the process of accession, either by signature of the Agreement before 31 March 2000 or anytime thereafter through an accession procedure.

It is intended that the Advisory Center provide legal training and legal assistance in WTO matters to its developing country Members and all least developed countries. The Center will be established in Geneva as an international organization independent form the WTO jurisprudence and will provide legal advice. Internships will be opened for government officials from developing country Members and least developed countries. The Center will also provide support throughout dispute settlement proceedings at discounted rates for its Members.[125]

The WTO is a complex system of rights and obligations, which is supported by a binding dispute settlement mechanism to ensure compliance. Meaningful participation therefore requires a good understanding of these rights and obligations and the ability to participate in its dispute settlement mechanism. Unfortunately, many Members face considerable problems due to lack of expertise and human resources in this particular field of international law.[126] The Advisory Center therefore responds to the urgent needs of developing countries and economies in transition to build up their legal expertise in order to participate more fully in the WTO. The Center is intended to be in operation towards the end of this year.

Another suggestion has been to establish a trust fund to finance strategic alliances with lawyers' offices of private firms to expand the scope of consultancy and advisory services.[127]

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[124] Bolivia, Canada, Colombia, Denmark, Egypt, Finland, Guatemala, Honduras, Hong Kong, China, Italy, Kenya, Netherlands, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sweden, Thailand, Tunisa, United Kingdom, Uruguay, Venezuela, Ecuador, Dominican Republic, Ireland, Nicaragua and Zimbabwe.
[125] http://www.itd.org/links/acw/intro.htm.
[126] Keet, "Globalization, The World Trade Organization and the Implications for Developing Countries." LDD (UWC) 1999. pp. 9-10.
[127] Job 6645, paragraphs 327-339.

Article 12.10 of the DSU provides that in the context of consultations involving and measures taken be a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. Also, in examining a complaint against a developing country Member, the panel shall allow sufficient time for the developing country Member to prepare and present its argumentation.

With reference to Article 12.10, a developing country defendant in a dispute has contended that the process raised a number of questions in relation to the DSU.[128] One of the issues raised was the fact that developing countries face real difficulties due to the insistence by developed countries that consultations be held only in Geneva. The question was also raised as to whether a Member could decide unilaterally that consultations had been concluded particularly since Article 12.10 provided that "In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4."

It can therefore be seen that even though the DSU provides for S & D treatment in various clauses, there is a lack of clarity regarding the manner in which such provisions are implemented. This is so even though in a number of relevant clauses, the words "shall" and "should" have been used in order to provide such a treatment to developing countries. There is however no way to ensure that such treatment is accorded to these countries in practice.[129]

There is thus a need for developing a screening process to check whether such requirements are adhered to.[130] It is necessary that the interests of developing country Members be fully taken into account in the dispute settlement process. There should be recognition of the fact that dispute settlement proceedings are extremely costly, that

[128] See WT/DSB/M/2, p.4.
[129] Qureshi Asif H, p.143.
[130] WT/GC/W/108, p.10.

developing countries and least developed countries do not have the necessary legal expertise to handle such cases and that dispute settlement proceedings are being competitively used by certain developed countries to prove their aggression to domestic constituencies. There must also be recognition of the fact that the general consensual character of the process of adjudication allows for power-based solutions that could militate against the interests of developing countries.[131]

Procedures must therefore be developed to make sure that the interests of developing countries are protected and that developed countries do not use dispute settlement proceedings as instruments for coercion of the less privileged Member countries. A number of suggestions can be made to ensure that the interests of developing country Members are fully taken into account in the dispute settlement process.

- In cases where the developing country is the complainant and a developed country is the respondent, the period available to the concerned developing country for making submissions, rebuttals etc. as indicated in Appendix 3 to the DSU, should be doubled. This will also entail a corresponding change in Article 12.8 of the DSU.[132]

- If, due to circumstances beyond the control of the developing country and in spite of such country' best endeavor, the developing country is unable to complete action within the implementation period laid down in Article 21.3 of the DSU, the matter should be considered by the DSB and additional time given to implement the commitment. This should however only apply in cases where the developing country is able to establish that despite best endeavor, it has not been possible to fulfill the commitment due to force majeure conditions.[133]

- Considering the disparity between developed and developing countries in commercial strength, it is obvious that developing and least developed countries

[131] Qureshi Asif H, p.142.
[132] Ibid.
[133] Ibid.

have very little capacity to take effective retaliatory action against developed countries. In cases where developing countries are to get ultimate relief through retaliation against developed countries, there should be joint action by the entire membership of the WTO.[134]

- Where a developing country, as respondent, has won a case initiated by a developed country, the developed country that had initiated the case should pay the legal fees and other costs.[135]

- In cases initiated by developed countries, the period of implementation suggested as a guideline to the arbitrator in Article 21.3 [c] of the DSU may be increased from 15 months to 3 years for developing countries where disputes between developed and developing countries result in favour of the developing country.[136]

- Article 22 of the DSU provides for compensation and suspension of concessions in case a defaulting Member country fails to comply with the recommendations of the Dispute Settlement Panel or the Appellate Body, as the case may be, within the reasonable period of time determined under paragraph 3 of Article 21. There are however no clear guidelines regarding the manner in which such compensation or suspension of concessions is to be calculated.[137]

  Since this is clearly not an issue that can be left entirely to negotiations between unequal partners, guidelines should be laid down in the same manner as in the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994. It is in any event essential that differential and more favourable treatment for developing and least developed countries be built into

[134] WT/GC/W/108, p11.
[135] WT/GC/W/108, p10.
[136] Ibid.
[137] WT/GC/W/108, p11.

these guidelines so that a developing or least developed country pay substantially less compensation than a developed country in comparable circumstances.[138]

- In cases where a developed country is the complainant and a developing country is the respondent, the developed country should acquire the right to initiate dispute settlement action against the developing country, only if it is able to demonstrate that the alleged violation of a provision of a covered agreement by a developing country causes, to the developed country, trade impairment or trade loss above a threshold or de minimis level. The level could for example be a certain percentage of the value of imports of that particular item by the developing country concerned or a certain fixed percentage of the total market size of the developing country for that particular item.[139]

  By adopting this approach, it would be possible to ensure that developed countries do not raise disputes against developing countries unless the measure taken by the developing country is demonstrated to have a significant impact on the trade of the developed country.

5.3. AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (SPS).[140]

Article 9 of the Agreement on Sanitary and Phytosanitary Measures (SPS) provides that:

> "Members *agree to facilitate* the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia,* in the areas of processing technologies, research and infrastructure, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets."

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[138] Ibid.
[139] Ibid.
[140] See GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations,* 1994.

> "Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter *shall consider* providing such technical assistance as will permit the developing country member to maintain and expand its market access opportunities for the product involved."

(Emphasis added)

The question arises as to whether or not Article 9 contains binding legal language. Some developing countries seem to be of the view that it does and that failure by developed countries to provide targeted assistance in this area could be a cause of complaint under the DSU. The use of the words "agree to facilitate" and "shall consider" however seems to indicate that it was not intended to make the provision of technical assistance obligatory. Instead, it is up to a developed country Member country to decide whether or not it is going to provide assistance to a particular developing country. The same applies to technical assistance provided by WTO and other multilateral institutions. The provision of technical assistance is usually dependent on the availability of funds.

Article 10.1 of the SPS Agreement states that "in the preparation and application of sanitary and phytosanitary measures, Members shall take account of the special needs of developing country Members and in particular of the least developed country Members."

Two important aspects need to be dealt with under Article 10.1 namely the "preparation" and the "application" of the SPS Measures.[141]

As far as the "preparation" of SPS Measures is concerned, it should be noted that international standards are normally adopted on the basis of the deliberations in the three international standard setting organizations. It is however the unanimous view of developing countries that they are grossly outnumbered in these deliberations. This results in the development and adoption of international standards, which do not take into account their developmental and implementational constraints.

[141] See statement by Ambassador Narayanan of India, p.2.

The provisions in Article 10.1 relating to the "application" of SPS Measures have also remained ineffectual because developed countries have rarely ever taken account of the special problems of developing countries when adopting and applying SPS Measures.[142] This has largely been due to the fact that Article 10.1 only stipulates that "Members shall take account of" the problems of developing countries. Since it has not been specified how this account shall be taken, these provisions have rarely been effectually implemented.

Furthermore it could be argued that Article 10.1 obliges developed country Members to consider the effects that their intended SPS Measures may have on developing countries, but does not compel them to change those measures even if there is the probability that they may negatively impact on the interests of developing countries.

Article 10.2 provides that "where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports."

Several developing country Members have however noted that this provision is not being implemented in a satisfactory manner.[143] In its review of the operation and implementation of the Agreement, the SPS Committee however noted that it had no information on the extent to which the provision had been applied to developing country Members, nor how the latter had made use of it.[144]

5.4 AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT).[145]

Article 12.3 of the TBT Agreement provides that:

> "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and

[142] Ibid.
[143] WT/COMTD/W/66, p.16
[144] Ibid.
[145] See GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations,* 1994.

> 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 which 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. Developed countries continue to impose standards that are either beyond the technical competence of developing countries or do not take into account the special development, financial and trade needs of developing countries. Developed countries also do not show a willingness to transfer to developing countries better and more advanced technologies at fair and reasonable costs.[146]

Guidelines therefore need to be prepared which lay down a process of prompt and regular notification and discussion of standards laid down by developed countries. A positive link must be created between transfer of technology at fair and reasonable costs and the application of standards and a procedure for the early removal of restrictions that are unreasonable.[147]

Article 12.5 states that:

> "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members."

This provision has given rise to a number of problems. The obligation is not a binding one because it is confined to "reasonable measures as may be available to them".

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[146] WT/GC/W/108, p.7.
[147] WT/GC/W/108, p.8.

International bodies also do not always take decisions by consensus with the result that even assuming that developing countries do participate, they may be overruled.[148]

Thus the problem with the above provisions is that they 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.

Possible solutions are the following:

- means have to be found to ensure the effective participation of developing countries in the setting of standards by international standard-setting organizations,
- technical cooperation is required to upgrade conformity assessment procedures in developing countries to gain their acceptance in developed markets,
- there is a need for developing equivalence of standards where the legitimate purpose behind the setting up of standards is achieved in a standard set in a developing country keeping view of the limitations of technical and technological know-how or fundamental climatic or geographical factors.[149]

5.5 GENERAL AGREEMENT ON TRADE IN SERVICES (GATS).[150]

Article IV of the GATS provides that:

> "[t] he increasing participation of developing country Members in the world *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

[148] See statement by Ambassador Narayanan of India, p.3.
[149] Ibid.
[150] See generally Broadman H.G, GATS: The Uruguay Round Accord on International Trade and Investment in Services, *The World Economy* (1994) 17:3, 281-292; Hoekman B, The General Agreement on Trade in Services, in *Readings on the New World Trading System,* OECD, Paris, 1994; Sauve, P, Assessing the General Agreement on Trade in Services – half-full or half-empty?, *JWT* 29:4 (1995), pp. 125-146.

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 is tighter than the one used in Article XXXVII,[151] but upon further reflection, it could be argued that it does not impose any positive obligations on developed countries. Maybe the only obligation it imposes on developed countries is to enter into negotiations with developing countries, which 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 that were anticipated by a developing country.[152]

Article XIX allows developing countries to make fewer specific commitments than industrialized nations. Article XIX.2 provides that "The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation…"

Negotiations under the GATS in the Uruguay Round and subsequent negotiations on the movement of natural persons and basic telecommunication reveal that the interests of developing countries are not being adequately addressed regardless of the provisions of Article IV and Article XIX.2.[153] Developing countries are being asked to undertake more and more national treatment and market access commitments, while developed countries

[151] Ibid at p.13.
[152] WT/GC/W/108. p.9.
[153] Ibid.

are not providing adequate market access in sectors and modes of supply of export interest to developing countries. Even though negotiations took place regarding the movement of natural persons, hardly any commitments have been undertaken by the developed countries for the movement of natural persons without commercial presence. Access to technology in several critical areas has also remained closed to developing countries.[154]

Since developing countries have limited comparative advantage in trade in services, there is a need to have a comprehensive assessment of the benefits that have accrued to developing countries through trade in services since the formation of the WTO. Since no specific mechanism for implementing Article IV and Article XIX.2 exists, these Articles can be said to be pious statements of intention because the GATS has been unsuccessful in adequately addressing the issue of the increasing participation of developing countries in trade in services.[155]

Overall, developed countries continue to dominate trade in services because the expected improvement in the participation of developing countries has not taken place. This indicates the need for special and more favourable treatment of developing countries. Developed countries have offered service providers of developing countries inadequate access, whereas the service providers of developed countries have been able to penetrate the markets of developing countries. The imbalance in commitments across countries and sectors therefore need to be corrected, paying particular attention to negotiating flexibility for developing countries as well as their increased participation in trade in services.[156] The credibility of GATS as a multilateral instrument of liberalization greatly depends on the political will of Member countries to open their markets in the future and to make changes to GATS' structure.[157]

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[154] Ibid..
[155] Ibid.
[156] S/C/M/34, paragraph 37.
[157] Sauve, P. 1995. "The General Agreement on Trade in Services: Much ado about What?" in D. Schwanen, ed., *Trains, Grains and Automobiles: Canada and the Uruguay Round.* Toronto: C.D. Howe Institute.

5.6 BALANCE OF PAYMENTS PROVISIONS.

Article XVIII of GATT, in particular Article XVIII:B, is one provision, which has helped developing countries in pre-WTO times to enjoy a certain degree of flexibility in their trade regimes. It permits developing countries to impose quantitative restrictions on imports for balance of payments reasons, taking into account not only the foreign exchange reserves position, but also the development needs of the economy.

Paragraph 2 of Article XVIII:B for example provides that:

> "The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development design to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agreed, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand of imports likely to be generated by their programmes of economic development."

Paragraph 8 of Article XVIII further elucidates this point:

> "The contracting parties recognize that contracting parties coming within the scope of paragraph 4(a) of this Article tend, when they are in rapid process of development, to experience balance of payment difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade."

Paragraph 9 on the other hand indicates that the developing countries may maintain quantitative restrictions for balance of payments "in order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development."

Paragraph 11 stipulates that:

> "in carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources."

It is therefore clear that the intention of the negotiators was to take into account the development needs of developing countries while estimating the adequacy or otherwise of foreign exchange reserves in the process of determining legitimacy of maintenance of quantitative restrictions. In actual fact however, assessment of adequacy of foreign exchange reserves are made exclusively on the basis of a comparison of volume of reserves with value of imports during the past few years. The development dimension is ignored and therefore in practice, there is no distinction between Article XII (which deals with quantitative restrictions maintained for balance of payment reasons by developed countries) and Article XVIII:B, which provides a special dispensation for developing countries.[158]

It is necessary to clearly define the scope of Article XVIII:B and to lay down guidelines for ensuring that the development dimension is fully taken into account while assessing foreign exchange reserves. A differential must be built into the provision so that Article XVIII:B serves its purpose in ensuring long term stability of the balance of payment position of developing countries, without making them vulnerable to violent fluctuations in reserves and exchange rates which can lead to severe and sustained setbacks in their growth process.

5.7 AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.[159]

In the application of countervailing measures, subsidies are divided into two types, specific and general, of which only the former are subject to disciplines. Specific

[158] WT/GC/W/108, p.3.
[159] See GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations,* 1994.

subsidies are prohibited, actionable or non-actionable.[160] While subsidies normally used in developed countries (research and development, regional development and adaptation to environmental standards) are considered non-actionable, subsidies usually used by developing countries for development, diversification and upgradation of their industry are actionable.[161] There is thus an in-built imbalance in the Agreement on Subsidies and Countervailing Measures, which has to be removed by making the latter range of measures also non-actionable.

Article 27.2 of the Agreement provides a special dispensation for developing country Members to the effect that the prohibition of paragraphs 1(a) of Article 3 does not apply to developing country Members referred to in Annexure VII and to other developing countries for a period of 8 years. The subsidies that are maintainable under the provisions of Article 27 are however subject to countervailing measures in accordance with the provisions of Article VI of GATT 1994. The special dispensation and the resulting benefits from the provisions of Article 27 therefore stand negated by virtue of the provisions relating to countervailing measures. It is thus necessary that countervailing measures are not allowed to be used by developing country Members against subsidies maintained by developing country Members within the special dispensation provided under Article 27.

Several other provisions in the Agreement on Subsidies and Countervailing Measures need to be altered to take into account the interests of developing countries. These include the following:

- The de minimis level below which countervailing duties may not be imposed has been fixed at 3% for developing countries. Developing country industries however face many disadvantages in comparison with their counterparts in

[160] de Paiva M. A, "Trade in Manufacturers: the outcome of the Uruguay Round and the developing country interests" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries,* (Cambridge University Press, Cambridge, 1996.) p.69.

[161] The Subsidies Agreement defines actionable subsidies as subsidies that cause adverse effects on other countries. Non-actionable subsidies include subsidies for research, for developing disadvantaged regions, and for meeting environmental requirements.

developed countries. Low levels of infrastructure development and poorly developed formation networks characterize industry in developing and least developed countries. In order to offset these disadvantages encountered by developing and least developed countries, it is necessary that the de minimis level below which countervailing duties may not be imposed be scaled up to a realistic level.[162] In view of the liberalization of world trade and the fact that more and more developing countries are expanding their export markets, it may be necessary to review the justification of carrying on countervailing duty investigations even when the total volume of imports of the products from all developing countries are greater than 9%.[163]

India has suggested that countervailing duty investigations should not be initiated or if they are initiated, they should be terminated when imports from a developing country are less than 7% irrespective of the cumulative volume of imports of the like products from all developing countries.[164]

- Where the investigating authorities of a developed country Member come to the conclusion that the export prices contain an element of subsidy, the duties should nevertheless be restricted to the amount by which such subsidy exceeds the de minimis level.[165]

- In many developing countries, taxes can be collected by government authorities at different levels. Income tax, excise duties on production of goods and customs duties are charged and collected by the Central Government. There are also several other taxes collected by the municipal and other local authorities. Goods produced in the country suffer from a number of these taxes at various stages of production. The main contention is that even though the GATT Agreement permits neutralization of all taxes, several taxes remain un-neutralized in many

[162] WT/GC/W/108, p.5.
[163] Ibid.
[164] WT/GC/W/108, p.6.
[165] Ibid.

developing countries because of the plethora of taxes and the multiplicity of collecting agencies. Developed countries overcome this problem by using the Value Added Tax system (VAT).[166] The introduction of VAT in developing countries will however take time in view of its complexities and the cost involved. Developing countries should therefore be allowed to neutralize the cost escalating effect of such taxes by means of a partial or full remission of direct taxes.

5.8 AGREEMENT ON TRADE RELATED INVESTMENT MEASURES (TRIMS).

The Agreement on Trade Related Investment Measures (TRIMS) poses an entirely different set of problems, which relate to both the transition periods allowed for removing TRIMS as well as the notification for availing transition provisions. The transition period allowed for existing TRIMS is five years for developing countries and seven years for least developed countries. This period lapses automatically but will be extended for developing and least developed countries if they encounter difficulty[167] must be agreed to in the Council for Trade in Goods.

Developing countries should have the freedom to use regulatory measures to channel investment in such a manner that it leads to increase in exports. Local content regulations, as an instrument of policy, can perform two critically important functions in developing countries. They can further the process of industrialization in these countries by creating linkages within their economies and can help in the conservation of foreign exchange by means of the progressive substitution of imported sources of inputs by domestic supplies.[168]

The need to impose local content regulations in developing countries has been felt by developing countries especially in the area of foreign investments. If foreign investment takes place in one industry, it should be able to encourage domestic investment by creating demand in other countries. The importance of such a mechanism can be seen

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[166] WT/GC/W/108, p.7.
[167] Low P and A. Subramanian, "Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries,* (Cambridge University Press, Cambridge, 1996.) pp. 380-408.
[168] WT/GC/W/108, p.8.

from the fact that once foreign investment has been attracted, it should be expected to lead to an economic effect that brings about a higher level of domestic sales.[169]

The balance of payments implications of industrialization without local content regulations can also be serious for a developing country. The existence of import dependent industries can lead to an increasing burden of external liabilities, which may eventually undermine the very process of industrialization. The increasing imbalances on the payments front can, at least, in theory, be met by depreciation of the foreign currency. This would however inevitably lead to increase in input costs resulting in domestic firms becoming globally uncompetitive. With their fragile export production bases, developing countries would run the risk of encountering repeated and severe balance of payments crises, which would set back for many years their process of growth.[170]

Since the implementation of the TRIMS Agreement is coming in the way of industrialization and balance of payments of developing countries, it is necessary to review the relevant provisions of the TRIMS Agreement with the objective of not impeding industrialization of developing countries.

5.9 THE ENABLING CLAUSE.

The question arises as to 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 1 of GATT 1994 to confer preferences on developing countries,[171] it does not contain any language, which suggests that it is mandatory. In fact, the absence of any binding legal language has been seized upon by some developed countries to unilaterally graduate certain developing countries from their GSP schemes. In the same vain, it can be argued that, while the Enabling Clause envisages the formation of global trading arrangements among developing countries, it does not compel them to create such arrangements.

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[169] Ibid.
[170] Ibid at p.9.
[171] See GATT. 1979. *BISD,* 16th Suppl., 1980, p.203.

5.10 AGREEMENT ON TEXTILES[172] AND CLOTHING.

With regard to the implementation of the Agreement on Textiles and Clothing,[173] several developing countries have stated that, while implementation by the major importing countries may have been consistent with the letter of the Agreement, it has not led to commercially meaningful liberalization because of the "backloading" of integration by these players, and because quotas have been removed to account for an insignificant share of restrained imports.[174] There are also concerns that burdensome administrative and customs procedures, changes to rules of origin and frequent use of safeguard measures are adversely affecting exports of textiles and clothing products from developing countries.[175]

Article 1.4 of the Agreement states that "members agree that the particular interests of cotton-producing exporting members should, in consultation with them, be reflected in the implementation of the provisions of this Agreement". It has however been stated that Members maintaining restraints have not allowed special concessions to cotton-producing, exporting countries which would have been in conformity with the letter and spirit of the Agreement.[176]

Article 6.6 (b) provides that "Members whose total volume of textile and clothing exports is small in comparison with the total volume of exports of other Members and who account for only a small percentage of total imports of that product into the importing Member, shall be accorded differential and more favourable treatment in the fixing of the economic terms provided in Articles 6.8, 6.13 and 6.14. For those suppliers, due account will be taken, pursuant to Article 1.2 and 1.3, of the future possibilities for the development of their trade and the need to allow commercial quantities of imports from them."

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[172] See for example Sanjoy Bagchi, The integration of the textile trade into GATT, *JWT,* 28:6 (Dec.1994); Hamilton C.B. (ed), *Textiles Trade and the Developing Countries: Eliminating the Multi-Fiber Arrangement in the 1990's,* Washington, DC: World Bank, 1990, pp. 238-262.
[173] See GATT, *The Results of the Uruguay Round of Trade Negotiations,* 1994.
[174] High Level Symposium on Trade and Development, 1999. p.25.
[175] Ibid at p.25.
[176] G/L/224, paragraph 52.

Concern has however been expressed that in the application of safeguard measures by a Member, involving Members considered to be small suppliers, account had not been taken of the specific requirement in Article 6.6(b) to provide differential and more favourable treatment.[177]

5.11 AGREEMENT ON AGRICULTURE.[178]

Developing countries have raised the adverse effects of tariff escalation and tariff peaks both in relation to agricultural products[179] and industrial goods.

As far as agriculture is concerned, the high (and often specific-rate) tariffs resulting from the "tariffication" of previous quotas and other non-tariff measures and some practices used for administering of lower-duty tariff rate quotas by developed countries are seen as significant impediments to market access for exporting developing countries. At the same time, the persistence of subsidies on major agricultural exports from developed countries – along with the "roll-over" of unused export subsidies and domestic support to agricultural production is perceived as attenuating the market access gains achieved by the Agreement on Agriculture. On the other hand, net food-importing developing countries have pointed to difficulties arising from a fall in recent years in levels of food aid.[180]

In agriculture, improved market access and reduced competition from richer countries' subsidies are crucial for most developing countries both to develop their present structure of trade and, to diversify into products with potential for new development. Increased production possibilities in agriculture will also help to resolve the problems of rural poverty, which assail so many developing countries. Increased trade possibilities in

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[177] G/L/224, paragraph 44.
[178] See GATT, The *Results of the Uruguay Round of Trade Negotiations*, 1994.
[179] See Avery W.P,, *World Agriculture and GATT,* Lynne Rienner Publishers, 1993; H. Guyomond et al., *Agriculture in the Uruguay Round: Ambitions and Realities*, Commission for the EC, 1993; Hathaway D.E, *Agriculture and the GATT*: Issues in a New Trade Round, Institute for International Economics, 1987; Rollo J.M.C, *Agriculture in the Uruguay Round: Foundations for Success*, Royal Institute of International Affairs, 1990.
[180] High Level Symposium on Trade and Development, 1999. p.25.

agriculture is one sure way to promote development, which will benefit particularly the rural poor in the poorest countries throughout the world.

5.12 AGREEMENT ON SAFEGUARDS.

Article 9.1 of the Agreement on Safeguards provides that:

> "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 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of the total imports of the product concerned."

Footnote 2 states that a Member shall immediately notify an action taken under Article 9.1 to the Committee on Safeguards.

In the Committee on Safeguards, three different concerns have been raised with respect to Article 9.1.[181] Opposition was voiced over the manner in which one Member had applied Article 9.1 of the Safeguards Agreement to exclude one developing country Member from eligibility under Article 9 on the grounds that that Member was not included in the preference-giving Members' list of GSP beneficiaries.

Concern was also raised over a decision by one developing country Member not to exclude another developing country Member from application of a safeguard measure, even though that developing country Member was the only developing country exporter of the product, which individually did not exceed the 3% share of imports.[182]

In addition, there have been requests for details regarding two developing country Members' application of Article 9.1's requirement to exclude from application of a measure, imports from developing countries with small import shares.[183]

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[181] G/SG/M/9.
[182] G/SG/M/12.
[183] G/SG/M/13.

5.13 ARTICLE XXXVII OF GATT.

Article XXXVIII of GATT provides that:

> "[t] he developed...[Members] *shall to the fullest extent possible*...accord high priority to the reduction and elimination of barriers to trade 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 the draftspersons wanted the obligation to be mandatory, they would have dispensed with the words "to the fullest extent possible".

This interpretation is supported by the *Vienna Convention on the Law of Treaties, which* provides that:

> "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."[184]

In the *United States – Standards for Reformulated and Conventional Gasoline*, the WTO Appellate Body held that the general rule of the interpretation as codified in the Vienna Convention had attained the status of a rule of customary or general international law and as such, was the standard to be used by it and panels clarifying the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the WTO.[185]

5.14 TRANSITIONAL TIME PERIODS PROVISIONS.

Transitional time periods are intended to facilitate the implementation of WTO Agreements by developing countries. It has been claimed however that the transitional

[184] See Article 31(1) of the Vienna Convention.
[185] WT/DS2/AB/R, adopted on 20 May 1996 by the Dispute Settlement Body, 1996:1 at p.16.

periods do not always give sufficient time to deal with specific shortfalls in capacity that are faced by individual Members, or with their precise development needs.

Many developing countries and least developed countries have experienced difficulties in implementing WTO Agreements on safeguards, subsidies and countervailing measures, Anti-Dumping, Technical Barriers to Trade, Sanitary and Phytosanitary Measures and TRIPS.[186] Developing countries who face fiscal constraints often have few resources that can be used in the areas of public administration responsible for overseeing and coordinating the implementation of WTO Agreements, which are costly.[187] The World Bank for instance has argued that the long-term cost of adopting an Agreement like that on customs valuation, may for a small least developed country be as high as its one-year's development expenditure.[188]

It was intended that these difficulties be overcome through technical assistance and longer transition periods. Transition time periods have however been negotiated without much involvement of developing country officials who were familiar with how long it takes to build institutional capacity where it was inadequate or totally lacking. There is thus a need for a very careful look at these transition periods in all the areas in which they have been extended on the grounds of institutional weakness.[189]

Developed countries have indicated their willingness to consider waivers but on a case-by case basis.[190] On the face of it, there should be no objections to this. However, if each developing country were to have its case heard individually, proceedings of the WTO would be tied up for months. At the same time, blanket extensions for all developing countries including the most advanced, which may not need them, would appear inappropriate. It is thus evident that a different approach is needed where not all

[186] Michalopoulos, 2000, p.30.
[187] Finger, M.J. and P. Schuler, "The Implementation of Uruguay Round Commitments: The Development Challenge" Policy Research Working Paper # 2000+, World Bank, Washington DC.
[188] World Bank 199b. World Development Indicators. Washington DC.
[189] Michalopoulos, 2000, p.30.
[190] Ibid.

developing countries are treated the same and which at the same time does not bombard the whole organization with work.

5.15 THE ENFORCMENT PERSPECTIVE.

Implementation of the WTO Code may be secured by mechanisms such as the dispute settlement procedures; review procedures, particularly the Trade Policy Review Mechanism (TPRM); and certain WTO authorized "self-help" measures. The WTO enforcement mechanisms are however reliant on individual members policing their rights rather than any external enforcement institution.[191]

The relationship between developing countries and these internal enforcement mechanisms is influenced by a number of things, most notably the availability of resources with regard to information and expertise, the trade-related institutional structure, and the interaction of the rest of the domestic economic structure with international trade-related issues.

Thus, in the first instance, developing countries need to have the necessary resources and set-up to facilitate the collection and analysis of information. The increased frequency and depth of financial crises in recent years - with close to a hundred countries suffering through such crises over the past quarter century[192] - has shown how hard it is to establish strong financial institutions, even in developed countries. The WTO incorporates not only dozens of specific agreements but thousands of pages of rules and regulations, trade and tariff undertakings going back fifty years to the beginning of GATT. The immediate difficulty facing new member countries, with limited technical and legal capacities, is the formal implementation of their various obligations as contracting parties. This for example entails bringing various sections of their national legislation into conformity with WTO requirements, together with a host of other legal and institutional measures.

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[191] In general, all international legal arrangements are thought to be weak compared to domestic law. International policing and prosecution are difficult, the coverage of international laws is usually limited and the penalties that can be invoked are relatively minor. See Whalley J, "Developing Countries and System Strengthening in the Uruguay Round" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries*, (Cambridge University Press, Cambridge, 1996)

[192] See World Bank 1999. *World Development Report 1999/2000*: Entering the 21st Century. Washington, DC: World Bank.

Many developing countries and especially least developed countries have been unable to carry out such implementation and duly notify the WTO of their compliances and submissions. Until this is done, they are not in a position to access and implement their rights under specific agreements, let alone S & D provisions.[193]

The nature of implementation has changed. The Uruguay Round has expanded the GATT/WTO agenda to issues on implementation that demands the construction of new things; not just policies, but the institutions that make them reality in the commercial world. Meeting obligations, say on phytosanitary standards requires more than a new draft law, it requires laboratories, equipment and trained experts. Implementation can be said to be a development project of design, purchase of equipment and the training of people. For developing countries, these commitments may involve a significant share of the development budget.[194]

The institutional framework of a country also has a bearing on international rule adherence, and on the efficacy of enforcement mechanisms. Many developing countries however have "defective" or flawed institutional structures for the formulation of trade policy – although such flaws are not necessarily specific to developing country Members only.[195]

Furthermore it should be noted that there is a relationship between the revenue attributes of trade-related taxes, and the capacity of developing countries to raise revenue from non-trade-related taxes – particularly direct taxes. A number of developing countries rely to a large extent on revenue from trade-related taxes for example Egypt,[196] Morocco,[197] Thailand,[198] and Columbia.[199] Such dependence can amount to as much as 40% of total

[193] Keet, "Globalisation, The World Trade Organization and the Implications for Developing Countries." LDD (UWC) 1999.
[194] Finger M.J, "Implementing Uruguay Round Commitments: Making it Part of Development." WTO Capacity Building Project – World Bank Work; May 1999. p.1.
[195] Finger J. Michael, p.2.
[196] GATT, *Trade Policy Review – Egypt*, at p.64.
[197] GATT, *Trade Policy Review – Morocco*, at p.107.
[198] GATT, *Trade Policy Review – Thailand*, at p.6.
[199] GATT, *Trade Policy Review – Columbia*, at p.5.

government tax revenue.[200] This is important to bear in mind in any endeavor to reduce tariffs.

It can therefore be seen that enforcement problems (most of which are resource-related) are common to developing countries. It also does not help that most of the provisions in the different enforcement mechanisms, most notably the DSU, are hortatory. A solution often suggested and which I agree with, is to make the obligations, which the S & D provisions impose, more binding by using the word "shall" instead of the present words, which require countries on whom the obligation is imposed to only make "best endeavors".

5.16 SUMMARY OF DEVELOPING COUNTRY CONCERNS.

This analysis indicates that the WTO obligations reflect little awareness of development problems and little appreciation of the capacities of the least developed countries to carry out the functions that the various Agreements address. Due to the limited capacity of developing and least developed countries to participate in the Uruguay Round negotiations, it can therefore be said that the WTO process has generated no sense of "ownership" of the reforms to which the WTO Membership obligates them.[201]

From the perspective of developing countries, the implementation exercise has instead been imposed in an imperial way, showing little concern for whether it will support their development efforts, what it will cost and how it will be done. At the end of the day, "The promise of the Uruguay Round agreement really lies in the future it makes possible."[202] The S & D provisions as they stand in the various WTO Agreements are not providing any benefit or relief or value to the developing countries. If this was the intention, then the S & D provisions should be deleted. By simply having these provisions without any operational significance or legal enforceability, the impression is

[200] See for example GATT, *Trade Policy Review – Bangladesh* at pp. 25 and 237.
[201] Finger M.J. and P. Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge", Policy Research Working Paper # 2000+, World Bank, Washington DC. p.1.
[202] Hathaway D.E and M.D. Ingco "Agricultural Liberalisation and the Uruguay Round" in W. Martin and A. Winters Eds. *The Uruguay Round and the Developing Countries*, (Cambridge University Press, Cambridge, 1996.) p.58.

being created that some benefit is being derived by developing countries. The existing S & D provisions should therefore either be made operational or they should be deleted.

6. CONCLUSIONS AND PRIORITIES FOR THE FUTURE.

Based on the above analysis of S & D treatment in the various WTO Agreements, it is evident that there is a need for a reorientation of priorities by both developed and developing country Members of the WTO.

Greater emphasis should be placed on instruments to strengthen developing country institutional capacity because the main differences between developed and developing countries are not in the trade policies they pursue but in the capacities of their institutions to pursue them. Thus, S & D provisions relating to technical and financial assistance as well as longer transition periods must be emphasized.

There must also be a sharper differentiation of developing countries because there are many problems of institutional capacity which are common to least developed countries and other low income developing countries, but which are not faced by more advanced developing countries. Without a sharper definition of which countries should be eligible for S & D, developed countries will continue to make commitments to developing countries in general which are not concrete, or rely on their own criteria to determine which countries will benefit from more favourable treatment. When it comes to financial flows, developing countries are treated substantially different.[203] The argument is therefore that the same principle should apply to trade.[204]

As stated by the Director-General of the WTO, Mike Moore, "No sane person could say with complacency 'I'm OK but your end of the boat is sinking.' In terms of human

[203] As far as the World Bank is concerned, some developing countries are only eligible for loans on hard terms, others for soft loans and some developing countries get no assistance at all.
[204] See Michalopoulos, 2000.

development, of human values, of security and of peace, we are all in the same boat. We must set sail together."[205]

The developed countries and the more advanced developing countries have a stake in the future economic performance of the lower-income developing countries. It is therefore in their interest to open wider their markets for goods and services that the developing countries export or could export in the future. It is also in their interest to provide generous assistance to help developing countries overcome domestic supply constraints and to participate more fully in the WTO activities. Ultimately, if low-income countries gain, everyone gains.

[205] Keynote address by Mike Moore, Director-General of the WTO, "Back on track for Trade and Development" UNCTAD X, Bangkok, 16 February 2000.

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