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]

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[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

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[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;

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[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.