

THE WTO AND DEVELOPMENT

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A. Introduction

The crisis in the WTO system that has been evident since Seattle and in the preparations for the Doha Ministerial Meeting in November 2001 has no single explanation, covering the treatment of standards, environment, agriculture, labour standards, investment, and competition policy among others. But the development issue is perhaps the oldest and most important. Since the US Congress failed to ratify the bill to establish the International Trade Organisation (ITO) in 1950, there have been various attempts to try to draw into the international economic system issues that were covered by the Havana Charter: employment and economic activity, economic development and reconstruction, restrictive business practices, intergovernmental commodity agreements and the establishment of the ITO. The GATT rules, established in parallel with the ITO negotiations, have been amended on a number of occasions, notably in 1954-55, in 1964 and in 1979 to try to fill the lacuna on development.

This process continued with establishment of the WTO whose objectives have some similarities to the Havana Charter. Thus, the Marrakech Agreement, establishing the WTO, sets out the objectives of the organization which include raising living standards, full employment, steadily growing real income and effective demand, expanding production and trade in goods and services, allowing optimal use of the world's resources in accordance with sustainable development. Under the Agreement, WTO Members also indicated their intention in fulfilling these objectives to seek, inter alia, "to enhance the means for doing so in manner consistent with [the] respective needs and concerns [of the Parties] at different levels of development". The Agreement also recognizes that "there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development".

However, while trade and development objectives appear central to the objectives of the organization and the means by which it seeks to fulfil those objectives, in practice many of the specific provisions are couched in "best endeavours" terms that have little legal force. This is one of the main reasons for the disillusion that many developing countries have manifest in relation to the results of the Uruguay Round. Most notably they have argued that the expected benefits were not realised - for example, back loading or the application of special safeguards, rules of origin and anti-dumping measures in the Agreement on Textiles and Clothing have offset the promised gains. They argue that inadequate account was taken of the time, cost and capacity to meet WTO commitments, e.g. in Customs Valuation or TRIMS. The Dispute Settlement Mechanism (DSM) is expensive and requires considerable expertise to use, and controversy has been stirred by certain decisions of the DSB and Appellate Body. The TRIPS Agreement is widely recognised to have posed a considerable burden on developing countries, and a controversy has arisen over the appropriateness of locating intellectual property matters in a trade policy setting. Despite the eight rounds of multilateral negotiations, tariff and non-tariff barriers remain heavily stacked against

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the exports of the developing countries. In short, there is a view that, despite the stated objectives, the WTO is systemically biased against development.

The WTO has spent much of the time since Seattle in trying to resolve a number of such specific issues that developing countries insisted need to be addressed before they were willing to contemplate a new round of trade negotiations, and there has been some success in this regard. However, the discussion of implementation of Uruguay Round commitments raises wider questions about the treatment of development in the WTO system. Are the various patches to the GATT and WTO sufficient to take care of the needs of development? Or is there a need to recast the architecture of the WTO system along the lines of the Havana Charter so that trade serves development— in the words of Dani Rodrik “trade as if development really mattered”.

In posing these questions, we do not seek to challenge the view that trade liberalisation can contribute to development, nor do we question the need for a rules-based system - far from it. Developing countries can gain both from liberalisation and from better governance of which the rules-based system is an important component. However, there is little doubt that liberalisation can entail short-term adjustment costs – a question of timing and sequencing. Taking account of this dimension as well as market imperfections and externalities, it seems reasonable to ask whether adequate space exists within the system to take account of needs and capacities of developing countries.

Let us also recall the context of the discussion – apart from that of establishing a new agenda for multilateral negotiations. While developing countries have been able to increase their share of trade in the last 20 years, the gains have not been evenly distributed, and the least-developed countries have seen their share of world trade decline.² Developing countries which were able to diversify their production and trade towards manufactures have done better, while commodity-dependent countries have done worse. The East Asian crisis, followed by that in Russia and Brazil, led to a challenging of the Washington consensus, which has to some extent been re-cast to take greater account of governance issues. The current economic crisis, exacerbated by the attacks in New York, highlights the vulnerability of the developing countries whose trade is more volatile than that of the developed countries. Against this background, it is valid to ask whether a more fundamental re-think of the trade and development agenda is required.

B. Developing countries in the multilateral trading system

At the time of the establishment of the GATT, 11 out of 23 founding contracting parties were developing countries. Today more than two thirds of the WTO current 140 plus members are developing countries. However, despite extensive references in the WTO Agreements to special provisions, rights and obligations accorded to developing countries, there is no official definition of what constitutes a “developing country,” and such status is in principle self-defined.³ On the other hand, there is an official list of UN-designated least-developed countries (LDCs) that includes a total of 48 countries, of which 29 are WTO members.

Prior to the Uruguay Round, developing countries received special and differential treatment (S&D) deriving from a number of amendments to the original GATT. Article XVIII of GATT, which

² WTO, "Participation of developing countries in world trade: Recent developments, and the trade of the least-developed countries", Note by the Secretariat (WT/COMTD/W/65 of 15 February 2000), Geneva.

³ However, this does not imply automatic acceptance of that status by other members. GSP beneficiaries are designated unilaterally by individual donors. In accession negotiations, the conditions of entry may vary by agreement.

derived from Article 13 of the Havana Charter, was revised in the 1954-55 Review Session to give developing countries the right to protect infant industries in addition to the existing right to use trade restrictions for balance-of-payments purposes. Article XXVIII *bis*, concerning tariff negotiations, was also added after the 1954-55 Review Session and provided flexibility for developing countries to assist their economic development. Part IV of the GATT, added in 1964, recognised the special needs of developing countries in the trading system, but much of the language was in “best endeavours” terms. The Enabling Clause – the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries was added in 1979, at the end of the Tokyo Round, to provide legal cover for the Generalised System of Preferences (GSP), for regional arrangements among developing countries, and for special treatment in favour of the least-developed countries. Two other features of the Enabling Clause deserve mention here. These are the juxtaposed statements on reciprocity and graduation. On the one hand, the Enabling Clause states that industrial countries do not expect to receive reciprocal commitments from developing countries that are inconsistent with the latter’s individual development, financial and trade needs. On the other hand, the Enabling Clause also states that developing countries expect to participate more fully in the framework of GATT rights and obligations as their development and trade situation improves.

The flexibility granted to developing countries under GATT Article XXVIII *bis* in tariff negotiations, was used in by the developing countries in past multilateral negotiations to limit their commitments. It is one of the first indications of differential and non-reciprocal treatment; Paragraph 3 states that negotiations shall be conducted on a basis which affords adequate opportunity to take into account, inter alia, "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; and all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned."

However, the flexibility envisaged by Article XXVIII *bis* is not automatic and depends on acceptance by partners in a negotiation. Nevertheless, even in the Uruguay Round, developing countries were granted longer transition period to reduce tariffs and lesser reductions. Thus, while developed countries cut their industrial tariffs by 38 per cent and agricultural tariffs by 34 per cent, developing countries made tariff reductions of 34 per cent for industrial products and 24 per cent for agriculture. Both groups of countries cut their industrial tariffs in six equal annual instalments, but in agriculture the developing countries had 10 years to make the cuts, while the developed countries completed the cuts in six years. Agriculture binding coverage was extended to all products without exception for all WTO Members, but, while developing countries substantially increased their binding in industrial products they generally did not increase this to 100 per cent, as is the case for almost all industrial products in the developed countries. To some extent, the increase in bindings by developing countries was the result of pressure by the developed countries, but many developing countries also felt that the exercise of flexibility in earlier negotiations meant that their exports were largely excluded and it was necessary to make offer in order to obtain improved access for their exports. Also, many saw this as a means of extending and binding their unilateral reforms of the last 10-15 years to increase their welfare gains and attract FDI through the enhanced credibility of their trade regimes.

In short, S&D up until the Uruguay Round rested on two pillars. One conferred onto developing countries a special treatment under the rules, and preferential access to OECD markets. Non-reciprocity in trade negotiations and graduation formed the other pillar.

The Uruguay Round chipped away at the two pillars of S&D, though neither was completely stripped away. Preferential access continues to apply independently of the outcome of the Uruguay Round but the value of preferences is much reduced as a result of tariff reductions in multilateral negotiations as well as the growth of regional trade agreements. As a result of the Single Undertaking of the Uruguay Round, whereby all WTO Members had to accept all Agreements as a package (except for the Agreements

on Government Procurement and Civil Aircraft), whereas previously GATT contracting parties could opt out of a number of the Tokyo Round Agreement.

In recognition of special difficulties in implementation of some of the agreements and associated adjustment costs, additional S&D provisions were introduced. More benefits were targeted towards the least-developed countries, the net food importing developing countries (NFIDCs), and Annex VII Countries (defined as those with a per capita income less than \$1,000). In various agreements, provisions were added that developing countries had to take special account of the needs of developing countries in the application of the particular agreement – although, as noted, many such provisions took the form of “best endeavours”, rather than firm legal commitments. Most of the WTO agreements also included extended transition periods for the developing countries, and even longer transition periods for the LDCs, as a form of S&D treatment. All told, there are now some 155 S&D provisions in the WTO.⁴

In essence, the Uruguay Round, while recognising the importance of development in its preamble, represents - most markedly through the Single Undertaking – a step towards a single tier system of rights and obligations. Apart from the “best endeavours” clauses, S&D treatment is not seen as a permanent recognition of the needs of the developing countries while they remain as such, but rather it is seen as a transitional set of measures over specifically defined time periods to allow developing countries to take on the same level of obligations as the developed countries. As such, S&D provisions have in effect triggered a debate on the special problems and barriers that developing countries face as they seek their fuller integration into the world economy.

However, by including additional benefits in favour of the least-developed, Annex VII countries and the net food importing developing countries, the Uruguay Round has also opened the door on the concept of tiering of S&D benefits across different groups of developing countries.

C. Developing Countries’ Concerns

The WTO Secretariat has classified the different provisions included in S&D have been grouped under six main headings: (1) provisions aimed at increasing trade opportunities; (2) provisions that call upon WTO members to safeguard the interest of developing countries; (3) flexibility of commitments; (4) transitional time periods; (5) technical assistance; and (6) provisions relating to least-developed country Members. As will be described below, developing countries have raised concerns under each of the headings.

(i) Provisions to Increase Trade Opportunities

a. Preferential access - GSP

The Generalised System of Preferences (GSP) is the most extensive and explicit expression of an attempt to use trade preferences as a tool of development. The underpinnings of the GSP were largely based on Prebisch and Singer's work on the secular decline in the terms of trade for agricultural commodities and the perception that only manufacturing could provide stability and jobs in developing countries.⁵ The Prebisch-Singer hypothesis led to two important policy prescriptions: sectoral intervention

⁴ WTO, “Implementation of Special and Differential Provisions in WTO Agreements and Decisions”, WT/COMTD/77 Rev.1 of 21 September 2001.

⁵ For an early history, see "The History of UNCTAD 1964-84", United Nations, New York, 1985 (Document UNCTAD/OSG/286, UN Publication Sales No. E.85.II.D.6).

favouring import-competing manufacturing industry (import-substitution industrialisation), and the idea of creating non-reciprocal tariff preferences to foster manufactured exports from the developing countries. (This is one of the reasons for the relatively low coverage of agricultural products in GSP schemes, as discussed later).

The idea of non-reciprocity became an issue in the preparation of the Kennedy Round of Multilateral Trade Negotiations with the increase in the number of developing countries that were becoming GATT contracting parties. This led to the addition in 1965 of Part IV on Trade and Development, which recognised the need for a "rapid and sustained expansion of the export earnings" of the developing countries and exhorting "positive efforts designed to ensure that [developing countries] secure a share in the growth of international trade commensurate with the needs of their economic development" by developed countries. Part IV also recognised the needs to "provide in the largest possible measure more favourable and acceptable conditions of access to world markets" for their limited range of primary exports, including "measures to attain stable, equitable and remunerative prices". It also stated that the "rapid expansion of the economies of the [developing countries] will be facilitated by a diversification of the structure of their economies... and the avoidance of an excessive dependence on the export of primary products".

However, Part IV did not fully exempt developing countries from reciprocity. Article XXXVI:8 states that "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." However, the Note to Article XXXVI:8 makes it clear "that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments".

The Generalised System of Preferences was proposed by Dr Prebisch, then Secretary-General of UNCTAD, as a non-reciprocal system of tariff preferences in favour of the developing countries, at UNCTAD I in 1964. The arguments were essentially: MFN treatment did not provide equality with domestic producers or regional trade partners unless set at zero; MFN treatment did not take account of inequality in economic structure and levels of development; and because negotiations were conducted on the basis of reciprocity and the MFN principle, developing countries' exports continued to face high tariffs. Preferences were seen as helping to overcome these disadvantages. After overcoming divergences of view and considerable work on the practical details, Prebisch's proposals were subsequently adopted as a principle at UNCTAD II in New Delhi in 1968. The compromise was that the Conference "agrees that the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of developing countries should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth."⁶

In the earliest discussions, some flexibilities were discussed and these have become de facto part of operational schemes. For example, it was noted that "...the industrial countries could establish a quota for admitting manufactured goods from developing countries free of duty, but they could exclude from these preferences a schedule of items constituting a reasonable percentage of the total goods they import."⁷ And "all the developing countries, irrespective of their level of development, would be eligible to avail themselves of the preferential system up to the amount of the relevant quota. But there would have to be a periodic review of the flow of exports; and if the exports from one or more countries increased so much that they did not leave sufficient room for those from others, equitable solutions should be sought."

⁶ Conference resolution 21 (II).

⁷ UNCTAD, "Towards a New Trade Policy for Development", E/CONF.46/3 (1964). Italics in original.

"Special preferences should be granted to the less advanced developing countries." It was also accepted that, after preferences had helped the developing countries "to prevent or rectify the structural imbalance in their trade", they "will gradually have to disappear". That was the concept of "graduation": that developing countries becoming advanced would no longer benefit from the GSP. Finally, it was recognised that, while developing countries would not offer "conventional reciprocity", as a result of preferences they would be able to import more than if the preferences had not been granted. Thus, irrespective of the subsequent legal texts, the early discussion already envisaged quota limits, graduation, special preferences for LDCs and the eventual phasing out of preferences.

In order to allow the GSP system to become legally operational, on 25 June 1971, the GATT Contracting Parties decided to waive the provisions of Article I of the GATT for a period of 10 years to the extent necessary to permit contracting parties to accord preferential tariff treatment to products originating in developing countries and territories.⁸ This Decision refers to "generalized, non-reciprocal, non-discriminatory preferences beneficial to the developing countries". Finally, on 28 November 1979, following the conclusion of the Tokyo Round in one of the "framework agreements", the Contracting Parties adopted the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") which provided a legal basis (other than a waiver) for the granting of trade preferences, tariffs and non-tariff measures, by developed contracting parties in favour of developing countries, and special treatment of the LDCs in the context of any general or specific measures in favour of developing countries.⁹ The Enabling Clause, as a decision of the GATT Contracting Parties, became part of the WTO system under provisions of paragraph 1 of the GATT 1994.

The Enabling Clause therefore constitutes the legal basis by which individual WTO Members may unilaterally grant GSP preferences to developing countries.¹⁰ Based on the permissive rather than mandatory language of the Decision, preference givers usually consider that they may also unilaterally modify, extend or withdraw such preferences, including the coverage of beneficiaries. Developing countries often argue that this creates a degree of uncertainty about the scope and duration of preferences, mitigating the benefits. Some such countries have therefore suggested the binding of preferential rates or margins to increase the security of GSP benefits.¹¹

WTO Members which grant GSP preferences under the Enabling Clause include: Australia, Belarus, Bulgaria, Canada, the Czech Republic, the European Communities, Hungary, Japan, New Zealand, Norway, Poland, Russia, the Slovak Republic, Switzerland, and the United States.¹² The scope for joint action by contracting parties (WTO Members) was also envisaged in Footnote 2 to Paragraph 2 of the Enabling Clause, but there does not appear to be any history of such joint action.

Under the scheme, all "developing countries" (undefined) are supposedly eligible for trade preferences where preference-giving countries exempt imports from developing countries from MFN duties. The GSP was founded on three principles - that it be generalised (covering all products), non-

⁸ BISD 18S/24.

⁹ L/4903 (BISD 26S/203)

¹⁰ The granting of non-reciprocal preferences by developing countries in favour of LDCs is the subject of the Decision of 15 June 1999 (WT/L/304).

¹¹ See for example WT/GC/W/331. The Enabling Clause does not provide legal cover for non-reciprocal, country-selective preference schemes such as those by the EC in favour of ACP countries, by the US and Canada in favour of Caribbean countries, and so on. These are covered by waivers from Article I of the GATT which are limited in time and require WTO approval for renewal.

¹² UNCTAD, "Generalized System of Preferences – List of Beneficiary Countries", UNCTAD/ITCD/TSB/Misc. 62 of 22 June 2001.

discriminatory (covering all developing countries) and non-reciprocal. However, the unilateral, non-contractual basis on which preference-giving countries have always maintained their GSP schemes has meant that in practice, not all of these principles have been fully observed in all of the schemes.

Considering that GSP has always been regarded as a temporary phenomenon, or as a mechanism to help developing countries “catch up” with their industrial country counterparts, it is hardly surprising that the notion that GSP should be generalised and non-discriminatory has given rise to interpretative differences. If GSP is to be transient, countries and/or products must inevitably be graduated from preferences over time. And since GSP is unilateral, consistency as to the coverage of schemes can hardly be expected. Product and country exceptions, variations in eligibility rules, different approaches to the determination of preference margins, and an assortment of conditionalities all add to the heterogeneity of the schemes.

Preferences can help to increase the exports of a recipient country (by diverting trade from non-preference-receiving countries). Export expansion in beneficiary countries may contribute to development in a broad sense, via increased investment, growth and employment, and diversification of the production base away from exclusive reliance on production of primary goods. Indeed, the relative success of those countries that have been able to diversify into manufactures seems to lend support to this basic premise. Of course, the non-preferential creation of new market access opportunities would hold out the same promise, but with the vital difference that no particular country or group of countries would be accorded such opportunities to the exclusion of others, and such MFN reductions would be more secure than preferences that can be unilaterally withdrawn. This competitive “edge” provided by preferences, supposedly on a temporary basis, is generally justified as a mechanism to help developing countries catch up with their more developed counterparts.

Two obvious disadvantages in using preferences as a means of according a temporary economic advantage are, first, that the preferences may induce beneficiaries to specialise in activities in which they may never become competitive, and, second, that they create vested interests opposed to multilateral trade liberalisation. Inappropriate specialisation may be particularly acute where preferential access entails economic transfers arising from privileged access behind high non-tariff barriers, as has been the case, for example, with certain agricultural preferences. Not only is the reversal of reliance on such high rent transfers likely to prove extremely painful unless it is carefully managed over an extended period, but the preferences themselves have perpetuated mono-cultural dependence rather than promoting diversification of the production base.

The overall significance of the GSP schemes in the Quad in 1999 may be observed from Table 1.¹³ Imports at GSP rates were \$4.16 billion by Canada (2 per cent of total imports in 1999), \$38.22 billion by the EC (5 per cent), \$39.88 billion by Japan (15 per cent), and \$16.7 billion (2 per cent) by the United States. The corresponding imports at the LDC rate were \$7.1 million by Canada, \$765.6 million by the EC, \$194 million by Japan and \$2.35 billion by the US. These were all less than 1 per cent of total imports by the respective donors. As noted earlier, the United States accords only zero rate for GSP beneficiaries, so that “imports from LDCs” in the table are only those for which LDCs have coverage that is not available to other GSP beneficiaries. Otherwise, imports from LDCs on lines for which GSP is generally available are covered in the GSP line.

The significance of GSP and other preferences is shown in Table 2. In Canada, the EC and Japan, where the GSP is often a non-zero rate below the MFN rate, the simple average GSP (and LDC) rate is lower than the simple average MFN rate, whether on all items or dutiable items, and the import-

¹³ Tables 1 and 2 are based on tariff treatment, not on country classifications. For example, if a GSP beneficiary also benefits from participation in a regional trade agreement with lower rates than GSP then its trade is allocated to that category of treatment.

weighted average on dutiable items is also lower than the import-weighted MFN average. In the case of import-weighted averages, however, the GSP rate is higher on all items in these three markets. This apparent inversion takes place because imports from developing countries are often of goods that attract high MFN rates, and the import-weighting procedure (where GSP rates are set at a margin below MFN rates) gives higher average rates. This phenomenon cannot exist in the United States, where the GSP rate is set at zero for qualifying imports.

Statistics also demonstrate that relatively few countries have captured the main benefits of GSP.¹⁴ Across the major schemes, there is a considerable concentration of benefits among developing countries with relatively large and diversified economies, including substantial manufacturing sectors. There is a strong representation of East Asian countries and India. China is the leading beneficiary in the schemes of Canada, the EC and Japan, but is excluded from the US scheme. Brazil is the major Latin American beneficiary, while South Africa is the leading African beneficiary (North African countries being covered by other preferential schemes in the EC where they might otherwise be larger suppliers than South Africa). There are no LDCs among the top 20 GSP plus LDC suppliers to the Canadian market. Bangladesh is the only LDC in the top 20 of such suppliers to the EC, and Mauritania is the only LDC in the top 20 of such suppliers to Japan. Angola and Democratic Republic of the Congo are among the top 20 suppliers to the US market, with Angola being the third supplier.

Thus, for most developing countries the preference schemes have had only moderate success in generating significant export growth or improving the trade shares of beneficiaries. It is difficult to estimate the effects of preferences on income levels and economic growth but the limited evidence suggest that the gains have not been great for the majority of beneficiaries. Of course, improvements could be made to the schemes, as has been recognised by the donors themselves. Greater simplicity and stability of coverage, more transparent competitive needs exclusions and so on are factors. For example, it is recognised that the simplicity and stability of the Japanese scheme have contributed to relatively high utilisation. In Japan too imports under GSP are a much higher share of total imports than in other donors, but this may also reflect the fact that Japan has relatively few reciprocal preference schemes.

Nevertheless, while the arrangements could doubtless be improved in various ways from the point of view of the beneficiaries, it would be difficult to point to significant obstacles to access inherent in the arrangements themselves. This suggest that the limited success of trade preferences in increasing the trade shares of beneficiary countries, and in fostering growth and economic diversification, must be explained primarily in terms of other constraints to development in the beneficiary countries – supply-side constraints – which are scarcely addressed in the WTO system.

On the other hand, the concentration of benefits suggests a need better to target preferences to countries that require them as a condition for their integration into the world economy and development. We come to this question of possible tiering of benefits later.

b. Non-preferential access

A number of studies have identified two main market access issues of particular concern to developing countries. These relate to tariff escalation and tariff peaks in both industrial and agricultural sectors. In addition to this, developing countries have expressed concerns over the benefits they are receiving from the Agreement on Textiles and Clothing and the Agreement on Agriculture.

The pattern of liberalisation of textiles and clothing products varies somewhat among the developed countries. Norway and Canada have accelerated the implementation of their commitments under the ATC, whereas the EU and the US have been undertaking liberalisation in accordance with the

¹⁴ WTO document WT/COMTD/W/93 of 5 October 2001.

Agreement. Overall, products integrated into the WTO thus far have been concentrated in the relatively low value-added range and the phase-out process has been back loaded in the sense that almost half of the quantitative restrictions – those shielding the most sensitive items – will be removed only at the end of the transition period. Developing country exporters are concerned that the governments of the industrialised countries will have difficulty overcoming industry objections to liberalisation, although importers have reiterated their commitment to the ATC. However, apart from back loading, tariff increases (within bound rates), the restrictive use of rules of origin, special safeguards and anti-dumping measures by importers have also led to charges of double jeopardy by some analysts.

Some developing country exporters also fear that back-loaded liberalisation will also distort the distribution of benefits among developing countries. They are concerned that they will lose competitiveness following the rapid phase-out of the quotas, and may hence lose market shares in the process. The MFA has created entrenched export interests protected from open competition, particularly from newer and possibly more efficient producers. Consequently, the dismantling of the MFA may entail significant adjustment costs for some developing countries that presently are major exporters.

Furthermore, some countries feel that further distortions have been introduced by the preferential tariff access accorded to some developing countries to selected developed markets as through the Europe Agreements. As a result, these countries enjoy better market access than other competitors from developing countries, some of whom may be lower-cost exporters. Clearly, continued application of relatively high tariff barriers will remain a cause of concern, even after all MFA-related quotas have been abolished.

With respect to the URAA, concerns have also been expressed, particularly by developing countries, regarding the weakness of several specific features, which have effectively limited liberalisation.

- Among the market access commitments, the provisions for “market access opportunities” have led to the introduction of tariff-quotas that in some cases have opened up markets formerly closed or restricted. However, there have been concerns that under-filled quotas combined with high out-of-quota tariffs have resulted in trade distortions. Even though there are several factors that can lead to under-utilisation of tariff-quotas, the method by which tariff-quotas are administered can have an important impact on the rate of fill.
- The domestic support provisions of the URAA are seen so far to have had only modest quantitative effects on agricultural trade. This is partly due to the aggregate (i.e., non-product-specific) nature of the reduction commitments and the exclusion of some support measures, i.e. “blue box” (payments under production-limiting programmes) and “green box” (domestic support policies that have “little or no” trade impact) payments, that in some cases may not be production and trade neutral.
- Notwithstanding the achievements of the URAA provisions on export subsidies, there remain some concerns regarding implementation in this area. In particular, the use of other policies that may have subsidy elements, including export credits, the activities of state trading entities as well as export taxes and restraints on exports, has attracted increasing attention.

The elimination of past production and trade distortions may also involve some costs and risks for net food importing developing countries that so far have been importing a large share of their food consumption at the generally depressed world market prices and through several concessional arrangements. These countries may now find themselves facing higher food import bills to the extent that some of these concessional arrangements are being eliminated or because of a rise in the level of world agricultural prices.

c. *Services*

Article IV of GATS foresees the participation of developing countries in the service liberalisation to be gradual, and to proceed along the developmental requirements of each member. This is to be achieved via the negotiation of specific commitments that would strengthen their domestic service capacity, efficiency and competitiveness through access to technology on commercial basis, the improvement of their access to distribution channels and information networks, and the liberalisation of market access in sectors and modes of supply of export interest to them.

Developing countries have expressed concerns over the lack of specific mechanism to operationalise the provisions in Article IV of GATS for liberalisation of market access in sectors and modes of supply of interest to them, and the need to move ahead with implementation of Article 66.2 of the TRIPS Agreement that deals with incentives for the transfer of technology to least-developed countries. As stated earlier, some developing countries have also argued that IP protection under the TRIPS Agreement is largely oriented towards areas of interest to developed countries, leaving aside areas that particularly interest them, like indigenous knowledge or geographical indications for traditional handicrafts.

(ii) *Provisions to Safeguard the Interests of Developing Countries*

A number of WTO Agreements provide provisions that call on members to take into account the interest of developing countries. For example, the TBT Agreement provides that in the preparation and application of technical regulations, standards and conformity assessment procedures, WTO members should aim to take into account the special development, financial and trade needs of developing countries. Similar provisions are also included in the Sanitary and Phytosanitary (SPS) Agreement. The Anti-Dumping Agreement (ADA) also stipulates that constructive remedies should be explored before applying anti-dumping duties in cases where they affect the essential interests of developing countries. The Agreement on Subsidies and Countervailing Measures also stipulates the termination of countervailing duty investigations against a product originating in a developing country if the level of subsidisation or the share of imports is less than a prescribed level. A similar stipulation is also included in the Agreement on Safeguards for the non-application of safeguard measures on imports from a developing country if the import share falls below a prescribed level.

A number of developing countries have expressed the view that many such provisions have been largely ineffective. For example, where it concerns the TBT and SPS Agreements, some have complained that developed countries have not adequately taken into account their special needs in preparing and applying sanitary and phytosanitary measures, technical regulations, standards and conformity assessment procedures. They have also expressed concerns over a lack of initiatives to facilitate their participation in standard setting organisations.

In addition, concerning the Anti-dumping Agreement, some developing countries argue that developed countries applying anti-dumping measures have paid inadequate attention to the special situation of developing countries and have not adequately explored possibilities for constructive remedies. Developing countries feel that they should be accorded more flexible procedures, e.g. by being allowed higher *de minimis* dumping margins and import share thresholds in anti-dumping proceedings. Moreover, these countries call for a “grace period” during the initiation of proceedings, as well as special considerations when setting the investigation period.

(iii) *Flexibility of Commitments*

Of the special S&D provisions, 43 impart more flexibility to developing countries in the implementation of certain rules and commitments. For example, the Agreement on Agriculture provides a longer time-frame and lower reductions in tariffs and subsidies for developing country members; they are

also not required to make commitments in respect of subsidies for marketing costs and internal transport and freight charges on export shipments during the implementation period. For non-agricultural subsidies, developing countries with per capita income less than \$1,000 (Annex VII countries) have been exempted from the prohibition on export subsidies as long as these do not disrupt other countries' markets. Once a developing country graduates (i.e., its per capita income exceeds \$1,000), then that country is given a maximum of 8 years to phase out export subsidies (there is however some provision for extension).

The Safeguard Agreement allows developing countries to maintain safeguard measures for a period of 10 years, instead of 8; and they may re-impose safeguard measures after half the time of a previous application in case the minimum two-year period of non-application has elapsed. The GATS also allows developing country members to open fewer sectors and liberalise fewer types of transactions while progressively extending market access in line with their level of development.

Developing countries were also given the flexibility to bind their tariffs at ceiling levels that are more often than not significantly higher than autonomously applied tariffs. In most cases, the lower applied tariffs have been introduced in the context of adjustment programmes outside the WTO reciprocal bargaining process. Thus, developing countries were given bargaining chips that they can use in future negotiations. This outcome also gave rise to the concept of "Credit for Concessions Given".

GATS Article XIX offers in addition "appropriate flexibility for individual developing countries for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their developmental situation and, when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the objectives referred to in Article IV."

As anticipated above, no specific concerns under this heading were raised by developing countries.

(iv) *Transitional Periods*

Longer time periods to facilitate implementation are provided for in all WTO agreements, save in the cases of the Agreements on the Implementation of Article VI (anti-dumping) of GATT 1994 and on Preshipment Inspection. For example, the TRIPS Agreement grants developing countries a 5 year transition period (except for the national treatment and MFN commitments), while least-developed economies are afforded up to 11 years to follow suit, with the possibility of further extensions.

Some developing countries have expressed the view that the transitional periods neither provide adequate time to deal with specific capacity constraints that many of them face, nor do they take into account their particular development needs. Specific areas in which extensions have been referred to include those related to non-agricultural export subsidies, TRIMS, TRIPS and the Customs Valuation Agreement.

(v) *Technical Assistance*

The provision of technical assistance to developing countries is often seen as part and parcel of S&D under the WTO Agreements. It aims at assisting developing country governments in their efforts to build institutional capacity needed to implement the Agreements and participate more fully in the multilateral trading system. This seems particularly important for implementation of SPS, TBT, Customs Valuation, GATS and TRIPS. However, technical assistance provisions are not an automatic right, and the limited budget of the WTO on technical assistance sets severe constraints on what is available to developing countries. It should be noted that, at the completion of the Uruguay Round, there was no attempt to assess what might be required to implement the various agreement, how long it would take or how much it would cost. It should also be noted that WTO technical assistance is linked exclusively to the

implementation of WTO obligations, and does not address the issue of supply capacity which some developing countries consider to be the more acute problem with a higher priority.

There is also a view among some developing countries that technical assistance is not a form of S&D treatment. Under this view S&D treatment is seen as addressing chronic differences between developed and developing countries, whereas technical assistance is seen as intended to lift developing countries to the same level of rights and obligations as other WTO Members.

(vi) *Least-developed countries*

Following the failure of the WTO Seattle meeting, a number of developed and developing country Members picked up the elements of the Seattle draft text and announced a package of measures for the least-developed countries. These include "the tariff-free and quota-free treatment consistent with domestic requirements and international agreements, under their preferential schemes for essentially all imports products originating in least-developed countries."¹⁵ In practice, LDCs already had relatively free access for many of their exports, and in some instances the new measures remain limited in areas such as agriculture and textiles and clothing, where the LDCs already have some capacity, but which are sensitive in the developed country markets. However, the European Union's Everything but Arms Initiative provides for the eventual duty-free and quota free treatment even of sensitive products such as rice, bananas and sugar, and the US AGOA for selected African countries moves in the same direction. There is also cooperation between the IMF, UNDP, UNCTAD, the World Bank, the WTO and the WTO/UNCTAD International Trade Centre in the context of the Integrated Framework of Trade-related Technical Assistance for the Least-developed Countries, intended to help LDCs develop the necessary analytical and policy framework for mainstreaming trade into national development strategies; after a bad start this initiative now seems to be moving forward.

D. Reflections on Special and Differential Treatment

Much of the previous section reflects the developing countries' dissatisfaction with the actual operation of a large number of S&D provisions. They consider them as inadequate instruments to help them integrate more fully into world trade.

However, any discussion of the actual or potential contribution of S&D to integration efforts and hence economic development must necessarily reflect the range of diversity among developing countries, from Afghanistan with an annual per capita income of some \$200 to Singapore with a per capita income of \$26,600 (1998), both in principle having the same right of access to S&D provisions. At the most basic level, no single system can pretend to address the interests and concerns of countries with such a wide difference in economic performance, needs and capacities.

Two alternative approaches can be distinguished: one would seek to encourage the more advanced developing countries to abandon the group on an autonomous basis. The other would extend the practice of targeting more benefits to a select group of developing countries. The inevitable consequence of the second approach is that the blanket special provisions under S&D would eventually become less responsive to the needs and concerns of some of the excluded countries. Thus, pressure would build to add this or that country to the list of the poorer developing countries.

¹⁵ Director-General's Report on Consultations on Measures in Favour of Least-developed Countries to the WTO General Council on 3 May 2000.

At this stage, we focus on eight possible areas for consideration in the context of a review of S&D provisions targeted exclusively to the benefit of LDCs. The intention is to launch the debate by sharing ideas that are by no means comprehensive or prescriptive of future policy orientation. They are meant to stimulate comments, any other proposals as well as future direction/re-orientation as the project progresses.

Starting with the GSP, mention has already been made of the recent proposals by developed countries to implement both tariff-free and quota-free treatment (consistent with domestic requirements and international agreements), under their preferential schemes for essentially all products originating in the least-developed countries. New Zealand has already granted duty-free access to its market for all products from LDCs with effect from 1 July 2001. Other countries, including Chile, the Czech Republic, Hungary, Iceland, Korea, Norway, Slovenia and Switzerland have also indicated their intentions to take measures to improve the access of LDCs to their markets.

Although LDCs already had few restrictions on their exports, these schemes will constitute a useful improvement in their market access conditions. Nevertheless, care should be exercised on the institutional side so that the individual country schemes add up to a homogeneous whole, and thus be more effective.

First, preference-granting countries could consider simplifying defined aspects of their preferential schemes, most notably their regulatory contents. This may include the substantive contents of rules of origin, technical specifications and standards (conformity assessment, including registration, inspection, laboratory accreditation, and quality system registration programmes; sanitary and phytosanitary measures, packaging and labelling requirements, etc.).

Where regulations concern rules of origin, consideration could be given to go beyond simplification to include harmonisation and the right to cumulate benefits across individual schemes. In matters relating to technical specifications and standards, perhaps an “early-warning” mechanism could be instituted to inform beneficiary countries of any contemplated changes in regulations.¹⁶ Such a mechanism could also be used to consult beneficiary countries on the “least-disruptive” and “least-costly” method of adjusting to new standards, on how best to minimise undesirable side-effects, and, where deemed necessary, to establish and channel targeted technical assistance to help countries adapt.

Second, the “early-warning” mechanism could also be entrusted with handling notification requirements of preferential schemes to the WTO, and with monitoring developments in both beneficiary and preference-giving countries. This may include tracking gains from the schemes, highlighting implementation issues and identifying potential problems that may arise in both the preference-granting and beneficiary countries.

Third, to the extent that one believes that previous preferential schemes may have discouraged entrepreneurs from entering long-term contractual arrangements due to the fact that preferences may be withdrawn at any time, one could think of “locking in” preferential duties in the MTS. However, such a step would require that an adequate “graduation” mechanism be devised so that preferences can be withdrawn whenever a country has managed to integrate its economy fully into world markets, i.e.,

¹⁶ In the WTO context, both the TBT Agreement (Article 2) and the SPS Agreement (Annex B) require that members should be given adequate time to comment in writing about any intended new or modified regulatory intervention, where such an intervention is not substantially based upon international norms or practice. Moreover, there is an obligation to consult upon request in relation to the written comments, and to take the comments and the results of any discussion into account when formulating the final content of the regulation. While the GATS does not contain comparable provisions, WTO members have committed themselves to develop any necessary disciplines in the regulatory field to replace the very general provisions that currently exist in Article VI:4.

graduated out of the status of the least-developed country. On the other hand, since developing countries often produce goods which are often differentiated from those of developed exporters and, as we have seen, face higher MFN duties, then consideration should be given to MFN tariff reductions on products of export interest to the developing countries.

Fourth, new efforts could be deployed to revitalise inter-developing countries' trade preferences (the Generalised System of Trade Preferences, GSTP). Benefits to LDCs from such schemes could turn out to be larger than those they receive under the GSP. This is because in the post-Uruguay Round trading environment, the majority of developing countries have bound their duties and at high levels. Thus, even if the GSTP were to grant LDC's exports lower margins of preferences than the GSP, yet the former can enhance LDCs' own trading opportunities much more than might a larger preferential margin under GSP applied to low tariffs in industrialised markets. Put simply, a smaller proportional reduction in a high tariff can stimulate exports more than a larger proportional reduction accorded to a low tariff. In a sense, developing countries themselves have increasingly begun to follow such an approach through a rapidly expanding network of regional trade agreements under the relatively easy conditions of the Enabling Clause.

Fifth, markets in many LDCs do not function properly on account of structural impediments of one kind or another, usually attributable to the behaviour of economic agents in the market concerned, or on account of market failure. The appropriate policy response depends to a degree upon the source of the market distortion. In some cases, it may be government policies and regulations that give rise to the problem, in which case the solution may well be to change those policies. In other cases, the source of the problem might be the actions of private firms or individuals colluding to set prices, allocate markets, rig bids or engage in other anti-competitive "hard core" cartel behaviour. Or alternatively, it might be that a private firm is abusing its market power or perhaps its own dominant position in a particular market. Such cases may call for an appropriate horizontal competition law or policy to be applied to prohibit or eliminate the anti-competitive private practices in question.

However, most of developing countries and the majority of LDCs do not currently have in place effective domestic competition laws and policies or active competition law enforcement agencies. Accordingly, an urgent need exists for capacity building and technical assistance to improve the quality of competition laws and policy enforcement and advocacy in developing countries. Such technical assistance and capacity building may be a necessary prerequisite to international co-operation with competition law enforcers from developed countries to help root out some private anti-competitive practices arising outside of a particular developing country, but which substantially lessen or prevent competition in that country. Some developed and developing countries have proposed multilateral competition disciplines to address these problems. Whatever the ultimate merits of such proposals, at this stage, it should be noted that national, regional and plurilateral competition disciplines are not necessarily inconsistent with the development of multilateral rules. Multilateral rules could serve as the takeoff point for developing national, regional or multilateral rules, and similarly multilateral rules might be facilitated by enhanced national competition laws and bilateral co-operation in the enforcement of competition laws.

Sixth, not all least-developed countries are WTO members. Some are currently negotiating their accession to the WTO.¹⁷ The faster the integration of these countries into the MTS, the earlier they can start on their journey towards fuller integration into the world economy. Initiatives could be introduced that would speed-up accession negotiations for these countries, in conjunction perhaps with the provision of technical assistance to help these countries participate and respond more effectively to the requirements of the accession process.

¹⁷ Seven LDCs are currently in the process of negotiating their accession to the WTO. They are: Cambodia, Cape Verde, Laos, Nepal, Samoa, Sudan and Vanuatu. Furthermore, Bhutan, Ethiopia and Yemen are WTO Observers.

Seventh, the GATT/WTO is also about helping countries to adopt good policies and practices and to rid their economies of bad ones. These are in essence governance issues which Stiglitz and Rodrik consider may well be more important than full liberalisation. An option might be to introduce incentives into WTO agreements that would encourage countries to examine ways to exploit fully the opportunities for reforms that the agreements generate. For example, the Customs Valuation Agreement provides remedies for valuation practices and is intended to improve the predictability of the customs process and to mitigate against the possibility of using customs valuation as a non-tariff barrier. However, in many of the poorer developing countries, valuation for customs purposes is but one part of the procedures for customs administration that need and require improvement. Thus, technical assistance efforts to help countries implement their commitments in this and other areas could be stretched to cover the whole range of needed reforms: this is one sure way to ensure that the benefits from the agreements are maximised.

Technical assistance programmes could be underpinned by a working group in the WTO that would examine issues related to customs modernisation and reform, and promote efforts to develop and implement initiatives that will simplify trade procedures and practices.¹⁸ The working group could also seek to build a database that spells out customs requirements of WTO members, ensuring their compatibility with WTO disciplines and enhancing transparency. The working group could then be entrusted with developing an operational technical assistance programme targeted at countries that need support. In any future negotiations, there should be an attempt to cost and program implementation, and the necessary technical assistance should be a right.

Where it concerns agreements that are intended to eliminate bad policies, care should be taken not to sanctify exemptions from disciplines that in fact make for perfect economic sense. Perhaps the most relevant example in this context is found in the Agreement on Subsidies and Countervailing Measures where it is stated that “subsidies may play an important role in the economic development programmes of developing country members” (Article XXVII:1). In fact, the least-developed countries are practically given a free-hand to subsidise exports as long as these do not disrupt other countries’ markets. In addition to the obvious observations that subsidies are distortionary policies and that poor countries could ill-afford them, their governments have not been given any cover from domestic groups seeking subsidies.

Eighth, developing countries have claimed that provisions for the recognition and safeguard of their interests have been largely ineffective. At the moment, much of the WTO provisions dealing with S&D treatment could be said to be unenforceable, as they are expressed in hortatory language. Efforts could be undertaken to bring the best endeavour provisions closer to the contractual nature of the WTO framework of Agreements.

E. Calibrating S&D treatment

(1) Options for tiering or calibrating S&D treatment

If S&D treatment is to be better targeted then this may entail the tiering or calibration of benefits throughout the WTO system along lines which started to be more clearly drawn out in the Uruguay Round and even earlier than the GSP and linked to the level of economic development achieved by a beneficiary country. Under the GSP, three principal tools have already been used for this purpose for some time:

¹⁸ The WTO agreements contain many elements related to the simplification of trade procedures. These are included in Articles V, VII, VIII, X of GATT 1947 as well as the Agreements on Customs Valuation, Import Licensing, Pre-shipment Inspection, Rules of Origin, Technical Barriers to Trade, and the Agreement on the Application of Sanitary and Phyto-Sanitary Measures. The WTO Singapore Ministerial Conference in 1996 gave the WTO a mandate to take a more comprehensive look at these issues.

- The extension of deeper benefits to those beneficiaries that are deemed to be the least-developed countries.
- The graduation (i.e., removal from GSP status) of specific products imported from beneficiaries that are deemed to be sufficiently competitive in the production of those items, and
- The graduation of the more advanced beneficiary countries from the programme altogether.

The original GSP proposal suggested that the programme as a whole lasts for just ten years, and also implied that the benefits might be reduced for the more advanced beneficiary countries. It did not directly address the question of whether individual countries might be graduated from the programme altogether. Nor was this matter clarified by the Enabling Clause. Though a preferential approach has become deeply ingrained and the principle of non-reciprocal concessions was codified in the Enabling Clause, the text of the Enabling Clause itself contains a provision to the effect that such preferential treatment should not be indefinite and should evolve through time, as developing countries state the expectation that:

“their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.”

This formulation, which has been described as “quite vague and ambiguous,”¹⁹ can be read in two different ways. In a narrow interpretation, the provision suggests that countries should be expected to engage more fully in the exchange of concessions as their economic development advances. A broader interpretation would hold that this clause constitutes the developing countries’ acceptance of graduation as a basic principle.

Whatever the original intent of the sponsor and beneficiary countries may have been, it is quite apparent that the graduation of countries has become a key element of the programme. All major schemes reviewed provide for the graduation of countries and/or products. Countries often are graduated in stages, such that the more advanced beneficiaries see many of their products graduated before they are removed from the programme altogether.

(2) *Experience in Australia, the European Union, Japan and the United States*

Graduation is most apparent in the case of the Australian programme. As a general rule, Australia has graduated (or is in the process of graduating) all countries other than the LDCs. The first step in this direction came in 1991, when Australia declared that the tariffs applied to Singapore, Chinese Taipei, Hong Kong-China, and the Republic of Korea were fixed to the July 1, 1992 rate until the general Australian tariff was reduced to that level. The margin of preferences extended to imports from these countries thus narrowed as MFN tariffs declined.

The next step came in 1994, when the White Paper on Employment and Growth removed all but the LDCs from the beneficiary list of the ASTP. The 1994 White Paper froze the July 1, 1994 developing country rates until the general rate was reduced to the same level. This did not lead to any increases in developing country tariffs; it instead had the effect of gradually diminishing the margins of preference. The following phase-out rules were applied:

¹⁹ Abdulqawi A. Yusuf, “‘Differential and More Favourable Treatment’: The GATT Enabling Clause,” *Journal of World Trade Law* Volume 14 Number 6 (November-December, 1980), page 505.

- Where general rates already reached 5 per cent or less (i.e., where developing country tariffs are zero) the existing developing country preferences are maintained.
- Where developing country rates have already fallen below 5 per cent but have not reached zero, they are frozen at those levels.
- The five percentage point margin will continue to apply for the present where no tariff phasing is currently taking place (sugar, footwear parts, soda ash and passenger motor vehicle replacement parts). The developing country preference will be phased out for these products if general tariff preferences are undertaken some time in the future.
- Developing countries will thus continue to receive tariff preferences until the MFN rates are reduced to the former GSP level.

The EU used to employ a system in which GSP privileges were quantitatively limited through “fixed duty-free amounts” and “fixed reduced-duty amounts.” These restrictions were not a graduation mechanism *per se*, but did limit the amount of available benefits. The EU replaced this approach in 1994 with a “tariff modulation” approach that is based on reduced rates of duty that are classified according to the product’s level of sensitivity. The EU also modulates the treatment extended to products and countries by providing objective standards for graduation.

Product and country graduations from the EU system are based on the combination of a specified level of GNP per capita and the “development index.”²⁰ That index is designed to determine a beneficiary country’s development level *vis à vis* the EU. The variables are income, population, and manufactured exports of both the beneficiary country and the EU. An index score of 0 means the development levels of the beneficiary country and the EU are equal. Income and population statistics are obtained from the World Bank while data on manufactured exports are from UNCTAD figures. The EU removed Singapore, South Korea, and Hong Kong-China from the programme in 1998, when countries that exceeded \$8,210 GNP per capita (according to World Bank figures) were to be graduated if they also received a development index score greater than -1.

The graduation of products from the European Union’s GSP was wholly revamped in 1994, based on sector-by-sector evaluation. According to Article 4 of the current GSP Regulation, countries “whose exports to the Community of products covered by this scheme in a given sector exceeded 25% of all beneficiary countries’ exports to the Community in that sector in the statistical reference year of the previous scheme” will be graduated. However, Article 4 part 2 states that —

“countries whose exports to the Community of products covered by the scheme in a given sector did not exceed 2% of all beneficiary countries’ exports to the Community in that sector in the statistical reference year of the previous scheme shall continue to be exempt from the graduation mechanism.”

The country’s sector specialisation is combined with the development index to determine a country’s eligibility for graduation in a given sector.

Beneficiary countries of Japan’s GSP system can graduate in three circumstances. Countries will graduate if they are classified as a “high-income economy” in the *World Bank Atlas* for three consecutive

²⁰ The EU development index is defined as $\{\log[(Y_i/POP_i)/(Y_{ue}/POP_{ue})] + \log[X_i/X_{ue}]\}/2$. Where Y_i = the beneficiary country’s income. Y_{ue} = the EU’s income. POP_i = the beneficiary country’s population. POP_{ue} =the population of the European Union. X_i = the value of the beneficiary country’s manufactured exports. X_{ue} = the value of the EU’s manufactured exports.

years, export more than 25% of total exports to Japan, or export more than ¥1 billion in products to Japan. A country will also be graduated if it is not listed in the *Atlas* but is recognised to have the same level of GNP per capita with other “high-income economies.” Eighteen countries are currently excluded from the GSP, as noted in Appendix 1.²¹

The Japanese GSP programme maintains a system of ceilings on a number of industrial products. Imports that exceed the product ceiling are subject to the general MFN rate. Ceilings play an important role in the Japanese graduation system as well. If preferential imports from a single country exceed one-fourth of the total value/quantity of the ceiling for that import, preferential treatment is suspended. These quantity regulations do not always apply. Thirty-five product groups’ ceilings and 66 product groups’ maximum country amounts qualify for “flexible administration.” Products that pose no threat or injury to domestic production are allowed to continue under preferential treatment beyond the product ceilings and maximum country amounts.

In the US, the graduation of products is governed by the competitive-need limitations (CNLs). The CNLs are intended to prevent the extension of preferential treatment to countries that are already competitive in the production of an item. The CNLs set a ceiling on GSP benefits for each product and country, and are triggered by the trade data that the GSP Subcommittee reviews on an annual basis. With certain exceptions and qualifications, a country will automatically lose its GSP eligibility for a given product the year after the CNLs are exceeded. Since 1985 there have been two CNLs in place: the original, “upper” competitive need limit and a new, “lower” limit. The “upper” CNL remains the most common, and applies to the great majority of products and countries. It is triggered on a product if during any calendar year US imports from a country account for half or more of the value of total US imports of that product or exceed a certain dollar value that is adjusted annually.²² The figure was originally set at \$25 million in 1975, and rose to \$95 million by 2000. It will go up by an additional \$5 million in each subsequent year (i.e., it will be \$100 million in 2001, \$105 million in 2002, etc.). Products that have been found by the GSP Subcommittee to be “sufficiently competitive” when imported from a specified beneficiary are subject to the “lower” CNL. For these products the trigger is 25 percent or a dollar value set at approximately 40 percent of the “upper” competitive need level. The US programme also allows for temporary or permanent waivers of the CNLs for specific products, and the CNLs are automatically waived for LDCs.

The US law also provides that a beneficiary country can be graduated completely from the programme if “the President determines that a beneficiary developing country has become a ‘high income’ country, as defined by the official statistics of the International Bank for Reconstruction and Development.” This provision has been used to graduate several Asian newly industrialised economies, among others. In addition to graduating Hong Kong-China, Korea, Singapore, and Chinese Taipei in 1989, as well as Malaysia in 1997, the United States removed Mexico from the programme when the North American Free Trade Agreement entered into effect in 1994 (Appendix 1 lists the countries that have been graduated from the programme, or have otherwise seen their preferences suspended or terminated).

(3) Subjective adjustment of privileges

Not all removals of countries and products have been made solely on the basis of objective considerations of economic development and competitiveness. Donors can use these privileges to exert influence on the beneficiary countries. For at least two of the schemes reviewed above, the donors have

²¹ UNCTAD, *Handbook on the Scheme of Japan: 2000/2001* (Geneva: UNCTAD, 2000).

²² Certain products can obtain a waiver under section 504(d). The percentage provision is waived for items that were not produced in the United States on January 3, 1985, as provided for in Section 504(d) of the GSP law. The list can be modified through petitions submitted in an annual review. For those products on this list, a 504(d) waiver will automatically be granted when required each year.

used either positive inducements (i.e., expanded benefits) or negative sanctions (i.e., the removal of countries or products) as a means of inducing changes in the policies of beneficiary countries.

For example, the EU provides a number of means to encourage compliance with internationally recognised environmental, labour, and drug policies. Section 4, Article 7 of the Regulation applying the 1999-2001 GSP programme outlines the “special arrangements supporting measures to combat drugs.” This incentive is meant to reward Central and South American countries for their domestic efforts to combat drugs. Customs duties are suspended entirely for a wide range of industrial products. Notable exceptions are parts and accessories of arms and ammunitions and various sensitive agricultural products. Countries benefiting from this special arrangement are the Andean Community²³ and Central American Common Market²⁴ members.

The special incentives linked to the protection of labour rights originally referred to ILO Conventions 87, 98 and 138. To bring this into line with the concept of “core labour rights”, beneficiaries are also being asked to comply with ILO Conventions 29, 100, 105, 111 and 182. On the other hand, serious and systematic violation of those standards is proposed as a reason for temporary withdrawal of GSP benefits. Some modification of the provisions related to environmental protection is being made to take account of the fact that some national certification schemes have acquired a degree of international recognition. Temporary withdrawal of benefits is being contemplated on the basis of significant detrimental effects on the environment arising from the production of certain products. Further modifications are envisaged in the scheme for the next decade.

In the US, the “designation criteria” that the President employs in deciding whether any specific country would be granted benefits also provide the means by which a country can be removed. A country’s benefits can be reduced, suspended, or terminated if it is found not to comply with these criteria. The US policy on this matter took a new turn with the Trade and Tariff Act of 1984, which — in addition to re-authorising the GSP — made three important changes in the programme.²⁵ First, the designation criteria for the GSP were expanded to cover additional items (e.g., labour rights). Second, the law provided for a “general review” that could lead to increases or reductions in countries’ benefits. Third, the law allowed the Office of the U.S. Trade Representative (USTR) to offer countries more secure benefits by waiving the limits on GSP benefits. The USTR first used these provisions in a general review of the GSP in 1985-1987, and has continued to use them in subsequent annual reviews.

The workers’ rights criterion has been the single most common issue cited in the petitions filed with the GSP Subcommittee. Of the 224 country practices petitions that were filed with the USTR during 1985-2000, 128 concerned workers’ rights.²⁶ Failure to meet this criterion has led to the temporary or permanent suspension of GSP privileges for Chile, Maldives, Mauritania, Paraguay, Sudan, and Syria, and their termination for Liberia, Nicaragua, and Romania. Other common topics of complaint in annual reviews concern expropriation disputes (which led to the suspension of Ethiopia’s benefits during 1980-1993), intellectual property rights, and market-access issues.

The protection of intellectual property rights is among the most important designation criteria. The United States demonstrated the potential use of GSP privileges in trade disputes when in 1997 “the

²³ Bolivia, Colombia, Ecuador, Peru, and Venezuela.

²⁴ Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

²⁵ See Stephen Lande and Craig VanGrasstek, “Renewal of the Generalised System of Preferences: Neoreciprocity and the Newly Industrialised Countries.” Chapter 4 of *The Trade and Tariff Act of 1984: Trade Policy in the Reagan Administration* (Lexington, Massachusetts: D.C. Heath, 1986).

²⁶ Secretariat’s calculations based on data provided by USTR.

U.S. Government announced the suspension of 50 percent of Argentina's GSP benefits effective in April 1997 because of Argentina's lack of patent protection for pharmaceuticals."²⁷

The benefits extended to countries can also be modified as a result of other policy considerations, such as the extension of more preferential treatment to favoured trading partners. On three occasions, US officials have conducted special reviews of the GSP to grant speedy and favourable treatment to the petitions submitted by partners from specific regions. The United States conducted special reviews for Andean countries in 1989-1990, Eastern European countries in 1991-1992, and sub-Saharan African countries in 1997.

The question arises to what extent do some of the conditions set by preference givers that beneficiaries, including in relation to these non-trade concerns, meet the criterion of "non-reciprocity"? If special incentives or penalties, requiring the fulfilment of conditions by the beneficiary, are applicable to a sub-group of GSP beneficiaries other than LDCs that meet the conditions, are these covered by the Enabling Clause? To what extent would it be wiser to use other tools than trade preferences – e.g. targeted aid, structural adjustment programmes or technical assistance - to achieve desirable social goals?

These questions need to be addressed at the political level since there is no redress within the existing WTO rules. This is because the GSP is fundamentally inconsistent with the core GATT rule of non-discriminatory treatment under Article I, the Enabling Clause isolated the GSP from the scope of GATT rules. Beneficiaries of the GSP do not have a legally enforceable right to these preferences, which are not "bound" in the donors' tariff commitments. As noted earlier, the Enabling Clause is couched in permissive rather than mandatory language, so that donors consider that they may unilaterally modify, extend or withdraw such preferences, including the coverage of beneficiaries. In other words, beneficiary countries have no recourse to multilateral rules in any disputes regarding the implementation of the programme.

F. Conclusions [Preliminary]

Despite the Marrakesh Agreement, the treatment of development issues in the detail of the WTO Agreements in effect represents a continuation of a 50-year process of the patching on to the GATT of development provisions that were an integral part of the Havana Charter. The philosophical underpinning of the WTO system is that of a single system of rights and obligations dedicated towards further trade liberalisation with supportive rule-making, monitoring and enforcement mechanisms, rather than "trade as if development really mattered". While developing countries had more limited obligations than developed countries under the Uruguay Round market access negotiations and there are special provisions for LDCs, Annex VII countries and net food importing developing countries, S&D treatment largely provides for extended transition periods while uncertain and limited technical assistance is intended to help developing countries meet the same level of obligations as other countries. Many S&D provisions are "best endeavours" with no legal force.

Yet, a realistic view of the needs and capacities of developing countries from Afghanistan to Singapore surely calls for a different approach than a single commitment to taking on greater and greater levels of obligations. The way in which the GSP has evolved – as well as the differentiation that has started to appear in the WTO system – suggests greater calibration or tiering of benefits as one form of response. However, this can only be a partial response to the problem. Moreover, such differentiation is a

²⁷ Office of the U.S. Trade Representative, *1997 National Trade Estimate: Argentina*. (Washington, D.C.: U.S. Government Printing Office, 1997), page 11.

divisive issue, as many developing countries (correctly) fear that it points to the progressive reduction of their benefits as they develop. As they would point out, many of the more advanced developing countries have considerable regional disparities and infrastructure weaknesses, and they do not have the resources of the developed countries use to address such issues (e.g., the EU solidarity funds). Again, integration in the WTO system and the world economy calls for supply-side and programmes and programmes to support structural changes that are not covered by the WTO. This calls for a more coordinated effort with the international financial institutions and a role for UN agencies.

Tackling the development issue is a central challenge to tailor the international economic framework to meet the genuine needs of development. Unfortunately, the Doha declaration follows the approach of patching up the system that has brought limited benefits in the past, with S&D exhortatory language added as an afterthought throughout the text. We do not challenge the need for progressive liberalisation or better governance, including through an improved international framework of rules. But patching up the WTO wherever it springs a leak is not a sufficient response to the need for a serious re-think about the way in which the international economic institutions address development issues.

[Reference List to be added]

Table 1: Imports by forms of tariff treatment (US\$'000), year: 1999

CANADA

World Imports excl. N.A. 207,912,378

World Imports N.A. 907,321

Duty Treatment	Total Imp. excl. N.A.	Total Imp Share	Dutiable Imp.	Free Imp.	N.A. Imp.	Duty Collected
MFN	119,586,220	58	16,596,986	102,989,234	740,672	1,519,807
Canada-United States under the North American Free Trade Agreement (NAFTA)	80,418,820	39	0	80,418,820	339	0
GSP	4,164,668	2	3,119,032	1,045,635	96,597	173,925
Mexico under the North American Free Trade Agreement (NAFTA)	3,394,771	2	1,507,108	1,887,663	12,500	36,028
Australia	118,163	0	14,071	104,092	40,124	1,544
Israel under the Canada-Israel Free Trade Agreement (CIFTA)	88,002	0	1,261	86,741	701	53
Commonwealth Caribbean Countries	53,890	0	18	53,872	0	2
Chile under the Canada-Chile Free Trade Agreement (CCFTA)	49,142	0	5,364	43,779	12,807	288
New Zealand	31,551	0	4,018	27,533	3,487	139
Least-developed Countries	7,152	0	0	7,152	95	0

JAPAN

World Imports excl. N.A. 266,075,935

World Imports N.A. 38,986,158

Duty Treatment	Total Imp. excl. N.A.	Total Imp Share	Dutiable Imp.	Free Imp.	N.A. Imp.	Duty Collected
MFN	226,000,351	85	51,374,062	174,626,288	6,339,516	4,449,190
GSP	39,880,847	15	21,241,758	18,639,089	32,539,318	1,384,559
Least-developed Countries	194,737	0	0	194,737	107,324	0

Source: WTO.

UNITED STATES

World Imports excl. N.A. 961,811,854

World Imports N.A. 8,912,427

Duty Treatment	Total Imp. excl. N.A.	Total Imp Share	Dutiable Imp.	Free Imp.	N.A. Imp.	Duty Collected
MFN	744,630,058	77	349,450,889	395,179,169	207,762	19,086,513
CAN/NAFTA	118,613,631	12	0	118,613,631		0
MEX/NAFTA	70,796,752	7	3,591,208	67,205,543	8,702,753	120,914
GSP	16,700,661	2	0	16,700,661	1,624	0
Caribbean Basin Economic Recovery Act/CBI	3,896,744	0	339,259	3,557,486	288	255,745
ISR/FTA	2,924,050	0	0	2,924,050		0
LDC	2,351,927	0	0	2,351,927		0
Andean Trade Preference Act (ATPA)	1,898,031	0	25,485	1,872,546		1,526

EUROPEAN COMMUNITIES

World Imports excl. N.A. 698,978,010

World Imports N.A. 2,526,980

Duty Treatment	Total Imp. excl. N.A.	Total Imp Share	Dutiable Imp.	Free Imp.	N.A. Imp.	Duty Collected
MFN	516,027,547	74	256,327,256	259,700,291	743,511	18,368,918
Other Preferences	134,040,848	19	122,703,344	11,337,503	967,845	7,590,718
GSP	38,216,249	5	28,603,236	9,613,012	812,190	1,735,006
ACP	9,828,800	1	6,354	9,822,445	3,434	497
LDC	765,568	0	137	765,430		6

Table 2: Tariff averages by forms of tariff treatment, year 1999

CANADA

Duty Treatment	Simple Tariff Average		Weighted Average	
	All items	Dutiable items	All items	Dutiable items
MFN	4.49	8.84	1.27	9.16
Canada-United States under the North American Free Trade Agreement (NAFTA)	0.00	0.00	0.00	0.00
GSP	2.89	5.00	4.18	5.58
Mexico under the North American Free Trade Agreement (NAFTA)	1.75	5.40	1.06	2.39
Australia	6.06	11.30	1.31	10.98
Israel under the Canada-Israel Free Trade Agreement (CIFTA)	0.28	5.41	0.06	4.20
Commonwealth Caribbean Countries	0.64	8.23	0.00	10.31
Chile under the Canada-Chile Free Trade Agreement (CCFTA)	1.67	7.58	0.59	5.37
New Zealand	5.92	10.41	0.44	3.47
Least-developed Countries	0.00	0.00	0.00	0.00

JAPAN

Duty Treatment	Simple Tariff Average		Weighted Average	
	All items	Dutiable items	All items	Dutiable items
MFN	5.28	8.33	1.97	8.66
GSP	2.20	7.21	3.47	6.52
LDC	0.00	0.00	0.00	0.00

UNITED STATES

Duty Treatment	Simple Tariff Average		Weighted Average	
	All items	Dutiable items	All items	Dutiable items
MFN	5.59	7.96	2.56	5.46
CAN/NAFTA	0.00	0.00	0.00	0.00
MEX/NAFTA	0.53	4.50	0.17	3.37
GSP	0.00	0.00	0.00	0.00
Caribbean Basin Economic Recovery Act/CBI	0.09	11.10	1.43	16.43
ISR/FTA	0.00	0.00	0.00	0.00
LDC	0.00	0.00	0.00	0.00
Andean Trade Preference Act (ATPA)	0.09	10.96	0.08	5.99

EUROPEAN COMMUNITIES

Duty Treatment	Simple Tariff Average		Weighted Average	
	All items	Dutiable items	All items	Dutiable items
MFN	7.07	8.69	3.56	7.17
Other Preferences	7.98	8.51	5.66	6.19
GSP	5.23	6.88	4.54	6.07
ACP	0.11	7.37	0.01	7.82
LDC	0.04	7.44	0.00	4.42

Source: WTO.

