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WTO Reform:

Issues in Special and Differential Treatment (S&DT)

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Abstract

This paper evaluates the special and differential treatment provisions in the WTO Agreement and examines whether there is truth in the averment made by certain developed countries that special and differential treatment (S&DT) provisions have made the WTO framework of rules and disciplines asymmetrical. It comes to the conclusion that for the most part, the S&DT provisions in the WTO Agreement provide only minor to very minor benefits to developing countries and sometimes no benefits at all. The rule of less than full reciprocity in tariff negotiations did no doubt provide meaningful benefits in the past but, in the WTO era, the developed countries have sharply escalated the demand for reciprocity and the value of this provision stands very much diminished. In agriculture, although major benefits are provided to developing countries by way of S&DT, these were more than counterbalanced by the more significant advantages provided to developed countries.

The paper also analyses the proposal of developed countries to end the current practice of self-declaration to determine the development status of a Member and to deny the benefit of S&DT to certain categories of advanced developing countries in future negotiations. It points out that when the S&DT was initially introduced in GATT 1947, the main concern was the low standard of living that prevailed among developing countries and argues that any change in the development status of a WTO Member should logically be on the basis of a rise in its standard of living.

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WTO Reform: Issues in Special and Differential Treatment (S&DT)[1]

Anwarul Hoda

1. Introduction

The multilateral trading system received a resounding endorsement from the major trading nations when they agreed in 1994 to establish the World Trade Organization (WTO). While approving the Marrakesh Agreement Establishing the World Trade Organization, the Parties had declared their determination 'to preserve the basic principles and to further the objectives underlying this multilateral trading system'. However, today, the system is in tatters. As Members look for ways to pull the organisation out of the mess, a number of issues for WTO reform have emerged. Failure to push forward with across-the-board liberalisation, the virtual collapse of the dispute settlement system, widespread non-adherence to transparency requirements and rising tensions on special and differential treatment of developing countries are some of the concerns engaging the attention of Members in the trade talks at Geneva.

The foremost of these issues is that twenty-six years have elapsed without a comprehensive multilateral agreement for the liberalisation of trade. The Doha Round has languished for more than 18 years. In a multipolar world, achieving consensus has become increasingly difficult in an organisation with a highly diversified membership in terms of levels of development and economic resources. It is time for the WTO Members to think hard about changes that they must bring about in the rules or the new approaches that they should explore to overcome or circumvent their disability to secure a major trade agreement.

In all these years, the WTO members had the satisfaction that the dispute settlement system was functioning reasonably well. However, on December 11, 2019, the Standing Appellate Body, designated to make final recommendations in each dispute became dysfunctional. As a result, the machinery envisaged in the Dispute Settlement Understanding (DSU) for resolving disputes in a quasi-judicial manner has been crippled. With the Appellate Body in abeyance, the WTO dispute settlement system is neither automatic nor binding. And this is another issue on which Members cannot afford to lose time in finding a solution.

Transparency is a fundamental obligation of the WTO Agreement: notification of critical aspects of trade policy is required from time to time to enable Members to monitor trade policy developments and maintain surveillance on the adherence of Members to their obligations. The high incidence of non-compliance has caused frustration among Members who are worried about the utility of negotiations for new agreements when a situation of non-compliance prevails in respect of existing agreements. The fact that many developing countries have been found wanting in compliance gives an edge to the issue.

[1] The label for special treatment of developing countries, used in the Decision of the Contracting Parties of 28 November 1979, was 'Differential and More Favourable Treatment'. The Punta Del Este Ministerial Declaration of 29 September 1986, that launched the Uruguay Round, used the same term. However, the usage evolved during the Uruguay Round negotiations, and in various multilateral agreements attached to the Marrakesh Agreement, the term used is 'Special and Differential Treatment'.

Special and differential treatment of developing countries (S&DT) was never an easy issue. However, with several developing countries registering impressive increases in their share of global merchandise trade, it has become even more difficult, and there is a backlash from the major developed countries. Some of them are asking the question whether it is the case that developing countries have been granted too many exemptions while rigorous trade policy disciplines have been applied to developed countries. They have even voiced the opinion that disagreement over S&DT is one of the reasons for the failure to clinch a deal in the Doha Round. In this paper, we focus on issues in S&DT that have been raised in the context of the current talks on WTO reform. What are the concerns of major developed economies and what changes do they seek for the future? What are the issues underlying the deep discord on the subject? Were differences on the issue the main cause of failure of the Doha Round negotiations? How did the idea of S&DT originate and evolve over time? Can the benefits of S&DT provisions be evaluated so that we can see clearly what is at stake? What concrete advantages do the provisions bring to the developing country Members of the WTO? Section 2 describes the origin and evolution of the idea of S&DT; Section 3 outlines the arguments that have been made on the issue in the debate on WTO reform; and Section 4, which undertakes an evaluation of the important S&DT provisions in the WTO Agreements, is the centrepiece of this paper. It is in light of this evaluation that we put forward suggestions for the way forward.

It needs to be mentioned here that developing countries have had their own concerns on the S&DT provisions. Many of these provisions are not cast in the mould of legally enforceable commitments but are hortatory in nature. As a matter of fact, at their instance, in 2001, the Doha Ministerial Declaration directed a review of all S&DT provisions 'with a view to strengthening them and making them more precise, effective and operational'. The ensuing discussions have led to 88 agreement-specific proposals, which are reflected in document JOB (03)68 circulated on April 7, 2003, by the Chairman of the General Council. A more recent proposal (Document (JOB/DEV/60, JOB/TNC/79) has been submitted on March 9, 2020, by the G-90 and discussions are still under way. These discussions are outside the scope of this paper, which is concerned with S&DT provisions as they exist now and not with proposals for their improvement.

2. Origin and evolution of the idea of S&DT of developing countries

S&DT of developing countries has been a central issue on the trade agenda for more than seven decades, although its content has been evolving. Affirmative action in trade rules in favour of developing countries first figured in the Review Session (1954-55), when the General Agreement on Tariffs and Trade (GATT 1947) was revised to give some room for manoeuvre in trade policies to developing countries and, in 1955, a new article, Article XVIII, titled Government Assistance to Economic Development, was added. Limited flexibility was accorded to them for taking measures that deviated from GATT obligations to promote the establishment of industry. In recognition of the structural nature of their balance of payments problems, the liability for developing contracting parties maintaining such

restrictions to hold consultations with the full membership was reduced from every year to once in two years.

At the Ministerial Session of the Contracting Parties[2] in 1957, there were expressions of renewed concern that developing countries were not benefiting equitably from the expansion of world trade that liberalisation had brought about. Attention turned from how much trade policy flexibility was needed by developing countries to what action was required to be taken by their developed country partners to assist them to expand their export earnings. At that time, the main export interest of developing countries was in primary products such as tropical products and simple manufactures, and they sought a reduction in and elimination of trade barriers on these products on a non-discriminatory basis. An expert panel, set up under the chairmanship of the renowned economist, Gottfried Haberler, also came to the conclusion that the rules and commercial policy practices were unfavourable to developing countries. As producers mainly of primary products, they were vulnerable to volatility in international commodity prices and adversely affected by high levels of agricultural protection as well as unconscionably high revenue duties in industrialised countries on products such as tea, coffee and tobacco. Intense deliberations on the findings and recommendations of the Haberler Report led to the addition of Part IV to the GATT in 1964, titled Trade and Development. Part IV, recognising the wide gap between standards of living in less developed countries and other countries, their dependence on exports of primary products and the need for diversification in their economies. The developed contracting parties made commitments on various measures to pull their less developed trading partners out of their predicament, including by providing market access to products of interest to these countries, in their primary as well as their processed forms. However, as we show later in the analysis in Section 4, most of the apparent assurances stop short of guaranteeing action on ameliorative steps for the benefit of developing countries. All contracting parties also undertook a commitment to collaborate jointly to provide improved conditions in world markets for primary products of interest to developing countries, including through international arrangements.

Part IV also introduced the notion that developed countries would not expect reciprocity from developing countries in negotiations to reduce or eliminate tariffs and other barriers to trade. It was explained in the addendum that this implied that, in the course of negotiations, developing countries should not be expected 'to make contributions that are inconsistent with their individual development, financial and trade needs'. These words carry the sense that although smaller contributions from developing countries could be acceptable, they could not be absolved altogether of the need to make concessions. In other words, there would not need to be full balancing of their concessions, in terms of trade coverage and depth of tariff reduction, as was the case in the negotiations among developed countries. That is how the concept of non-reciprocity evolved into one of less than full reciprocity and later, became one of the most important pillars of S&DT in the WTO framework.

[2] The term used in GATT 1947 for the full membership, or contracting parties acting jointly, is 'CONTRACTING PARTIES' but in this publication, we have used 'Contracting Parties'.

In the years that followed the addition of Part IV in GATT 1947, the momentum gathered for making further advances in the trade rules in favour of developing countries, and eventually led to an agreement on granting them preferential treatment. In 1968, the United Nations Conference on Trade and Development (UNCTAD) Resolution 21 (II) was adopted, approving the establishment of a 'system of generalized, non-reciprocal and non-discriminatory preferences', which enabled developed countries to introduce preferential tariffs on imports of merchandise from developing countries. The UNCTAD Resolution envisaged a deviation from the MFN clause, which was a fundamental principle of GATT 1947. Pursuant to the UNCTAD Resolution, a number of developed countries proceeded to establish schemes for tariff preference for developing countries under the Generalised System of Preferences (GSP). The mechanism of waiver was used in 1971 to achieve conformity with the MFN clause of GATT 1947 (GATT, Basic Instruments and Selected Documents, BISD 18/S).

Acceptance of the idea of preferential tariffs for developing countries was already a major advance in the evolution of the concept of S&DT. However, waiver was still needed if any new scheme granting preferential treatment to developing countries was to be introduced by developed countries, and developing countries pressed for further improvement in the rules. On November 28, 1979, following negotiations in the Tokyo Round, the decision was adopted by the Contracting Parties (the full membership of GATT 1947), with the full title of 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.' This decision established a permanent basis for preferential tariff treatment of developing countries, and dispensed with the need for waivers. Indeed, the enabling clause did more than just consolidate the legal position of preferential tariffs in the rules of GATT 1947. It broadened the application of S&DT in principle to non-tariff measures. Further, it provided developing countries with an alternative route to enter into economic integration arrangements among themselves without conforming to the rigorous conditions of Article XXIV of GATT 1994.

Two other significant features of the enabling clause need to be mentioned here. First, while it reaffirmed the concept of less than full reciprocity by developing countries in trade negotiations with developed countries, it also underlined the notion of graduation by emphasising that as they achieved progressive development, they would participate more fully in the framework of rights and obligations under the General Agreement. Secondly, it envisaged special treatment of least developed countries in the context of any general or specific measures in favour of developing countries.

During the Uruguay Round negotiations that led to the WTO Agreement, participants were guided by various elements of special treatment of developing countries agreed to during the GATT 1947 era. The Punta Del Este Ministerial Declaration that launched the negotiations specifically provided as follows:

'Contracting Parties agree that the principle of differential and more favourable treatment embodied in Part IV and other relevant provisions of the General Agreement and in the Decision of the Contracting Parties of 28 November 1979 on Differential and More

Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries applies to the negotiations.'

The WTO Agreement not only carried forward all the provisions of special treatment from GATT 1947 but also added some more in various multilateral agreements annexed to the Marrakesh Agreement. The negotiation of specific commitments on goods and services that formed part of the multilateral agreements on goods and services was also guided by the principle.

3. Special and Differential Treatment (S&DT) in the WTO Reform Debate[3]

S&DT has emerged as an area of fundamental divergence of opinion between the major developed and developing countries. No one is suggesting elimination of S&DT. What is being proposed, by the US in particular, is that there should be an end to the undifferentiated treatment of developing countries for the purpose of the special rules in the WTO Agreement. Actually, the question of diversity in the levels of development had arisen repeatedly in the GATT 1947 days but a decision on graduation of individual developing countries had proven politically difficult, and the issue was talked out informally. During the Tokyo Round, for the first time, it was agreed that the sub-category of least developed countries could be given special treatment within the category of developing countries. For other developing countries, the GATT membership chose to follow the path of least resistance and allowed the practice of self-declaration to continue to determine the development status of a country/territory.

With the remarkable economic development of more than a dozen developing economies and the phenomenal rise of China in recent decades, developed countries cannot live with the idea of self-declaration any longer. The US has raised the issue and pointed out, *inter alia*, the large gains in some developing countries in terms of per capita GNI and the Human Development Index (HDI), notable increases in exports of both goods and services in others including high technology exports, the substantial rise of both FDI inflows and outflows, which in one case even outstrips most OECD countries, and the rise in the share of agricultural value added of China and India and argued that it was no longer possible to accept the convention whereby a WTO Member that declares itself as a developing country is treated as one.

The US believes that not only is it inappropriate to treat developing countries as a monolithic group in the light of the significant economic growth and diversification in several such countries in recent decades, but also that this approach was the main cause of the collapse of the negotiations on the Doha Development Agenda. In its assessment of the S&DT provisions in the WTO Agreement, the US takes a somewhat extreme view:

'[A]ll the rules apply to a few (the developed countries) and just some of the rules to most, the self-declared developing countries'.

[3] Due to limitation of space, we are selective in presenting the arguments made by representatives in the ongoing debate on WTO reform

It goes on to assert that

'[T]the perpetuation of this construct has severely damaged the negotiating arm of the WTO by making every negotiation a negotiation about setting high standards for a few, and allowing vast flexibilities or exemptions for the many.'[4]

Later in the paper, we come back to this severe indictment of developing country Members, but here, we might mention briefly that our finding is that developing country Members are governed by the core obligations of the WTO Agreement as much as developed country Members, and a large majority of the S&DT provisions afford no more than fringe benefits to them.

The US has also put forward a definitive proposal[5] that four categories of WTO Members must be denied S&DT: members of the OECD or applicants for its membership; members of the G20; high-income country, as classified by the World Bank; and those that have a share of 0.5 per cent or more in global merchandise trade. The US has explicitly mentioned that its proposals are about current and future negotiations and are not intended to affect the functioning of existing provisions. However, in separate initiatives during the Trump administration, the USTR tried to persuade individual developing countries such as Brazil and South Korea to give up their developing status voluntarily.

The EU has not formally submitted a paper on the subject in the WTO but has supported restricting the scope of S&DT benefits to developing countries other than LDCs in future agreements. In an interim concept paper[6] that has been widely circulated, the EU has proposed that, in future, the idea should be for the core rights and obligations to apply to everyone, with only time bound exceptions being provided by way of S&DT. The EU is less strident than the US in not proposing the exclusion of any developing country from S&DT altogether in current and future negotiations. However, it is equally radical in envisaging only time-bound exceptions for individual developing countries in future negotiations. As for existing agreements, the EU explicitly proposes voluntary exit from SD&T, either horizontally or agreement by agreement.

India and China, supported by a number of other developing countries, have put forward the view[7] that even though many developing Members of the WTO have made significant economic progress in past decades, the standards of living in most developing Members are well below those prevailing in developed country Members. In addition, they draw attention to the large proportions of poor and undernourished populations residing in developing countries. In agriculture, they draw particular attention to the much higher levels of domestic support per farmer provided in developed country Members as compared to developing country Members, constituting a kind of S&DT in reverse in this sector.

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4 WTO Document WT/GC/W/757/Rev.1
5 WTO Document WT/GC/W/764
6 trade.ec.europa.eu/doclib /docs/2018/September /tradoc 157331.pdf__
7 WTO Document WT/GC/W/765/Rev.2

Developing countries make mainly an economic argument against differentiation among developing countries by pointing out the large continuing gap in the levels of per capita GDP between the major developed and developing countries. However, they also make a legal case for it, arguing that self-declaration to determine the development status was a long-standing practice in GATT 1947, and that Article XVI:1 of the Marrakesh Agreement provides that 'WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947'.

4. Evaluation of the S&DT provisions in the WTO Agreement

The debate on the S&DT issue in the WTO trade talks has risen to fever pitch at Geneva. For developed countries, the emphasis is on reducing the scope for S&DT provisions in current and future negotiations. They want no flexibility to be extended to developing countries over core principles in new agreements and, at best, can agree only to transitional arrangements. Further, they propose in future to deny S&DT altogether to the more advanced developing countries. Developing countries, on the other hand, want no change in the existing practices on S&DT, as carried forward from the GATT 1947 days, with the full range of flexibility on trade policy instruments available to them. Before we can come to a rational conclusion on the debate, it is necessary to evaluate the existing S&DT provisions and try to make an assessment of the advantage that developing countries have derived and the disadvantage that developed countries have had to put up with. Even though the main fight is over S&DT to be introduced in future agreements, a thorough analysis of extant provisions and their implementation can provide guidance on the future line of action that would be in the best interest of the community of nations. In this section, therefore, we undertake such an analysis.

In a background document,[8] the WTO Secretariat has classified the S&DT provisions in WTO Agreements and Decisions into six categories, viz., provisions that are aimed at increasing market access for products of export interest to developing contracting parties; those that envisage that Members should safeguard their trade interests; those that provide for flexibility in the use of trade policy instruments; transitional time-periods; technical assistance; and provisions on the least developed country (LDC) Members. The last three categories in this enumeration are uncontroversial. It is generally recognised that transitional time periods are useful and sometimes absolutely necessary to help developing Members to phase in new obligations. Further, technical assistance is provided ungrudgingly to LDCs and other Members with weak administrative infrastructure. There is also little dissent over the special provisions for LDCs. We, therefore, exclude these three categories from the agreement-wise evaluation that we undertake in the following paragraphs, and focus only on the first three.

[8] WTO Document WT/COMTD/W/219

4.1 General Agreement on Tariffs on Tariffs and Trade (GATT) 1994

4.1.1 Commitments for improving market access for products of export interest to developing countries

At the time that Part IV was added to GATT 1947, there was expectation that trade benefits would flow to developing countries from commitments embodied in Article XXXVII for developed country Members to improve market access for products of export interest to developing countries. However, from the outset, there was also some amount of scepticism about the sincerity of these commitments, as qualifications and conditions had been added to the language of the Article. For instance, for reducing market access barriers on products of interest to developing countries, developed countries are required merely to accord high priority, and that, too, 'to the fullest extent possible'. Further, for taking steps to encourage consumption of particular products or to introduce measures of trade promotion, developed countries are exhorted merely to give 'active consideration'.

The weak language used in Part IV to embody the commitments of developed countries has been derided by critics. However, for a full assessment of the commitments, we need to go beyond dwelling on the inadequacies of language of the relevant Article and look also at implementation. Here, it must be acknowledged that, developed countries did make considerable progress in the liberalisation of market access in one area, that is, tropical products, in both primary and processed forms, largely unilaterally but also during successive rounds of multilateral trade negotiations. It must be added that developed countries also went beyond their Part IV commitments in granting preferential access to developing countries in their schemes under the Generalised System of Preferences. There are no doubt shortcomings in the GSP schemes of the US and the EU from the perspective of beneficiary developing countries. In the US GSP scheme, limited product coverage and competitive needs limitations severely curtail the benefits. There is also an irksome requirement of reciprocity from beneficiaries. Similarly, the benefits of the EU GSP are diminished by the shallow cuts in tariffs for important products of export interest to developing countries, the practice of product/sector graduation, and the policy of differentiation among beneficiaries. However, despite all these limitations, the GSP schemes of the major developed countries make a small positive contribution towards expansion of market access of developing countries.

To give the complete picture, it must also be mentioned that, contrary to the spirit of Part IV, in the nineteen sixties and seventies, most developed countries applied discriminatory import restrictions against imports of light manufactures from developing countries. The Multi-Fibre Agreement (MFA) and the short-term and long-term arrangements before that, which envisaged comprehensive discriminatory restrictions on imports of textiles and clothing products from developing countries, remained in position for a long period from 1961 to 1994. Individual developing countries also suffered from the so-called voluntary export restraints (VERs) and orderly marketing arrangements (OMAs) on certain products in which they became internationally competitive. These restrictions shrank the package of benefits to developing countries from unilateral concessions granted by developed countries in the spirit of Part IV.

But times have changed. Twenty-six years into the WTO era, the reality that the spirit of Part IV has evaporated.

4.1.2 Less than full reciprocity in tariff negotiations between developing and developed countries

The most significant benefit in the existing rules as embodied in Article XXXVIII.8 of GATT 1994, and reiterated in the decision titled 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', also known as the Enabling Clause, is that in tariff negotiations with developed countries, full reciprocity is not expected of developing countries. Article XXVIII bis further recognises 'the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes'. We have seen in Section 2 that the concepts embodied in Article XXXVIII.8 and Article XXVIII bis of GATT 1947 and the enabling clause evolved into the idea that, in tariff negotiations between developed and developing country contracting parties, less than full reciprocity would be required from developing countries. Pursuant to these provisions, in the Kennedy and Tokyo rounds of negotiations, most developing countries made very limited contributions by way of reduction and elimination of tariffs, while developed countries made reductions across the board on the basis of the adopted formula. In the Uruguay Round also, a big disparity remained between them in undertaking tariff reductions. Developed countries agreed to reduce their general level of tariffs on non-agricultural products by one-third and also eliminated or harmonised their tariffs in a number of sectors, with substantial trade coverage. Developing countries were under no pressure to reduce non-agricultural tariffs to the same extent, although many of them offered a substantial reduction in tariffs[9] on a voluntary basis. Except for Korea, Singapore and Hong Kong (China), none was also called upon to participate in sectoral elimination or harmonisation of non-agricultural tariffs.

But it is important to underscore the fact that the position has changed in the WTO era. In the Doha Round, the demand for reciprocity from developing countries was steeply escalated. All Members, whether developing or developed, had to agree on the Swiss formula as the basis for tariff reductions. While developed countries seemed willing to concede the use of a higher coefficient by developing countries, they were insistent on the advanced developing country Members accepting the commitments of sectoral initiatives as well for the elimination of tariffs. Even without the sectoral agreements, developing countries were complaining that in terms of the traditional measure of reciprocity (depth of cut*trade coverage), many of the advanced developing countries would have had to deliver more rather than less than full reciprocity if the Chair's last proposal were accepted.

Although the idea of less than full reciprocity is well accepted, experience in the Doha Round has brought home the point that the rules do not provide the assurance that it would be translated into practice in future negotiations. At any rate, there is no stipulation on the

[9] Hoda, A. (2001), Tariff negotiations and renegotiations under the GATT and the WTO: Procedures and Practices. Geneva. CUP

margin of disparity in the contributions of developing and developed countries that should be compulsorily acceptable. The term, less than full reciprocity, is not definitive enough in these adversarial times. Nothing prevents developed countries from pushing the envelope further until the contributions they seek from developing countries are only marginally less than theirs. This element of S&DT, thus, is not of high value to developing countries any more.

4.1.3 Flexibility to use quantitative restrictions for balance of payment reasons

Article XI.1 of GATT 1994 bans all quantitative prohibitions and restrictions (QRs) on imports and exports. However, Article XVIII, Section B, permits developing country Members to use quantitative restrictions on imports to safeguard their external financial position, subject to certain limitations and qualifications that have been reinforced in the Tokyo Round Declaration on Trade Measures Taken for Balance of Payments Purposes, 1979, and the WTO Understanding on the Balance of Payments Provisions of GATT 1994. Article XII of GATT 1994 is a broadly similar provision that applies to Members other than developing country Members, but there is also an important difference in the content of the two articles. Article XVIII:B goes beyond Article XII and gives more space to allow a developing country Member to restrict imports in order to 'safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programmes of economic development.'

As a general rule, under both Articles XII and XVIII: B, Members must give preference to price-based measures for balance of payments purposes. When a Member chooses to apply QRs, it must provide justification as to why price-based instruments are not adequate to deal with the balance of payments situation. Further, QRs on imports may be applied for balance of payment purposes only to control the general level of imports, and not to restrict imports in specific sectors.

In the GATT 1947 days, Article XVIII: B was of great value as an S&DT provision as it facilitated the pursuit of import substitution policies. But the reality in the WTO era is that the wind has been blowing in developing countries in the direction of less or least distorting trade policy instruments. The current trend in the trade policy of developing country Members disfavours the adoption of QRs for balance of payments purposes. The last developing country Member to invoke Article XVIII: B was Ecuador in 2009[10] but, following consultations in the Committee on Balance of Payments Restrictions, it agreed to replace most of them with price-based measures and finally eliminated all balance of payments measures on July 23, 2010. In April 2015, Ecuador again introduced measures to deal with the deterioration in its balance of payments, but this time, the measures took the form of a temporary tariff surcharge. Quantitative restrictions are no longer a trade policy measure of choice in developing countries. The value of Article XVIII: B as an S&DT provision, therefore, has greatly diminished.

[10] WTO Document WT/BOP/N/65 dated February 18, 2009.

4.1.4 Special measures for promoting the establishment of industry

Section C of Article XVIII of GATT 1994 provides for procedures that a developing country may follow in order to take a measure that is not consistent with the provisions of GATT 1994, such as imposing a quantitative restriction on imports, for instance, required to promote the establishment of an industry. The Secretariat compilation of provisions on S&DT[11] mentions that this provision was invoked 14 times before the entry into force of the WTO Agreement and three times during the period 1995-2002. The account given of the three instances of the invocation of this provision after the entry into force of the WTO Agreement does not show that the developing countries concerned benefited significantly from the measures for which they sought clearance. As it is generally recognised that the use of quantitative restrictions for imports is highly distorting, Section C of Article XVIII has not been invoked in the last 18 years and seems destined to fade into disuse in future.

4.2 Agreement on Agriculture

In the Agreement on Agriculture, there are a number of S&DT provisions that were designed to deliver significant benefits to developing country Members. The modalities agreed among participants for making reduction commitments in the three pillars of agricultural support (market access, domestic support and export competition) also reflected S&DT. To avoid a situation in which our analysis of the complex provisions of the Agreement becomes disproportionately long, we limit ourselves to the key S&DT provisions.

In market access, the big achievement in the WTO Agreement is that all pre-existing non-tariff barriers have had to be converted into tariffs by developing and developed country Members alike. Developing countries were given the flexibility of offering ceiling bindings with respect to products in which tariffs had not been bound earlier. In cases in which tariff commitments had been undertaken earlier, they were required to reduce bound tariffs by a simple average of 24 per cent (subject to minimum reduction of 10 per cent for each tariff line) against the generally applicable rate of reduction by a simple average of 36 per cent (subject to a minimum reduction of 36 per cent).

Since the base period agreed was 1986-88, when world commodity prices were at the lowest in the decade, it was to be expected that the process of tariffication in developed countries would result in very high tariffs. But the flexibility provided in the modalities in the choice of databases enabled them to overstate the tariff equivalents of non-tariff barriers, and pitch their tariff at even higher levels, so much so that they remained high even after the application of the Uruguay Round cuts. In the statement at Annexure, we provide a comparison of the levels of bound and applied tariffs (2020) in five advanced developing country Members and four major developed country Members. We give both the average and maximum levels of bound and applied tariffs in five important agricultural products, viz., animal products; dairy products; cereal and cereal products; oilseeds, fats and oils; and sugar and confectionary. While there are variations, it is possible to posit that, overall, tariffs in developed countries

[11] WTO Doc. WT/COMTD/W/219

are higher, and sometimes much higher, than those in developing countries. It must be acknowledged here that India is an outlier among developing countries, with much higher agricultural tariffs, both bound and applied. It is also necessary to add the caveat that agricultural tariffs in the US are somewhat lower than those in other developed countries.

In domestic support, Article 6.2 of the Agreement on Agriculture provides S&DT to developing countries Members through exemptions from reduction commitments for generally available investment subsidies and for agricultural input subsidies for low-income or resource-poor farmers. Article 6.4 provides another element of S&DT for domestic support by way of the higher de minimis level of 10 per cent against 5 per cent for developed country Members. Members are not required to include de minimis amounts in the calculation of Current Total Aggregate Measurement of Support (AMS), nor required to reduce such amounts.

The above exemptions from reduction commitments in domestic support, particularly the Article 6.2 exemptions for investment and agricultural input subsidies, no doubt provide very meaningful S&DT benefits. However, for a fair view on the issue, we need to take into consideration the benefits that other provisions provide effectively only to developed countries. Article 6.5 envisages exemption from reduction commitments for direct payments under production-limiting programmes, also referred to as the Blue Box. This exemption, although not limited in its applicability to any group of Members, addresses developed country practices only, so that only those Members stand to gain advantage from it. Similarly, Annex 2 of the Agreement on Agriculture (Green Box) envisages exemption for fully decoupled income-support programmes, as it was assumed in the Uruguay Round that the practice had no, or at most minimal, trade-distorting effect or effects on production. Since then, studies have shown that large direct payments, even if decoupled, do have a pronounced effect on production. Developing country benefits from the exemption for investment subsidies and agricultural input subsidies are relatively smaller in comparison with the developed country benefits from exemptions for direct payments and decoupled income support. At the same time, they encounter insensitivity in the Committee on Agriculture during the review of domestic support commitments relating to market price support programmes. The problem arises when on account of inflation the current product-specific AMS level overshoots the committed AMS level. Article 18.4 provides for Members to 'give due consideration to the excessive rates of inflation on the ability of any Member to abide by its domestic support commitments.' However, during the review process this provision is virtually ignored in practice[12]. In market access, the S&DT benefit has been neutralised in the process of implementation of the agreed modalities. In domestic support, the S&DT benefits are wiped out by the application of other provisions that deliver greater benefits to developed countries. On the whole, the Agreement on Agriculture seems to have resulted in tilting the balance of favourable treatment towards developed countries.

[12] For a detailed account see "Public Stockholdings Issue in the WTO- the Way Forward for India", ICRIER Policy Series No. 17, November 2017. This paper draws on the summary reports on the Review Process in the Committee on Agriculture (G/AG/R/23 for Turkey; G/AG/R/41 and G/AG/R/50 for Tunisia; G/AG/R/45 for Iceland is also relevant)

The narrative on S&DT in agriculture cannot be complete without referring to the third pillar of export competition. Article 9.4 of the Agreement on Agriculture gave a big advantage to developing countries by exempting them from making reduction commitments in respect of subsidies to reduce the costs of marketing exports of agricultural products and subsidies on internal transport and freight charges on export shipments. However, at the Nairobi Ministerial Meeting in 2015, a decision was taken to phase out S&DT provisions on export subsidy in agriculture altogether, with effect from 2023 for developing country Members and from 2030 for LDC Members.

The relative ease with which an agreement was reached on uniform rules on export competition should make us ponder whether the approach is feasible also for the two other pillars of agriculture. The eventual aim should be to develop uniform rules in market access and domestic support applicable to agriculture in developing and developed countries alike. The only S&DT provision on which there is agreement already is for a special safeguard mechanism (SSM) for developing countries.

This is the right place to deal with the charge brought up by the US that disagreements on S&DT was the main reason for failure of the talks in the Doha Development Agenda. While it is true that lack of agreement on the design of the SSM proved to be the trigger for the talks being called off during the July 2006 mini-Ministerial at Geneva, it is also true that there were many areas of conflict among participants that had remained unresolved at the time the talks were called off. Agriculture received priority attention as it was the most important issue and the turn of other issues was yet to come. Even in agriculture, as the Chairman recalled in his 2011report, there were as many as six unresolved pending tariff issues, viz., sensitive products, tariff cap, tariff quota creation, tariff simplification, special products and the SSM. Only two of these were S&DT issues. Subsequent developments resulting in the Appellate Body of the WTO being put in abeyance because of US action point to the possibility that anti-dumping could have frustrated efforts to conclude the Doha Round even if agriculture had been resolved. And the unresolved issue in anti-dumping had nothing to do with S&DT.

4.3 Agreement on Application of Sanitary and Phytosanitary Measures

Articles 10.1 of the SPS Agreement mandates Members to "take into account" the special needs of developing countries in the preparation and application of SPS measures. There appears to be an inherent difficulty in implementing this provision. When authorities in Members prepare or apply SPS measures, their primary objective is the protection of the life and health of their own consumers, and the interests of producers or exporters in the territories of other Members , including developing country Members, are not on their horizon. Take for instance, the EU's decision in 2020, to adopt more restrictive levels of maximum residue levels (MRLs) for plant protection chemicals for food and agricultural products. This action flowed from adoption of the policy in the EU to reduce the use of chemicals as agricultural inputs, which itself had resulted from their decision to make agricultural operations climate neutral by the year 2050. Thirty-three developing countries appealed to the EU to suspend for a 12-month period all processes for the reduction of MRLs,

as the measures could exacerbate the hardship caused in these countries by the pandemic (G/SPS/GEN/1778/Rev.2 G/TBT/GEN/296/Rev.2). The EU's response was as follows:

"When steps are taken to protect consumers' life and health, derogations are highly unlikely. We cannot compromise on consumers' health even under the worst-case scenario (G/SPS/GEN/1814/Rev.2; G/TBT/GEN/315)".

Attempts made in the SPS Committee to give greater specificity to Article 10.1 have not succeeded as can be seen in the July 2006 Report of the Chairman to the General Council on Special and Differential Treatment (G/SPS/41).

The S&DT envisaged in Article 10.1 of the SPS Agreement is of very little avail.

4.4 Agreement on Technical Barriers to Trade

While Article 12 of the Agreement on Technical Barriers to Trade (TBT Agreement) deals with several aspects of S&DT, Article 12.3 is perhaps the central provision. This Article is similar to Article 10.1 of the SPS Agreement, enjoining Members to "take account of the special development, financial and trade needs of developing country Members" in the preparation and application of technical regulations, standards and conformity assessment procedures. The question that arises in this context is whether in the implementation process, Members have been able to give concrete shape to the obligation embodied in Article 12.3. In meetings of the TBT Committee, Members have on many occasions sought information on precisely this aspect – how Members have taken S&D provisions into account in the preparation of technical regulations and conformity assessment procedures. The matter was discussed at the Fourth, Sixth and Seventh Triennial Reviews of the TBT Agreement but the only Committee recommendation of any relevance that emerged (at the Third Triennial Review) was to "encourage" developed country Members to provide more than 60 days to developing country Members to comment on notifications (G/TBT/13, paragraph 26).

In this context, reference has also been made to the benefits gained by developing country Members from the use of Supplier's Declaration of Conformity (SDoC) in importing countries. No doubt, the idea of SDoC was shaped by the general consideration that its use would reduce the cost of conformity assessment procedures and not by the objective of giving special benefits to developing countries. There can be little doubt, however, that the use of SDoCs in importing countries benefits exporters, including those from developing country Members. It, therefore, can be argued that in introducing SDoCs, the interests of developing country Members have been taken into account.

Pursuant to Article 12.3 of the TBT Agreement, some very minor benefits have been extended to developing countries.

4.5 Agreement on Trade-Related Investment Measures

The Agreement on Trade-Related Investment Measures (TRIMs) specifically prohibits the imposition of domestic content or trade balancing requirement on investors in manufacturing

enterprises. Domestic content requirements are inconsistent with the national treatment obligation under Article III.4 of GATT 1994 and trade balancing requirements infringe the commitment in Article XI.1 that generally bans all quantitative prohibitions and restrictions (QRs) on imports and exports.

Article 4 of the TRIMs Agreement allows developing country Members to use TRIMs as a temporary measure in situations in which they are permitted by Section B of Article XVIII and related WTO instruments to adopt QRs on imports for balance of payments reasons. Ordinarily, this S&DT provision would seem to be of great interest to developing countries, as not many years ago, both domestic content and trade balancing requirements were favourite policy instruments in some countries to foster industrial development. The local content requirement in Indonesia's National Car Programme figured in the WTO dispute raised by Japan and others (WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R). Similarly, India's Public Notice No.60 that figured in the dispute raised by the European Communities and the United States (WT/DS146/R; WT/DS175/R) included requirements for indigenisation and trade balancing.

But times have changed. As we have seen above, quantitative restrictions are no longer a trade policy measure of choice in developing countries. The use of domestic content requirement as a tool of industrialisation is also not in vogue any longer. As a result, the value of Article 4 of the TRIMs Agreement as an S&DT provision has also diminished.

4.6 Agreement on Implementation of Article VI of GATT 1994

Article 15 of the WTO Anti-dumping Agreement seeks to give S&DT to products that might be affected by anti-dumping measures imposed by developed countries. For evaluating the benefit that developing countries stand to gain from this provision, it is necessary to quote it in its entirety at the outset.

'It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this 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.'

It would be no exaggeration to say that the language of the above provision is somewhat like the language of Part IV of GATT 1994, with a great deal of verbiage devoid of operational content. In WTO disputes, the only meaningful thing that the panels have been able to do is to identify that imposition of lesser duty and adoption of price undertakings would constitute constructive remedies. Beyond that, the panel reports have only repeatedly exposed the vacuous nature of Article 15 of the WTO Anti-Dumping Agreement.

In EC-Bedlinen (DS141), the Panel observed as follows:

"Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an

obligation to actively consider, with an open mind, the possibility of such a remedy, prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country." (Paragraph 6.233)

The panels in US-Steel Plates (DS206) and EC-Tube or Pipe Fittings (DS219) reached the same conclusion and referred, in particular, to the view expressed by the panel in the paragraph mentioned above in EC-Bedlinen (DS241).

If there is no obligation to implement the remedy that is identified or offered, of what avail is the obligation to "actively consider, with an open mind, the possibility of such a remedy"?

Insufficiency in operational terms of Article 15 of the Anti-dumping Agreement has been acknowledged implicitly at the level of WTO Ministers and, at the Doha Ministerial Conference, they observed that "while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision." [13]

Article 15 of the Anti-dumping Agreement has no value as an S&DT provision.

4.7 Agreement on Import Licensing Measures

The Agreement on Import Licensing Procedures aims to ensure that import licensing introduced by any Member to implement quantitative restrictions or other measures permitted by GATT 1994 do not have additional restrictive effects. There are some specific provisions in the Agreement aimed at achieving this general objective. Two of these specific provisions are as follows:

(i) Article 3.5 (a) (iv): Members have an obligation to provide import statistics of the products under licensing when requested by another Member having a trade interest in the product.

(ii) Article 3.5(j): When licences have not been fully utilised, licensing authorities must consider a reasonable distribution of licences to new importers.

Each of the above two provisions also contain an element of S&DT. For providing import statistics pursuant to Article 3.5 (a) (iv), developing country Members are not expected to take additional administrative or financial burden. When considering new importers for distribution of licences under Article 3.5 (j), Members are exhorted to give special consideration to importers that source import products from developing countries.

To what extent do these S&DT provisions really provide benefits to developing countries?

[13] WT/MIN (MIN (01)/17, 20 November, 2001, paragraph 7.2

The language of Article 3.5 (a) (iv) could be interpreted to mean that if, in the opinion of the concerned developing country Member, providing import statistics would be administratively or financially burdensome, it could refuse to comply with the request. The Secretariat document WT/COMTD/W/219 on Page 56 provides the information that in committee meetings, Members have requested import licencing related statistics but no developing country Member has ever invoked this provision or refused to comply with the request. The S&DT benefit is perhaps not significant enough for developing countries to really care.

As for S&DT in Article 3.5 (j), the question is whether the language used, that is, in allocating new licences '*special consideration should be given* (emphasis added) to those importers importing products originating in developing country Members' implies an obligation to actually grant new licences to importers that do business with developing countries. Going by the Panel report in EC-Bedlinen (DS141) to which we referred earlier in the context of evaluating Article 15 of the Anti-Dumping Agreement, giving consideration or even special consideration to importers importing goods produced in developing countries cannot be interpreted as constituting an obligation to actually grant new licences to such importers.

The S&DT provisions in the Agreement on Import License Procedures cannot be said to be of any value to developing countries.

4.8 Agreement on Implementation of Article VII of GATT 1994

S&DT provisions on customs valuation are somewhat of a technical nature and, in order to understand them, it is necessary to have background information on the nature of generally applicable obligations with respect to customs valuation in the WTO Agreement.

The WTO Agreement on Implementation of Article VII of GATT 1994, or the Customs Valuation Agreement requires Members to accept the transaction value of the imported goods as the customs value (Article1), except under defined circumstances such as when the buyer and seller are related. Where the valuation cannot be determined on the basis of the transaction value of the imported goods, the Agreement sets out in sequential order, alternative standards of transaction value of identical goods (Article 2), and transaction value of similar goods (Article 3) for the determination of the customs value. Each of these alternative standards is to be used if the previous one in the sequence cannot be applied.

In case the valuation cannot be determined on the basis of the three alternative standards described above, the customs value is to be based on the price at which the goods are sold in the domestic market in the condition as imported (Article 5). The same Article also provides that if the goods are not sold in the domestic market as imported, the customs value is to be based on the unit price at which the imported goods are sold after further processing. However, Article 5 expressly provides that this alternative of basing the customs value on the sale price of imported goods after further processing may be adopted only at the specific request of the importing entity.

If the customs value cannot be determined under Article 5, it should be based on a computed value (Article 6). Article 4 provides that the sequential order of application of Articles 5 and 6 may be reversed if the importing entity so requests.

The following are the two main S&DT provisions in the Agreement on Implementation of Article VII of GATT 1994:

1. Developing country Members have been given the right to make a reservation on Article 4 of the Agreement that gives an automatic right to importing entities to obtain a reversal of the order of application of Articles 5 and 6 of the Agreement.

2. Developing country Members have been given the right to make a reservation on Article 5.2, which provides for basing customs value on the unit price of imported goods after processing only at the specific request of the importing entity.

The WTO Agreement on Implementation of Article VII of GATT 1994 is based very substantially on the Tokyo Round Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, which was signed in April 1979. The S&DT provisions in the WTO Agreement are derived from the provisions in the Protocol to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, which was signed in November 1979.

According to information available in the latest annual review[14] of the Agreement, 53 developing country Members have made reservations on Article 4 and 51 have done so on Article 5.2. In the case of nine Members, the reservations have been carried forward[15] from the time they were signatories of the Tokyo Round Customs Valuation Code.

The implication of these reservations is that the customs authorities in the developing country Members concerned retain full control on decisions in cases in which the importing entity requests for either reversing the order of application of Articles 5 and 6 or for basing the customs value on the unit price of the imported goods after processing. In the developing country Members that have made the reservations under Article 4 or Article 5.2, requests made by the importing entity is only the starting point but the ultimate authority for allowing action in accordance with the requests rests with the customs authorities concerned.

Since large numbers of developing country Members have made these reservations and retained them for more than fifty years, we must assess the enabling S&DT provisions to be of some value. In terms of trade advantage though, they are of small value.

[14] WTO Document G/VAL/77 dated November 11, 2020.

[15] WTO Document WT/L/38 dated February 15, 1995, Decision of the General Council on Continued Application under the WTO Customs Valuation Agreement of Invocation of Provisions for Developing Countries for delayed Application and Reservations under the Customs Valuation Agreement 1979.

4.9 Agreement on Subsidies and Countervailing Measures

4.9.1 Exemption from prohibition on export subsidy in areas other than agriculture

A major S&DT provision in the Agreement on Subsidies and Countervailing Measures (ASCM) is that, under paragraph 2 (a) of Article 27, LDCs and twenty low-income country Members listed in Annex VII are exempt from the prohibition on export subsidies, until their GNP per capita reaches US$1,000. In 2000, a decision was taken in the General Council to add Honduras to this list as it was the only original Member of the WTO with the GNP per capita that was less than $1,000 that had been left out of Annex VII. At the 2001 Ministerial meeting at Doha, it was agreed that the exemption would continue to apply to the Members listed in Annex VII until their GNP per capita reaches US$1,000 in constant 1990 dollars for three consecutive years. The decision was also taken that the Secretariat would do calculations annually to show the position of each Member in terms of GNP per capita in constant 1990 dollars. Accordingly, the Secretariat has been making the calculations and notifying them in Document series G/SCM/110/Addendum every year. The latest calculations for the years 2017-19, available at Addendum 18, show that out of the initial list of 20 low-income Members in Annex VII, and Honduras that was added in 2000, 11 (Bolivia, Cameroon, Dominican Republic, Egypt, Guatemala, Guyana, India, Indonesia, Morocco, Philippines and Sri Lanka) have already graduated and only 10 (Congo, Cote d'Ivoire Ghana, Honduras, Kenya, Nicaragua, Nigeria, Pakistan, Senegal and Zimbabwe) remain eligible.

An Annex VII country Member is also deemed to have become competitive in a product in which its share of world trade has reached 3.25 per cent in two consecutive calendar years and is required to phase out export subsidies on the product over a period of eight years. Although, at the request of Members, the Secretariat has provided calculations for particular products and specific Members listed in Annex VII, there has been no decision on product specific graduation. A part of the reason for this is that, in the language of Article 27.6 of the ASCM, there is less than full clarity on how the world trade share of the product/developing country Member concerned needs to be determined in terms of the harmonised system (HS) nomenclature.[16] As a result, Article 27.6 has remained non-operational and has not affected the benefit of exemption from the prohibition on export subsidies that is applicable to the 10 developing country Members enumerated in the previous paragraph.

In overall terms, the S&DT provided by exempting a small group of developing countries from the prohibition on export subsidies on non-agricultural products must be evaluated as constituting a small benefit to developing countries.

[16] The HS is structured as follows. It has 21 sections that are subdivided into 99 chapters (2 digits). Each chapter is further subdivided into headings (4 digits) and then into sub-headings (6 digits). For determining the world trade share, any one of the four categories (sections, chapters, headings or sub-headings) could have been used, but the language of Article 27.6 is confusing as it says that 'a product is defined as a section heading of the Harmonised System Nomenclature'. If a product were defined as a section or as a heading, it would have been possible to calculate the world trade share of the developing Member concerned. But to define a product as a section heading does not make sense. As a participant in the negotiations, the author recalls that the intention was to define the product broadly as a section of the HS and the word 'heading' was inserted inadvertently.

4.9.2 Special treatment of products imported from developing countries in CVD investigations

There is a provision of general application in Article 11.9 of the ASCM that requires a CVD investigation to be terminated if the amount of subsidy is de minimis or the volume of subsidised import (or the injury being caused by it) is negligible. The text of the Agreement defines de minimis subsidy in quantitative terms as less than 1 per cent ad valorem, but leaves it to the discretion of individual Members to define the threshold of negligibility in terms of the volume of imports. Article 27.10 of the ASCM envisages benefits for developing countries in respect of both the de minimis level and the negligibility threshold. For developing countries, the de minimis level is fixed at 2 per cent ad valorem (against 1 per cent stipulated generally in Article 11.9). Article 27.10 also establishes a clear negligibility threshold for developing countries at 4 per cent share of imports, unless imports from all developing countries with less than 4 per cent share collectively account for more than 9 per cent share of imports. The negligibility threshold for Members other than developing country Members is not stipulated in the ASCM but it would be relevant to mention that the Anti-Dumping Agreement (ADA) does stipulate such a threshold as 3 per cent for individual Members, unless the imports from individual Members with less than 3 per cent share total up to 7 per cent collectively.

It is difficult to pronounce a verdict straightway on how valuable Article 27.10 benefits can be. Intuitively, 2 per cent looks substantial as compared to 1 per cent. As regards negligibility, the indication of a fixed quantitative level of 4 per cent certainly improves matters since it makes application of the rule more predictable. However, the requirement that the benefit of negligibility will apply only if imports from developing countries collectively do not account for more than 9 per cent diminishes the value of the benefit considerably. Over the past few decades, manufacturing has registered impressive growth in developing countries and the level of 9 per cent collective imports is likely to be reached for many, if not most, products.

Having regard to all the aspects examined above, the view can be put forward that Article 27.10 delivers very minor S&DT benefits. What is troublesome is that even these not very significant benefits are in peril. In February 2020, the United States took a decision[17] to close the window of these benefits for countries with a share of world trade of 0.5 per cent and to members of the Group of 20. The decision on 0.5 per cent share of world trade resulted in the exclusion from Article 27.10 benefits of Brazil, India, Indonesia, Malaysia, Thailand and Viet Nam and making G20 members ineligible extinguished the benefits for Argentina and South Africa.

[17] Federal Register/ Vol. 85, No. 27, February 10, 2020

4.9.3 Exemption of certain actionable subsidies maintained by a developing country Member from remedies under Article 7

Another important S&DT provision in ASCM is its Article 27.9, which limits remedies against developing countries for causing adverse effects to the interests of other Members.

The ASCM envisages remedies against actionable subsidies when they cause (i) injury to the domestic industry of another Member importing the subsidised product; (ii) nullification or impairment of a tariff or other commitments or (iii) 'serious prejudice' to the interests of another Member. The concept of serious prejudice, which is initially mentioned in Article XVI of GATT 1994, has been considerably elaborated in the ASCM. Serious prejudice may arise due to the effect of a subsidy in the market of the exporting Member, or the market of the importing Member or in third country markets.

Article 27.9 of the ASCM provides that Article 7 remedies cannot be sought against developing country Members unless there is nullification or impairment of tariff concessions or other obligations under GATT 1994 or unless injury is caused to a domestic industry in the market of the importing Member. Thus, no action can be taken against developing country Members for 'serious prejudice'. This interpretation has been confirmed by the Panel in *Indonesia-Automobiles* in the following observation:

'Article 27.9 provides that, in the usual case, developing country Members may not be subject to a claim that their actionable subsidies have caused serious prejudice to the interests of another Member. Rather, a Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member's subsidies or that subsidized imports into the complaining Member have caused injury to a domestic industry.'[18]

In the context in which the Panel made the above observation, the term 'the usual case' meant cases other than those of egregious subsidisation referred to in Article 6.1.

Exemption from actionability for serious prejudice is the only S&DT provision that we recognise as providing more than a minor benefit to developing countries.

4.10 Agreement on Safeguards

4.10.1 Special treatment of products imported from developing countries in safeguard measures

Article 9.1 of the Safeguards Agreement provides that safeguard measures are not to be applied against products imported from a developing country Member with a share of imports of less than 3 per cent, provided that imports from Members with individual shares of less than 3 per cent collectively account for not more than 9 per cent of the total imports of the product in the importing Member. Footnote 2 to Article 9.1 specially requires Members

[18] Indonesia-Automobiles, Report of the Panel, WT/DS/54/55/59/64/R

imposing safeguard measures to notify the exemption of developing countries whose share in imports is less than 3 per cent.

In recent years, developing countries have been the main users of safeguards. The notifications made in compliance with the requirement in footnote 2 to Article 9.1 show that small developing country exporters benefit widely from the exemption in safeguard action by other developing countries. They benefit from the exemption applied in developed countries as well, but recourse to safeguard action in these countries is less frequent. Furthermore, there is a tendency in some developed countries to limit the scope of exemptions in respect of some developing countries. For instance, in the US, the exemption applies to developing countries that are designated beneficiaries of the US Generalised System of Preferences (GSP). Consequently, if the US excludes any developing country from the list of GSP beneficiaries for any reason (for instance, when it judges that it has been denied "equitable and reasonable access" to the markets of the developing country concerned), that country gets excluded also from the benefit of exemption. This happened to India and Turkey in respect of safeguard measures applied by the US on crystalline silicon photovoltaic (CSPV) products and large residential washers (G/SG/N/8/USA/9/Suppl.6). In Canada, several of the more advanced developing counties are excluded altogether from the exemption, as they are not considered as eligible developing countries. As in the US, the exemption from safeguard action applies only to those developing country members of the WTO that are eligible for the General Preferential Tariff in Canada, and the list of these developing countries excludes all the more advanced countries, such as Argentina, Brazil, China, Malaysia, and Thailand. Thus, in practice, several developing countries do not benefit from this provision on S&DT in certain developed countries.

4.10.2 Flexibility for developing countries in applying safeguard measures

Article 9.2 of the Safeguards Agreement allows developing country Members to apply a safeguard measure for two years more than the maximum of eight years generally allowed in Article 7 of the Safeguards Agreement. The second sentence of the same provision gives further flexibility to these countries to apply a safeguard measure again to the import of a product, even if the product has been subject to such a measure earlier, notwithstanding the cooling off period requirement of paragraph 5 of Article 7. The Secretariat report on S&DT provisions referred to above shows that developing country Members using safeguard measures made good use of the provision to extend the measures for a further period of two years. However, the further flexibility available in the second sentence of Article 9.2 has remained in disuse.

Both the exemption from safeguard action of imports from developing countries under Article 9.1 and the flexibility to apply safeguards for two years more than the maximum under Article 9.2 are useful S&DT provisions. But on the whole, the trade advantage that they provide to developing countries must be assessed as small.

4.11 General Agreement on Trade in Services

Although the terms S&DT and reciprocity or less than full reciprocity are not used in the General Agreement on Trade in Services (GATS), the idea of special treatment of developing country Members in line with the concessional treatment in GATT 1994 is very much embedded in that Agreement.

Article IV of GATS states that "the increasing participation of developing country Members in world trade" would be accomplished through negotiated specific commitments relating, *inter alia*, to "the liberalization of market access in sectors and modes of supply of export interest to them". The language of Article IV of GATS is devoid of any promise of purposive action or commitment by developed country Members or the membership as a whole, to liberalise market access in the areas of interest of developing country Members. It states that developing countries would have to negotiate for liberalisation of access in sectors and modes of export interest to them. In the same vein, there is reference to strengthening the domestic service capacity of developing country Members through access to technology and improving their access to distribution channels.

As regards relatively lower commitments by developing country Members in negotiations with developed country Members, the language of Article XIX of GATS is clearer and more elaborate than the corresponding provision in Part IV of GATT 1994, reflecting the multi-dimensional nature of services transactions. It is quoted below in full:

'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 and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV'.

To what extent have the elements of S&DT reflected in the above provisions of the GATS been actually translated into practice?

A read-out of the services schedules of Members definitely creates the impression that the commitments made by developing country Members are relatively modest as compared to those of developed country Members. But can we develop a methodology for measurement in overall terms of the commitments of groups of Members to enable us to make a comparative evaluation on a credible basis?

Adlung and Roy[19] have done just that, and presented a count per Member of the subsectors in which groups of Members have made commitments in their schedules. The results of their analysis are reflected in Table 1 below. Although the quality of liberalisation and the coverage of trade are not captured, the number of sub-sectors in which commitments have

[19] Adlung, R. and M. Roy (2005), Turning Hills into Mountains? Current Commitments Under the GATS and Prospects for Change, WTO Staff Working Paper ERSD-2005-01, March. The results of this study have also been made use of in the OECD study referred to in Footnote No.18 infra.

been made per Member can provide one metric of the commitments by the country group concerned. Clearly, in the Uruguay Round and in the post-Uruguay Round negotiations, lower or "less than reciprocal" contributions by developing country Members were accepted multilaterally, pursuant to Article XIX of GATS.

Table 1: GATS commitments by country groups, March 2005

	Average number of sub-sectors committed per Member	Range (Lowest and highest number of scheduled sub-sectors)
Developing country Members	52	1-147
Developed country Members	105	86-115
All Members	50	1-147

Notes: Total number of sub-sectors –160; total number of WTO Members at the time of Adlung study in 2005 –148

Source: Adapted from Adlung & Roy

But what is the evidence on the other aspect of S&DT, of facilitating the expansion of trade of developing countries through 'the liberalization of market access in sectors and modes of supply of export interest to them'? An OECD study[20] finds evidence, based on a study by Marchetti,[21] that in the Uruguay Round, developed countries have indeed liberalised sectors in which developing countries are known to have an export interest, such as maritime services, health-related and social services, distribution services, computer-related services, and construction services interest. However, as regards the modes of export interest to developing countries, the position is less encouraging. The developed countries have made minimal commitments in mode IV, in which developing countries have the deepest interest. But the sobering fact is that developing countries themselves have not been very forthcoming in this highly sensitive area and have hardly made any commitments.

In the Uruguay Round and the sectoral negotiations held shortly after the Round, developed country Members agreed to developing country Members undertaking liberalising commitments in fewer sub sectors. At the same time, the former undertook commitments for liberalisation of market access in sectors and modes of supply of export interest to the latter, except mode IV. The experience in the Doha Round, however, was very different. Developed country Members put developing country Members under unrelenting pressure until the very end to improve offers for binding commitments, and there was no agreement to conclude the negotiations. As in the case of the idea of less than full reciprocity in GATT 1994, experience in the Doha Round has brought home the point that the rules of Article IV and Article XIX of

[20] OECD (2006-01-26), "Special and Differential Treatment under the GATS", OECD Trade Policy Papers, No. 26, OECD Publishing, Paris. http://dx.doi.org/10.1787/786764616255

[21] Marchetti, J. (2004), Developing Countries in the WTO Services Negotiations, Staff Working Paper ERSD-2004-06, WTO, Geneva

GATS do not provide any assurance of favourable treatment of developing countries in the negotiation of specific commitments in future.

4.12 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

The provisions of the DSU apply uniformly to all Members, and they all benefit from guaranteed access to the dispute settlement machinery and its automatic and binding nature. However, a few rules envisage S&DT as well, and we review the key provisions and their implementation.

Article 12.10 of the DSU mandates panels to give sufficient time to a developing country Member to prepare and present its arguments. Pursuant to this provision, in some cases, panels have specifically granted the request for additional time, as in India-Quantitative Restrictions (DS96) and India-Export Related Measures (DS334). In other cases, panels merely noted that they had taken into account the status of the respondent as a developing country Member in preparing the timetable, as in Turkey-Rice (DS334) and Philippines-Distilled Spirits (DS396/DS403), but did not explicitly grant extra time.

Article 12.11 calls for an explicit indication in the panel's report of the form in which the S&DT in the provisions of the covered agreements have been taken into account. The invocation of this Article in a number of cases does not seem to have conferred any advantage on developing countries, as exemplified in India Quantitative Restrictions (DS96). The panel seems to have taken the view that by analysing Article XVIII: B, which is an S&DT provision, it had fulfilled the requirement of Article 12.11.

Article 21.2 is a generally phrased provision that requires particular attention to be paid to matters affecting the interests of developing country Members. This provision has been invoked in arbitration procedures under Article 21.3(c) for determining the 'reasonable period of time' for implementing DSB rulings and recommendations. In Indonesia-Autos (Article 21.3 (c)), the Arbitrator granted an additional time of six months (WT/DS54/15, WT/DS55/11, WT/DS59/10, WT/DS64/9) but in Chile-Alcoholic Beverages (Article 21.3(c), he only recognised the requirement to be mindful of difficulties of developing countries in implementation, but gave no extra time on this account (WT/ DS87/15, WT/DS110/4).

Article 27.2 enjoins the WTO Secretariat to make available a qualified legal expert from technical co-operation services on the request of any developing country Member. What has been immensely more useful for developing countries is the Advisory Centre on WTO Law, established by an Agreement concluded on November 30, 1999, among a group of developing and developed countries. Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway and Sweden made large endowment fund donations and Ireland, Netherlands, Norway and the UK also made large contributions to the annual budget for the first five years to help start the centre. The centre provides support to developing countries in dispute settlement cases in which they are involved as complainants or defendants.

The S&DT provisions of the DSU provide very small benefits to developing country Members. Much more significant benefits are provided to these countries by the Advisory Centre on WTO Law, which was established outside the WTO framework, and does not have the label of S&DT.

4.13 Overall evaluation of S&DT in the WTO Agreement

What conclusions can be drawn from the above analysis on the overall value of existing S&DT provisions to the trade of developing countries, both in affording protection against imports and providing stimulus to products of export interest to them?

The S&DT provisions in the agreements on SPS measures, the anti-dumping measures and import licensing procedures do not seem to result in any benefit to developing countries at all. Those in the agreements on technical barriers to trade, customs valuation, subsidies and countervailing measures, and safeguards deliver only minor or very minor benefits. The same observation holds good for the S&DT measures in the DSU. The S&DT provisions in Article XVIII: B and Article XVIII: C have fallen into disuse and consequently, they have ceased to be of value. The same comment applies to the S&DT provision in the TRIMS Agreement. The only S&DT that we recognise as providing more than a minor benefit is the exemption from actionability for serious prejudice in the Agreement on Subsidies and Countervailing Measures.

The S&DT provisions in the Agreement on Agriculture are undoubtedly of great value to developing countries but the reality is that the preoccupation with S&DT among a large group of developing countries enabled the major developed countries to walk away with provisions that give more generous treatment to them than to developing countries. It is arguable that, on the whole, the Agreement on Agriculture is tilted in favour of developed countries.

Developing countries benefited greatly from the S&DT provision on less than full reciprocity in tariff negotiations with developed countries right up to the Uruguay Round, which led to the establishment of the WTO. The same can be said about the notion of more favourable treatment for developing countries embedded in Article IV and XIX of GATS. But experience in the Doha Round has demonstrated that the rules provide no assurance that these provisions will be translated into practice in future negotiations. The political will to implement the provisions on less than full reciprocity in tariff negotiations in GATT 1994 and those in GATS on the negotiation of specific commitments that embody the same spirit has vanished.

5. Conclusions and the way forward

The evaluation in Section 4 reveals that, for the most part, the S&DT provisions in the WTO Agreement provide only minor to very minor benefits to developing countries and sometimes no benefits at all. The requirement of less than full reciprocity from developing countries in tariff negotiations with developed countries and a similar flexibility in the negotiation of

specific commitments in services were no doubt meaningful benefits provided in the rules and were applied in actual practice in the past. But rules alone are not sufficient to instil the political goodwill necessary for the continuation of these favourable approaches in future. As argued above, developed countries can go on asking for reciprocal concessions in trade negotiations until these are only marginally less than concessions that they receive. In agriculture too, although major benefits were provided to developing countries by way of S&DT, it has come to light that these benefits were more than counterbalanced by the exemptions for direct payments under production-limiting programmes and decoupled income support, which benefited developed countries exclusively as they addressed practices prevalent in those countries only. On agricultural tariffs, the benefit of ceiling tariffs given to developing countries has been undercut through what is referred to generally as 'dirty tariffication' and the Tables in the Annexure show how high some of the agricultural tariffs are in the principal developed countries. Having regard to our assessment of existing S&DT provisions, and the sharp change in the attitude in developed countries experienced in the Doha Round, developing countries should not have any illusions about the extent of S&DT benefits they will receive in future negotiations.

It must also be emphasised that the basic obligations of the agreements in Annex 1, 2 and 3 of the Marrakesh Agreement apply equally to developed and developing country Members. Most of the S&DT provisions are concentrated in the Multilateral Agreements on Trade in Goods and they do not affect the basic obligations. The core obligations in the WTO Agreement on the three main trade policy instruments in goods, viz., tariffs, quantitative restrictions and subsidies, are the same for all Members, and minor benefits here and there in the multilateral trade agreements on goods do not make much difference. Tariff commitments bind all WTO Members equally under Article II of GATT 1994. The prohibition on quantitative restrictions (QRs) on both imports and exports envisaged in Article XI of GATT 1994 applies to all. Undoubtedly, there is flexibility for developing countries under Article XVIII: B of GATT 1994 for balance of payments reasons and under Article XVIII: C for facilitating the establishment of industry. However, in the WTO era, the use of QRs for balance of payments purposes under Article XVIII: B and the invocation of Article XVIII: C for the establishment of industry has been phased out by developing countries in actual practice. As for subsidies in non-agricultural goods, a major benefit accorded to selected developing countries was exemption from the prohibition on export subsidies, but gradually, developing countries with significant export capability have been graduated out of the benefit and no longer come within the ambit of this exemption. The assertion made by the United States in its submission[22] in the Geneva talks on WTO reform, that in the WTO Agreement '[a]ll the rules apply to a few (developed) countries and just some of the rules to most self-declared developing countries' is far from the truth. It is certainly not the case that developing countries are exempted from obligations and these apply asymmetrically solely to developed countries. The analysis in Section 4 of this paper also demonstrates that the characterisation in the same US paper of S&DT provisions as 'vast flexibilities or exemptions' is sheer

[22] WTO Document WT/GC/W/757/Rev.1

hyperbole. We have also shown (in Sub Section 4.2) that the US charge of putting the blame of failure of DDA talks on S&DT is unacceptable.

The most important requirement for a resolution of the differences on S&DT is to lower the temperature of the debate. With this end in view, developed countries should consider withdrawing the item from the current agenda for WTO reform. Once this happens, the stage will be set for a low-key consideration of the US proposal, perhaps in the Committee of Trade and Development, on the categories of developing countries that should be excluded from S&DT in future.

The main argument put forward by the US is that since a number of developing countries have made great strides in development, it would not be rational to continue to put all of them in an undifferentiated group. While the logic of this argument is difficult to contest, the point to ponder is how to determine the level at which a country may be deemed to have emerged out of the developing status, for the purposes of WTO rules. When Part IV was added to GATT 1947, the main concern was the wide gap between standards of living in developing and other countries. It was on the basis of their low standard of living that developing countries were regarded as a class apart. It follows that any change in the development status of a WTO Member should logically be on the basis of a rise in its standard of living. Of the four alternatives proposed by the USA, clearly a rise in the share of world merchandise trade is not an appropriate measure, as it does not take into account the standard of living. The same argument applies to the membership of the G20, which is a political grouping and not one based on the standard of living. The suggestions to treat Members that have been classified by the World Bank as high-income countries or that have joined the OECD as developed are more logical as both groupings can be associated with a higher development status. However, the most desirable course to adopt will not be to impose the decision on them but to try to persuade the Members that have become members of the OECD, and Members that have been put by the World Bank in the category of high-income countries to declare themselves to be developed countries and forgo eligibility for S&DT under the WTO provisions. This course of action may be inevitable because of the convention in the WTO to take decisions by consensus.

Annexure A

Tariff profiles of Selected Developed and Developing Country Members

USA	Bound		Applied MFN	
	Average	Maximum	Average	Maximum
Animal Products	2.4	2.6	2.3	2.6
Dairy Products	17.6	11.8	18.4	11.8
Cereal Preparations	3.5	56	31	44
Oilseeds, Fats and Oils	4.3	164	7.2	164
Sugar & Confectionary	13.3	66	13.8	45
Canada				
Animal Products	23.7	532	24.1	526
Dairy Products	222	314	249	314
Cereal Preparations	20.5	277	199	277
Oilseeds, Fats and Oils	5	218	3.1	218
Sugar & Confectionary	4.2	13	3.5	13
European Union				
Animal Products	15.3	94	15.6	94
Dairy Products	37.2	212	37.1	200
Cereal Preparations	16	52	13.7	52.00
Oilseeds, Fats and Oils	5.3	100	5.3	100
Sugar & Confectionary	24.3	117	24.5	117
Japan				
Animal Products	14	303	11.1	303
Dairy Products	85.6	503	89.3	503
Cereal Preparations	60.2	662	34.6	662
Oilseeds, Fats and Oils	8.3	440	12.9	440
Sugar & Confectionary	36.8	165	22.1	71
Brazil				
Animal Products	37.8	55	8.3	16
Dairy Products	43.8	55	18.3	28
Cereal Preparations	112.9	55	10.7	20
Oilseeds, Fats and Oils	34.4	35	7.9	14
Sugar & Confectionary	34.4	35	16.5	20

China				
Animal Products	14.9	25	13.2	25
Dairy Products	12.2	20	12.3	20
Cereal Preparations	23.7	65	19.5	65
Oilseeds, Fats and Oils	11.1	30	10.9	30
Sugar & Confectionary	27.4	50	28.7	50
India				
Animal Products	104.5	150	30.8	100
Dairy Products	63.8	150	35.7	60
Cereal Preparations	114.1	150	32.9	100
Oilseeds, Fats and Oils	165.1	300	33.9	100
Sugar & Confectionary	126.2	150	50.9	100
Indonesia				
Animal Products	43.1	50	7.1	30
Dairy Products	74.0	210	5.5	10
Cereal Preparations	44.6	160	7.4	150
Oilseeds, Fats and Oils	37.9	60	4.4	10
Sugar & Confectionary	58.3	95	7.5	20
Argentina				
Animal Products	26.5	35	8.3	16
Dairy Products	35.0	35	18.3	28
Cereal Preparations	33.1	35	10.9	31
Oilseeds, Fats and Oils	34.6	35	8.0	36
Sugar & Confectionary	33.3	35	17.5	20

Source: World Tariff Profiles 2020, WTO

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