

**Special and Differential Treatment under the WTO with Specific Reference to the  
Application of the Agreement on Agriculture**

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## Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my original work and that I have not previously in its entirety or in part submitted it at any other university for a degree.

Signature: . . . . .

A handwritten signature in blue ink, consisting of a stylized 'B' followed by a horizontal line extending to the right.

Date: 30-JUNE-2005

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## **ABSTRACT**

When engaged in multilateral trade discourse developing countries have to take heed of involved principles and the general impact of the enforcement of such principles to their economic trade background. The principle of special and differential treatment is one of the principles that directly affect this category of states. It is therefore essential to know its proper interpretation and the ensued implementation. There is also the need for both the developed and developing countries alike to take special and differential treatment seriously in order to achieve indiscriminately the best system suitable for fair-trade practices.

## LIST OF ABREVEATIONS

AMS Aggregate Measure of Support

ATC Agreement on Textiles and Clothing

BOP Balance-Of-Payments

CCFF Contingency and Compensatory Financing Facility

DSU Understanding on Rules and Procedures Governing the Settlement Of Disputes/Dispute Settlement Unit

FAO Food Aid Organisation

FAC Food Aid Convention

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

GDP Gross Domestic Product

GNP Gross National Product

GSP Generalized System of Preferences

EU European Union

FAO Food and Agriculture Organization of the United Nations

IFIS International Financial Institutions

IMF International Monetary Fund

ISO International Standards Organization

ITC International Trade Centre (UNCTAD/WTO)

ITO International Trade Organization

LDCS Least-Developed Countries

MFN Most Favoured Nation

MTS Multilateral Trading System

NAFTA North American Free Trade Association

NFIDCS Net Food-Importing Developing Countries  
NTMS Non-Tariff Measures  
QRS Quantitative Restrictions  
R&D Research and Development  
S&D/SDT Special and Differential Treatment  
SMC Singapore Ministerial Conference  
SME Small and Medium Sized Enterprises  
SPS Sanitary and Phytosanitary  
SSG Special Safeguard  
TBT Technical Barriers to Trade  
TNC Transnational Corporations  
TRIMS Trade-Related Investment Measures  
TRIPS Trade-Related Aspects of Intellectual Property Rights  
UN United Nations  
UNCTAD United Nations Conference on Trade and Development  
UNDP United Nations Development Programme  
WTO World Trade Organization

## CHAPTER ONE: INTRODUCTION

### 1.1 Introduction

In the urge to achieve liberalised multilateral trade, the world saw it fit that there should be a forum that addresses issues of international trade which culminated in the formation of the World Trade Organisation (WTO) in 1995.<sup>1</sup> The predecessor of the WTO is Part IV of the Charter of Havana,<sup>2</sup> generally known as the General Agreement on Tariffs and Trade (GATT) of 1948.<sup>3</sup> The WTO came into effect in 1995 as the answer to the perceived inabilities of GATT. GATT was considered ineffective as far as guaranteeing proper implementation of the governing rules of multilateral trade.<sup>4</sup>

The new organisation, the WTO, substantially differed from GATT's provisional Treaty in that it had the mandate to administer a unified package of agreements, which demanded commitment from all parties.<sup>5</sup> It introduced new aspects, which were not addressed before; for example, as opposed to GATT 1948, which dealt with the "products" only, the WTO dealt with both goods and services and other several trade matters. In addition, the WTO established a forum for dispute settlement taking into account the fact that there can be disagreements amongst members that demand a legal intervention and monitoring.<sup>6</sup>

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<sup>1</sup> Also called GATT 1995; Stewart (eds) 1993:1; Schott and Burman 1994:1; Berman et al 1993:953;

<sup>2</sup> Williams 1995:5; Thomas and Dillion 1995: 350; Promulgated in 1947; Focus GATT Newsletter. 'The WTO Enters in to Force,' GATT Information and Media Relations Division.Geneva

<sup>3</sup> [http://www.europarl.eu.int/factsheets/6\\_2\\_2\\_en.htm](http://www.europarl.eu.int/factsheets/6_2_2_en.htm) European Parliament Fact Sheet 24-10-2004

<sup>4</sup> Bustamante 1997:533; Mota 1993:75-76; Feeway 1996:99-100; Zsolt and Bessko 1994:265-267; Petersmann 1995:161-221

<sup>5</sup> States and customs territory with full autonomy wishing to join the WTO had to follow a specialised accession procedure and bilateral negotiations which bind the joining state to establish its schedule and commitments on goods and services. This bilateral process determined the specific commitments to be undertaken by the acceding government, as well as any transitory arrangement acceptable to the working party.

<sup>6</sup> Bernan 2000:13 Stewart (eds) 1993:1; Schott and Burman 1994:1; Berman et al 1993:953; Williams 1995:5; Thomas and Dillion 1995: 350; Promulgated in 1947; Focus GATT Newsletter. 'The WTO Enters in to Force,' GATT Information and Media Relations Division.Geneva

The objectives of liberal multilateral trade are marked by raised standards of living and incomes of all the WTO members. This can be achieved through ensured participation of all members; expansion of production and trade of each state; the optimal use of resources by the state to which they are available and, finally, the achievement of sustainable development by all the states.<sup>7</sup>

The GATT/WTO agreements form the basis of multilateral trade principles. These are negotiated and signed by the bulk of the world's trading members. They bear the same consequences as contractual agreements; hence they are binding in nature. These agreements deal with a wide range of activities, which include matters of agriculture, intellectual property, textiles and clothing, banking, telecommunications, government procurement, industrial standards, food sanitation rules and product safety. They bind their signatories to subject their trade policies within the rules laid down in the agreements.<sup>8</sup> The application of these agreements is monitored through strict adherence to the fundamental principles.<sup>9</sup>

### 1.1.1 FUNDAMENTAL PRINCIPLES OF GATT/WTO

The operation of GATT/WTO is based on the basic principles which include the principle of non-discrimination; the elimination of quantitative restrictions and the prohibition of export subsidies; the use of tariffs as the only legal instrument of protection; transparency of national trade legislation and special and differential treatment.<sup>10</sup>

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<sup>7</sup> [http://www.europarl.eu.int/factsheets/6\\_2\\_2\\_en.htm](http://www.europarl.eu.int/factsheets/6_2_2_en.htm) European Parliament Fact Sheet date accessed [24-10-2004] Stewart (eds) 1993:1; Schott and Burman 1994:1; Berman et al 1993:953; Williams 1995:5; Thomas and Dillion 1995: 350; Promulgated in 1947; Focus GATT Newsletter. 'The WTO Enters in to Force,' GATT Information and Media Relations Division.Geneva

<sup>8</sup> <http://www.org> GATT 1995; Stewart (eds) 1993:1; Schott and Burman 1994:1; Berman et al 1993:953; Williams 1995:5; Thomas and Dillion 1995: 350; Promulgated in 1947; Focus GATT Newsletter. 'The WTO Enters in to Force,' GATT Information and Media Relations Division.Geneva

<sup>9</sup> Williams 1995:5; Thomas and Dillion 1995: 350; Promulgated in 1947; Focus GATT Newsletter. 'The WTO Enters in to Force,' GATT Information and Media Relations Division.Geneva  
Bernan 2000:13-14; 80% being the developing countries and 20% being developed countries

### 1.1.2 THE SYSTEM OF TARIFFICATION

This is derived from the majors set in the General Agreement on Tariffs and Trade (GATT). According to this process members are expected to keep to the statutorily provided minimum level of tariffs.<sup>11</sup> No member can lower any tariff or refrain from raising any unless there is a special agreement at hand. Normally a party would enter into tariff concessions under the principle of reciprocity in return for reciprocal concessions from the other member country. Once the agreement becomes a tariff concession on a particular item, it subjects the item to a decreased level of tariff. Under these circumstances the member should refrain from imposing other charges or duties, which would undercut the tariff concession already made.<sup>12</sup>

Tariff concessions are not only entitlements to the parties to the agreement, but they also entitle all other members to the similar benefits of the agreement. The parties are supposed to grant the favours of such agreement without discriminating against other member states.<sup>13</sup> Tariff concessions can be withdrawn under two conditions, where new compensating agreements are made and if an operative concession leads unexpectedly to serious injury to domestic industry; in return the counter party will be entitled to withdraw equivalent concessions. This emphasises the principle of flexibility in international trade. With this flexibility states are encouraged to enter into negotiations for tariff concessions. Such practice brings the use of high tariffs to the limit as they hamper free trade. In addition, uncontrolled use of tariffs obscures trade predictability and therefore creates lack of transparency in multilateral trade.

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<sup>10</sup> [http://www.europarl.eu.int/factsheets/6\\_2\\_2\\_en.htm](http://www.europarl.eu.int/factsheets/6_2_2_en.htm) European Parliament Fact Sheets The European Union and the World Trade Organization (WTO/GATT) [date accessed 24-10-2004]

<sup>11</sup> Article 2 of GATT; Philipinas 2000:4; Sumner 1994:1-4;

<sup>12</sup> Article 2 of GATT

<sup>13</sup> Article 2(1)(a) of GATT

### 1.1.3 NON DISCRIMINATION

The second principle is non-discrimination. This principle requires that there should be an equal treatment of all member states in international trade matters. It originates from the most favoured nation (MFN) rule, which requires that no single member of the WTO should be favoured against other members in international trade matters.<sup>14</sup> The principle of non-discrimination is also encompassed in the national treatment concept. According to this concept, states should avoid discriminating between their own products or services and those, which are foreign. Equal treatment should be granted to both foreign and domestic services, and to foreign and local trademarks together with foreign and local copyrights.<sup>15</sup>

### 1.1.4 THE ELIMINATION OF QUANTITATIVE RESTRICTIONS

In order to do away with quantitative restrictions the general rule is that parties should not maintain prohibitions or restrictions that can hamper fair competition. The caveat to this rule is however, that the prohibited restrictions can be legal as far as they meet the requirements of Article XI (I), namely, 'temporary export prohibitions or: restrictions to prevent or relieve critical shortages of food-stuffs or other essentials; import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade, import restrictions on any agricultural or fisheries product necessary to the enforcement of government measures for<sup>16</sup>

- (a) restricting the quantities of the like or substitutable domestic product that can be marketed or produced,
- (b) removing a temporary surplus of like or substitutable domestic product by making the surplus available to certain domestic consumers free or at subsidised prices and

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<sup>14</sup> Article 1 and 2 (1) (a) of GATT and Article 1 of GATS together with Article 4 of TRIPS

<sup>15</sup> Article 1 and 2 (1) (a) of GATT and Article 1 of GATS together with Article 4 of TRIPS

<sup>16</sup> Kumar 1998: 9:12; Sunmer ea 2004:2

(c) restricting the production of an animal product, the production of which is directly dependant, wholly or mainly on the imported commodity.

### **1.1.5 THE PROHIBITION ON TRADE-DISTORTING SUBSIDIES**

The need to avoid subsidisation, which causes injury, and prejudice to domestic industries of other signatories and therefore affect fair trade and interests of contracting parties was catered for by Article XVI on subsidies. This Article provided that the provision of subsidies should be kept to the minimum and that ought to be done under strict conditions. This Article prohibited subsidies other than export subsidies in all cases except where they were used to promote social and economic policy objectives, which included,<sup>17</sup>

- eliminating industrial, economic and social disadvantages of specific regions;
- facilitating the restructuring, under socially acceptable conditions, of certain sectors, where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade;
- sustaining employment and encouraging re-training and change in employment,
- encouraging research and development programmes, especially in the field of high technology industries;
- implementing economic programmes and policies to promote the economic and social development of developing countries; and
- redeployment of industry in order to avoid congestion and environmental protection.

The inadequacy and therefore in efficiency of Article XVI to cater for its objective lead to the adoption of Agreement on Subsidies and Countervailing Measures which is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII. This agreement remedies the prior loopholes in the prohibition of trade-distorting subsidies it does two things, namely, it disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. It provides

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<sup>17</sup> Kumar 1998:9:12



that any affected country have a right to put its matter before the DSU and seek the withdrawal of subsidy or the removal of the adverse effects due to the provision of subsidies by other member states. Alternatively the affected country can launch its own investigation and ultimately charge extra duty (known as “countervailing duty”) on subsidized imports that are found to be hurting domestic producers.

The agreement further specifies what is meant by a subsidy.<sup>18</sup> Furthermore, the agreement defines two categories of subsidies, namely, prohibited and actionable.<sup>19</sup> The former relates to subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries’ trade. They can be challenged in the WTO dispute settlement procedure where they are handled under an accelerated timetable. If the dispute settlement procedure confirms that the subsidy is prohibited, it must be withdrawn immediately. Otherwise, the complaining country can take counter measures. If domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

The latter encompass such subsidies where a complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted. The agreement defines three types of damage that subsidies can cause. For example, it explains that one country’s subsidies can hurt a domestic industry in an importing country. They can hurt rival exporters from another country when the two compete in third markets. And domestic subsidies in one country can hurt exporters trying to compete in the subsidizing country’s domestic market. This is what was alleged in the matter where Brazil, Australia, and Thailand accused the EU of breaking global trade rules by providing export subsidies for sugar industry in excess of the concerned commitments. This was said to distort world prices and cause other states to lose revenue.

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<sup>18</sup> It introduces the concept of a “specific” subsidy — i.e. a subsidy available only to an enterprise, industry, group of enterprises, or group of industries in the country (or state, etc) that gives the subsidy. The disciplines set out in the agreement only apply to specific subsidies. They can be domestic or export subsidies.

<sup>19</sup> It originally contained a third category: non-actionable subsidies. This category existed for five years, ending on 31 December 1999, and was not extended. The agreement applies to agricultural goods as well as industrial products, except when the subsidies are exempt under the Agriculture Agreement’s “peace clause”, due to expire at the end of 2003.

The agreement also suggest remedies that the parties may resort to if the Dispute Settlement Body rules that the subsidy does have an adverse effect. It relates that, the subsidy must be withdrawn or its adverse effect must be removed. Again, if domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

### **1.1.6 TRANSPARENCY OF NATIONAL TRADE LEGISLATION**

The main requirements of this principle are set out in the provisions of the three main WTO Agreements namely, agreement on trade in goods, agreement on trade in services and agreement on trade related intellectual property rights.<sup>20</sup>

Article III of GATT is of particular relevance in this regard; it states under Article III: 4, that national treatment is required in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of goods. This requirement also applies to GATS Article XVII; and TRIPS Agreement Article 3.<sup>21</sup>

It is in addition, incorporated in various other agreements that form part of Annex IA of the WTO Agreement, the part of the WTO that contains multilateral agreements on trade in goods, for example, the Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures. It is also a cornerstone of the plurilateral Agreement on Government Procurement.<sup>22</sup>

The essence of the principle of national treatment is to require a WTO Member not to put the goods or services or persons of other WTO Members at a competitive disadvantage

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<sup>20</sup> WT/WGTCP/W/114

<sup>21</sup> WT/WGTCP/W/114

<sup>22</sup> WT/WGTCP/W/114

*vis-à-vis* its own goods or services or nationals. However, the purpose and scope of the principle of national treatment differ between the three mentioned WTO Agreements.<sup>23</sup>

The focus of the GATT, at least as originally negotiated in 1947, was on the control and liberalisation of border measures restricting international trade. A key principle is that, as a general rule, any border measures intended to give a competitive advantage to domestic products should take the form of customs tariffs imposed at the border and that the level of such customs tariffs should be a matter for negotiation and binding in national schedules. Within this scheme of things, Article III on national treatment plays a critical role since, as its paragraph 1 makes clear that, it is designed to ensure that all other measures, referred to as "internal" measures, are not applied to imported or domestic products so as to afford protection to domestic production.<sup>24</sup>

It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effect of tariff concessions and other multilateral rules applicable to border measures. The focus in the GATT on border measures, together with its historical background as replacing a proliferation of bilateral trade agreements with a multilateral one, explains why most favoured nation treatment is often referred to as the cornerstone of the GATT, notwithstanding the key role of national treatment in regard to internal measures.<sup>25</sup>

### 1.1.7 SPECIAL AND DIFFERENTIAL TREATMENT

Last but not least, we have special and differential treatment.<sup>26</sup> This is one exception to the non-discrimination principle. For example, under the WTO it is not discrimination

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<sup>23</sup> WT/WGTCP/W/114

<sup>24</sup> WT/WGTCP/W/114

<sup>25</sup> WT/WGTCP/W/114

<sup>26</sup> Matthews 2003:1-10; Langhammer and Lücke 2003:148; Das 1998:13; Whalley 1999:24 Fukasaku 2000:4; Youssef 1999:7; Melamed 2002:3; Gibbs 1998:14; Davenport 2001:3; Kessie 2000:7 Mele`ndez-ortis and Dehlavi 1998:13; Onguglo 1999:8; Oyejde 2001:10; Stevens 2002:15; Carlos P`erez Del Castillo 2003:14; WTO(1999a); WTO(1999b)W/T/COMTD/W/77;G/AG/NG/W/13;G/AG/NG/W/102;G/AG/NG/S/10.

where countries have set up a free trade area agreement, which discriminates against goods from outside.<sup>27</sup> It is also not discrimination for members to give developing countries special access to their markets, where others cannot enjoy such benefits.<sup>28</sup>

The concept of special and differential treatment forms the basis of the WTO objectives.<sup>29</sup> Thus, for purposes of sustainable development in the world, the living standards and incomes of all states should be raised.<sup>30</sup> Each member state should be fully engaged in trade activities.<sup>31</sup> Production and trade in the whole world should be expanded - there should be optimal utilisation of world resources and developed state parties should assist developing countries so that these countries secure a greater share in the growth of international trade.<sup>32</sup>

The Agreement on Agriculture reiterates these principles. It initiates a process of reform of trade in agriculture based on the objectives of the WTO negotiations as set out in the Punta del Este Declaration.<sup>33</sup> The long-term objective will be to establish a fair and market-oriented agricultural trading system.

To realise this objective the Agreement on Agriculture insists that developing states should be awarded special and differential treatment, where it provides that to keep 'with the recognition that differential and more favourable treatment for developing country members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided.'<sup>34</sup>

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27 Egesa 2004:4; Stevens 2002:15; Carlos P`erez Del Castillo 2003:14

28 Hoda e.a 2003:1; Michalopoulos 2000:14

29 Kessie 2000:7 Mele`ndez-ortis and Dehlavi 1998:13; Onguglo 1999:8; Oyejde 2001:10

30 Stevens 2002:15; Carlos P`erez Del Castillo 2003:14

31 Stevens 2002:17; Carlos P`erez Del Castillo 2003:19

32 As stated in the Marrakesh Agreement Preamble; also see [www.mfat.govt.nz](http://www.mfat.govt.nz). Trade Matters. August 20-04-2004. The need to uplift the developing states to a higher standard is vital so that the main objective of the WTO/GATT is reached namely that no individual state should lack behind economically because this will affect fuller participation of state members.

33 The Uruguay Round 1986

34 Article 15 Agreement on Agriculture.

## 1.2 UNDERLYING ASSUMPTIONS AND AIMS OF THE STUDY

It is generally acknowledged<sup>35</sup> that effective application of special and differential treatment would grant development opportunities to developing and least-developed states, so that they graduate into developed states within a reasonable time. Regardless of that, implementation of special and differential treatment provisions encountered problems. These status of facts raise a concern that developed states are reluctant to enforce the concept of Special and Differential Treatment and that defects in WTO provisions on special and differential treatment allow for foot-dragging on the issue of implementation<sup>36</sup>. This is so alleged because the formative nature of these provisions<sup>37</sup> are not binding in nature and that does not afford developing states rights to adjudicate on the failure of developed states to afford these states special and differential treatment.

This research investigates the reasons for the problems encountered in the attempts to enforce the Special and Differential Treatment provisions. It refers to the WTO Agreement on Agriculture with the aim of analysing the application of the concept of special and differential treatment in respect of developing and least-developed states. It discusses different interpretations of the principle of special and differential treatment. This work recommends possible solutions where problems are identified.

This study focuses mainly on the concept of special and differential treatment. It explores the origin of this principle and gives its interpretation in order to analyse its enforcement. Although this work will touch on relevant principles to give a clear meaning of special and differential treatment, it does not extend to in-depth discussion of multilateral trade principles. Since both economic development and international trade principles will be dealt with to some extent in this work, it will therefore serve as a

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<sup>35</sup> ICTSD February 2003. Development Since the Fourth WTO Ministerial Conference. Doha Round Briefing Series, Vol.1 No13 of 13: Page 1.

<sup>36</sup> ICTSD February 2003. Development Since the Fourth WTO Ministerial Conference. Doha Round Briefing Series, Vol.1 No13 of 13: Page1

<sup>37</sup> Special and Differential Treatment provisions are worded in gentlemen's agreement language

contribution towards the solution of soft development in the WTO.<sup>38</sup> The recommendations of this study will be valuable to different fields, namely, the academic community, policy makers in developing states and law reformers both internationally and domestically.

### **1.3 RESEARCH STRUCTURE**

Chapter One is the introduction. It explains the underlying assumptions and the objective of this research, and explains how it will be achieved.

Chapter Two will deal with the history of the World Trade Organisation in order to sketch the background behind the concept of Special and Differential Treatment in the World Trade Organisation.

Chapter Three gives the interpretation of special and differential treatment and reviews the understanding of this concept by the developed and developing states. In this chapter it will be shown how the concept can be applied in a more precise, effective and operational manner in order to enhance multilateral trade.

Chapter Four will discuss the application of this concept in the Agreement on Agriculture. It will elaborate on the provisions of this agreement, which deal with this concept. This will lead to the analysis of the application of this concept in agricultural trade. It will then be shown why there are differences when different states implement this concept.

Chapter Five will give the conclusion and recommendations on how the effective utilisation of the concept of special and differential treatment can be achieved. The

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<sup>38</sup> Soft development means lack of development or a circumstance of slow development due to disobedience of laws or policies put in place. In the context of multilateral trade issues of special and differential treatment, soft development relates to the failure in multilateral trade to enforce special and differential treatment so that by this time all states would be operating on an equal footing and that by now all states would be regarded as developed. The failure to enforce special and differential treatment provisions lead to extreme poverty in developing countries.

importance of this concept will be highlighted and any loopholes hindering the application of this concept will be considered.

#### **1.4 RESEARCH METHODOLOGY**

Review research will be carried out, where the relevant information on international trade agreements will be gathered, and this will form the basis for the analysis of the trends of development in different WTO member states. Extensive use will be made of the WTO website, which contains both recent and old information on world trade activities and findings. The use of the internet will be coupled with field work, where relevant public and private institutions will be visited and interviews carried out with relevant officers.

The preliminary research which was carried out to confirm the validity of this project included the reading of newspaper articles that reported on economic development and multilateral trade, and the reading of information downloaded from the WTO website on international trade, with particular reference to developing and least-developed countries. There was a visit to the Ministry of Trade and Industry for an interview with the senior legal officer of the ministry. Several international trade and development issues were explained during this visit.

The information gathered from this initial research informs the hypothesis that ineffective enforcement of the Special and Differential Treatment concept jeopardises the development process of developing states and is therefore contrary to the fundamental objective of multilateral trade, namely, to liberalise trade and do away with trade discrimination. The same concern has been the subject of debate in recent international summits and conferences. For example, in the four consecutive WTO ministerial conferences held in Doha, several issues pertinent to development and trade in developing and least developed states were on the agenda.<sup>39</sup>

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<sup>39</sup> Special and Differential Treatment issues remained part of the Doha agenda in all of these meetings as it was always deferred to next meetings.

## **1.5 RESEARCH TECHNIQUES**

Authorities are referred to in footnotes. The last name followed by the year of the publication where necessary. The use of page numbers and volumes of journals will also be applicable in this regard. The bibliography at the end of this work contains the full titles and references of books and articles, referred to and exclude the court cases. The words state(s), country(ies) members and nations are used interchangeably to describe those states, which are members of the World Trade Organisation. GATT/WTO are not given any specific reference, but instead are used to describe both the international trade organisation and the international trade system. For present purposes the term developing state(s) or countries covers both least-developed and developing countries unless specifically stated otherwise.



## CHAPTER TWO: BACKGROUND ON SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS UNDER THE WTO

### 2 INTRODUCTION

The history of Special and Differential Treatment provisions (SDT) goes as far back as the initial stages of multilateral trade.<sup>40</sup> It is part of the basis of the multilateral trade system. This concept has a long history in the GATT/WTO deliberations.<sup>41</sup> For example, in the initial post-world war II debates developing states insisted that trade and development should not be divorced so that they participate in multilateral trade.<sup>42</sup> Similarly, in the recent Doha rounds the similar need that there should be agreement on SDT was raised by the Developing Countries.<sup>43</sup> The fact that SDT provisions have ever been part of every essential WTO/GATT agreements marks that these provisions form are of essence of multilateral trade.<sup>44</sup>

In Chapter one a summary of the three main principles of multilateral trade, namely, the principle of tariffication; the Most Favoured Nation Principle (MFN) and SDT was given. SDT is described as the exception to the two principles. Whilst the MFN principle and the principle of tariffication respectively require that the same treatment be given to all members; thus if one member enters into an agreement in favour of another member, such an agreement should also be open for the rest of the members to avoid discrimination and that parties should do away with non-tariff barriers and strive for the entire removal of tariffs as trade barriers to encourage trade liberalisation.<sup>45</sup>

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<sup>40</sup> Fukasaku 2000:10; Hoekman e.a. 2003:18; Hudec 1987:23; Kessie 2000:14; Michalopoulos 2000:17; Pangestu 2000:21; Prowse 2002:31 Stevens 2002:10; Whalley 1999:13

<sup>41</sup> Fukasaku (2000), Hoekman et al. (2003), Hudec (1987), Kessie (2000), Michalopoulos (2000), Pangestu (2000), Prowse (2002), Stevens (2002), Whalley (1999), and WTO Secretariat (1999).

<sup>42</sup> Hoda and Gulati 2003:1

<sup>43</sup> (WT/GC/W/442); Paragraph 44 of the Doha Declaration.

<sup>44</sup> Fukasaku 2000:5; Hoekman e.a. 2003:8; Hudec 1987:3; Kessie 2000:10; Michalopoulos 2000:7; Pangestu 2000:11; Prowse 2002:13 Stevens 2002:4; Whalley 1999:3; Athukorala 2004:890; Charnovitz 2002:; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijk and Faber 1996:60

<sup>45</sup> Supra footnote 98

SDT on the other hand allows discriminatory treatment for developing countries to the extent that these states get economic trade benefits in order for them to emancipate in to competitive economic entities. SDT provisions are therefore set to increase trade opportunities for developing states; to safeguard trade interests for the upcoming industries; to provide flexibility on trade terms; they set the time periods for transition; they aim at technical assistance to the incapacitated industries and they seek to address development needs of the least developed states.

This understanding is derived from the diction of the SDT provisions. Examples can be drawn from Part IV of GATT which provides under Article XXXVI (8) that the developed member countries 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 member countries. The interpretative note in this part explains that developing members cannot make contributions which are inconsistent with their individual development, financial and trade needs, taking into account the past trade developments. In addition to that, Article XXVIII (3) states that less developed members are not required to reduce tariffs needed for economic development or revenue purposes.

The Tokyo Round decision of the 28<sup>th</sup> Nov 1979 similarly provides clearly that, notwithstanding the provisions of Article 1 of GATT 47,<sup>46</sup> member countries may accord differential and more favourable treatment to developing countries in respect of preferential tariff treatment granted by the developed member countries to products originating in developing countries in accordance with the GSPs; differential and more favourable treatment regarding non-tariff measures; regional or global arrangements amongst less developed member countries for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions that may be prescribed by the WTO member countries, for the mutual reduction or elimination of non-tariff measures, on products imported from one another; special treatment for the least developed among the developing countries in the content of any general or specific measures in favour of developing countries.

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Referred to as GATT 48

Paragraphs 5 and 7 of the same decision provides that the developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or to remove tariffs and other barriers to the trade of developing countries. They also provide that the less-developed member countries expect that their capacity to make negotiated concessions or take other mutually agreed action under GATT would improve with the progressive development of their economies and improvement in their trade situation and they would expect to participate more fully in the framework of rights and obligations under GATT.

These example provisions are worded in the same way as other SDT provisions in other WTO agreements. They are in general exemptions to the single undertaking principle.

## **2.2 SOURCES OF SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS UNDER THE WTO**

In addition to the pre Uruguay round agreements there are other SDT provisions throughout World Trade Organisation Agreements and Understandings. They are the exceptions to the general provisions of these Agreements and Understandings.<sup>47</sup> According to the brief of the World Trade Organisation Secretariat, '[t]he universe of SDT consists of one hundred and forty-five<sup>48</sup> provisions spread across the different Multilateral Agreements. Of the one hundred and forty-five Provisions, one hundred and seven were adopted at the conclusion of the Uruguay Round, and twenty-two apply to the least developed country Members.'<sup>49</sup>

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<sup>47</sup> <http://www.wto.org> Doha Briefing [date accessed] 17-04-2004; Athukorala 2004:888; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:56

<sup>48</sup> The Doha Briefing states that there are one hundred and fifty five Special and differential provisions; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:-30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996: -60

<sup>49</sup> <http://www.wto.org> WT/COMTD/W/77 Implementation of SDT Provisions in WTO Agreements and Decisions [date accessed] 25<sup>th</sup> October 2000; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:-28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita

## **2.2.1 AGREEMENT ON AGRICULTURE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article 15 recognises that differential and more favourable treatment for developing country Members is an integral part of the negotiation on agriculture. It therefore emphasises that SDT in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the schedules of concessions and commitments.<sup>50</sup> Furthermore this article recognises that developing country members have to have the flexibility to implement reduction commitments over a period of up to 10 years and that Least-developed country members shall not be required to undertake reduction commitments.<sup>51</sup>

Part X of Article 16 provides for Least-Developed and Net Food-Importing Developing Countries. It states that developed country members shall take such action as is provided for within the framework of the decision on measures concerning the possible negative effects of the reform programme on Least-Developed and Net Food-Importing Developing Countries.<sup>52</sup> It also provides that the Committee on Agriculture shall monitor, as appropriate, the follow-up to this decision.<sup>53</sup>

## **2.2.2 AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article 10 of this Agreement provides for SDT on preparation and application of sanitary or phytosanitary measures. According to this article, members shall take account of the special needs of developing country members, and in particular of the least-developed country members.<sup>54</sup> It also states that where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or

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2002:27; Melaku 2002:-25; Tang 1996-20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60;.

<sup>50</sup> Article 15(1)

<sup>51</sup> Article 15(2)

<sup>52</sup> Article 16(1)

<sup>53</sup> Article 16(2)

<sup>54</sup> Article 10(1)

phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country members so as to maintain opportunities for their exports. In addition, it provides that, with a view to ensuring that developing country members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs, and that members should encourage and facilitate the active participation of developing country members in the relevant international organizations.<sup>55</sup>

### **2.2.3 AGREEMENT ON TECHNICAL BARRIERS TO TRADE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

According to Article 11 of this agreement, members shall, if requested, advise other members, especially the developing country members, on the preparation of technical regulations and, also if requested, shall advise and grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardising bodies, and participation in the international standardising bodies, and shall encourage their national standardising bodies to do likewise.<sup>56</sup>

Furthermore, members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other members, especially the developing country members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and the methods by which their technical regulations can best be met.<sup>57</sup>

Furthermore this agreement requires that, members , if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other members, especially the developing country members, and shall grant them technical

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<sup>55</sup> Article 10 (2) to (4)

<sup>56</sup> Article 11(1)

<sup>57</sup> Article 11(1) to (2)

assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting member. Developed country members should therefore advise other members, especially the developing country members, appropriately and should grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers, if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the member receiving the request.<sup>58</sup>

Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other members, especially the developing country members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfill the obligations of membership or participation in such systems.<sup>59</sup>

Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other members, especially the developing country members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation. In providing advice and technical assistance to other members, members shall give priority to the needs of the least-developed country members.<sup>60</sup>

In conformity with Article 12 of this agreement, which provides for SDT of developing country members, developed members shall provide differential and more favourable treatment to developing country members through the following provisions as well as through the relevant provisions of other Articles of this Agreement namely;

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<sup>58</sup> Article 11(4) to (5)

<sup>59</sup> Article 11(6)

<sup>60</sup> Articles 11(7) to (8)

Article,12.2 which states that Members shall give particular attention to the provisions of this Agreement concerning developing country Members rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

Article 12.3 which provides that Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

Article 12.4 which reads Members recognise that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognise that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

Followed by Article 12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members and Article 12.6 which requires Members to take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

Article 12.7 reads Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

According to Article 12.8, It is recognised that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognised that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

Article 12.9 provides that During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development and Article 12.10 requires that the



Committee examines periodically the SDT, as laid down in this Agreement, granted to developing country Members on national and international levels.

#### **2.2.4 AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article 4 on developing country members provides that a developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

#### **2.2.5 AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 SDT PROVISIONS**

According to Article 15 on developing country Members, it is recognised 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.

#### **2.2.6 AGREEMENT ON IMPLEMENTATION OF ARTICLE VII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article 20 hereof provides that developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of the provisions of this Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such

Members. Developing country Members who choose to delay application of this Agreement shall notify the Director-General of the WTO accordingly.<sup>61</sup>

This Article goes on to state that, In addition to paragraph 1, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of paragraph 2(b) (iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this Agreement. Developing country Members that choose to delay application of the provisions specified in this paragraph shall notify the Director-General of the WTO accordingly.<sup>62</sup>

Paragraph 3 states that developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, *inter alia*, training of personnel, and assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this Agreement.

## **2.2.7 AGREEMENT ON IMPORT LICENSING PROCEDURE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

The general provisions of this Article read that, for the purpose of this Agreement, import licensing is defined as administrative procedure used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.<sup>63</sup>

Paragraph two states that Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and

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<sup>61</sup> Article 20(1)

<sup>62</sup> Article 20(2)

<sup>63</sup> Article 11(1)

financial and trade needs of developing country Members. Paragraph three provides that the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

According to paragraph four subparagraph (a) the rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 referred to in this Agreement as "the Committee", in such a manner as to enable governments and traders to become acquainted with them. Such publication shall take place, whenever practicable; twenty-one days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat. Sub paragraph (b) adds on that Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion.

Paragraphs five and six deal with provision of information and the related procedure, the former provides that application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application. The latter states that, application procedures and, where applicable, renewal procedures shall be as simple as possible and applicants shall be allowed a reasonable period for the submission of licence applications. Where there is a closing date, this period should be at least twenty-one days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants shall have to approach only one administrative body in connection with an application.

Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies. Paragraph

seven adds that no application shall be refused for minor documentation errors which do not alter basic data contained therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.

Paragraph eight deals with licensed import and provides that licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice. Its counterpart paragraph nine demands that the foreign exchange necessary to pay for licensed imports be made available to licence holders on the same basis as to importers of goods not requiring import licences. With regard to security exceptions paragraph ten provides that, the provisions of Article XXI of GATT 1994 apply.<sup>64</sup> Paragraph eleven provides that this agreement will not require states to provide or disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20 of this agreement deals specifically with developing countries, it provides exceptions for these states namely, that, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of the provisions of this Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members. Developing country Members who choose to delay application of this Agreement shall notify the Director-General of the WTO accordingly.

In addition to paragraph 1, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this Agreement. Developing country Members that choose to delay application of the

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<sup>64</sup> For a detailed provision of Article XXI of GATT see annexure 4

provisions specified in this paragraph shall notify the Director-General of the WTO accordingly.

Further, developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, inter alia, training of personnel, and assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this Agreement

## **2.2.8 ARTICLE 3 - NON-AUTOMATIC IMPORT LICENSING SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Paragraph one states that the under mentioned provisions, in addition to those in paragraphs 1 through 11 of Article 1<sup>65</sup>, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2.<sup>66</sup>

Paragraph two provides that non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.<sup>67</sup> Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published under paragraph 4 of Article 1 as well as information on how to make such a request and, to

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<sup>65</sup> See annexure 4 for full provision of Article 1

<sup>66</sup> For full details of Paragraph 1 of Article 2 see annexure 4

<sup>67</sup> Paragraph 3

the extent possible, an indication of the circumstances under which requests would be considered.<sup>68</sup>

According to paragraph five, Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions; the import licences granted over a recent period; the distribution of such licences among supplying countries; (iv) where practicable, import statistics that is either value or volume with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account, where Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof, within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them.

In the case of quotas allocated among supplying countries, the Member applying the restrictions shall promptly inform all other Members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall publish this information within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them.

Where situations arise which make it necessary to provide for an early opening date of quotas, the information referred to in paragraph 4 of Article 1 should be published within the time-periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them. Any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reason therefore and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing Member.

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<sup>68</sup> Paragraph 4

The period for processing applications shall, except when not possible for reasons outside the control of the Member, not be longer than 30 days if applications are considered as and when received that is on a first-come first-served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period.

The period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements;

When administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of quotas and when issuing licences, Members shall take into account the desirability of issuing licences for products in economic quantities. In allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members.

In the case of quotas administered through licences which are not allocated among supplying countries, licence holders shall be free to choose the sources of imports. In the case of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries, in applying paragraph 8 of Article 1, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

## **2.2.9 AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article 27 hereof provides for SDT of Developing Country Members. Subsections one and two state that members recognise that subsidies may play an important role in economic development programmes of developing country Members and therefore the prohibition of paragraph 1(a) of Article 3<sup>69</sup> shall not apply to (a) developing country Members referred to in Annex VII.<sup>70</sup> (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4<sup>71</sup>.

Sub articles 3 and 4 provide that the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement and that any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs.

If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into

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<sup>69</sup> For detailed provision of Paragraph 1(b) of Article 3 of agreement on subsidies and countervailing measures, refer to annexure 4

<sup>70</sup> Annex VII provides that developing country members referred to in paragraph 2(a) of article 27 are the developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:  
(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.  
(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.(The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.)

<sup>71</sup> See annexure 4 for provision of Paragraph 4 of Article 3 of Agreement on Subsidies and Countervailing Measures



consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

Paragraph five further provides that, a developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member who is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

Paragraph six deals with competitiveness of developing states and provides that export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

Paragraph seven states that provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5 stated above. The relevant provisions in such a case shall be those of Article 7.<sup>72</sup> Paragraph eight provides that there shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by

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<sup>72</sup> Article 7 provides for remedies. For a full reference see annexure 4

positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

Paragraph nine provides that regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6<sup>73</sup>, action may not be authorised or taken under Article 7<sup>74</sup> unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidising developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

According to paragraph ten any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

Paragraph eleven states that for those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement. Paragraph twelve qualifies paragraphs 10 and 11, it states that these provisions shall govern any determination of de minimis under paragraph 3 of Article 15.<sup>75</sup>

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<sup>73</sup> Article 6.1 is provided in annexure 4

<sup>74</sup> See footnote 80 above

<sup>75</sup> See annexure 4 for full details of Article 15(3)

Paragraph 13 limits the provisions of Part III because it states that those provisions shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

Paragraphs fourteen and fifteen deal with review procedure by the Committee where they provide that the Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs<sup>76</sup> and that the Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.<sup>77</sup>

#### **2.2.10. GENERAL AGREEMENT ON TRADE IN SERVICES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article IV of this agreement provides for participation of developing countries. Basically it aims at increasing participation of these states on trade in services. Paragraph one states that the increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to: (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of export interest to them.

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<sup>76</sup> See annexure 4 for details of Paragraph 14

<sup>77</sup> See details of Paragraph 15 in annexure 4

Paragraph two provides that developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning: (a) commercial and technical aspects of the supply of services; (b) registration, recognition and obtaining of professional qualifications; and (c) the availability of services technology. Paragraph three, in addition, provides that special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

#### **2.2.11. ARTICLE IX ON BUSINESS PRACTICES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Paragraph one of this article provides that Members recognise that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services. This article further states that each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph one.<sup>78</sup> The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

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<sup>78</sup> For provisions of Paragraph 2 see annexure 4

## **2.2.12. ARTICLE XXV ON TECHNICAL COOPERATION SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Paragraph one states that service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV<sup>79</sup>. Paragraph two provides that technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

## **2.2.13 AGREEMENT ON GOVERNMENT PROCUREMENT SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Article V of this agreement provides for SDT under paragraph one where it states its objectives, namely that parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to: (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development; (b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy; (c) support industrial units so long as they are wholly or substantially dependent on government procurement; and (d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.

According to paragraph two, consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

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<sup>79</sup> Paragraph 2 of Article IV. For full detail see annexure4

Paragraph three provides for the coverage of this article and states that, with a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Paragraph four deals with agreed exclusions, namely, that a developing country may negotiate with other participants and that in negotiations under the agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, inter alia, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

Paragraph five adds that after entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the

particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

Paragraph six limits the application of paragraphs four and five where it states that these provisions shall apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force. Paragraph seven in turn states that such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14.<sup>80</sup>

On technical assistance paragraph eight provides that each developed country party shall, upon request, provide all technical assistance, which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement. Further, according to paragraph nine this assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, *inter alia*, to:- the solution of particular technical problems relating to the award of a specific contract; and- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

According to paragraph ten, technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Paragraph eleven deals with information centres and it states that developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia*, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services

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<sup>80</sup> For details of Paragraph 14 see annexure 4

procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Paragraph twelve provides for special treatment where it reads that, having regard to paragraph 6 of the Decision of the contracting parties to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries, which are not Parties, with respect to products or services originating in those countries.

Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Paragraph fourteen provides for review and provides that the Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended. In paragraph fifteen, it is further provided that in the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.



## **2.2.14 DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Trade capacity building measures for least developed states were set when the Ministers of member states, recognised the plight of the least-developed countries. The member states therefore decided that in order to ensure their effective participation in the world trading system and to improve their trading opportunities, all the members should recognise the specific needs of the least-developed countries in the area of market access where continued preferential access remains an essential means for improving their trading opportunities;

The members therefore reaffirmed their commitment to implement fully the provisions concerning the least-developed countries contained in paragraphs 2(d), 6 and 8 of the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries and also took regard to the commitment of the participants as set out in Section B (vii) of Part I of the Punta del Este Ministerial Declaration and finally decided that; if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least-developed countries shall be given additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization.

Finally, they also agreed that<sup>81</sup>(i) Expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through, *inter alia*, regular reviews.(ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging.

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<sup>81</sup> Details of Paragraph 2 are provided in annexure 4

Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries.(iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries.

To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees.(iv) In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII of GATT 1947 and the corresponding provision of GATT 1994, special consideration shall be given to the export interests of least-developed countries.(v) Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets.

They further<sup>82</sup> agree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries.

All of the above discussed SDT provisions although of the same theme are mandated for different purposes hence a possibility to classify them differently.

### **2.3 CLASSIFICATION OF SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

The Committee on Trade and Development<sup>83</sup> generally classifies provisions on SDT in relation to their objectives, namely, provisions aimed at increasing the trade opportunities of developing country members; provisions under which the WTO members should safeguard the interests of developing country members; flexibility of

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<sup>82</sup> Details of Paragraph 3 are provided in annexure 4

<sup>83</sup> WT/COMTD/W/66; Athukorala 2004:889; Charnovitz 2002:19; Chuan 2001:30; Fletcher 2001:18; Jackson and Sykes 1997:25; Lowenfield 2002:-40; Matsushita 2002:27; Melaku 2002:2-2; Tang 1996:-20; Trebilock and Howse 2001:-38; Van Dijck and Faber 1996:60

commitments, of action, and use of policy instruments; transitional time periods; technical assistance and provisions relating to least-developed country members.

### **2.3.1 PROVISIONS AIMED AT INCREASING THE TRADE OPPORTUNITIES OF DEVELOPING COUNTRY MEMBERS**

There are twelve such provisions in total across the following four agreements and one decision: GATT 1994 (Articles XXXVI-XXXVIII); Agriculture; Textiles and Clothing; the GATS; and the Enabling Clause. These provisions all consist of actions to be taken by Members in order to increase the trade opportunities available to developing countries.<sup>84</sup>

### **2.3.2 PROVISIONS UNDER WHICH WTO MEMBERS SHOULD SAFEGUARD THE INTERESTS OF DEVELOPING COUNTRY MEMBERS**

There are forty nine such provisions across the following 13 WTO agreements and two decisions: Part IV of GATT 1994; Application of SPS Measures; Textiles and Clothing; Technical Barriers to Trade; Implementation of Article VI of GATT 1994; Implementation of Article VII of GATT 1994; Import Licensing Procedures; Subsidies and Countervailing Measures; Safeguards; GATS; TRIPS; the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries and the Decision on Texts relating to Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires.<sup>85</sup>

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<sup>84</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:-30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>85</sup> Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

These provisions concern either actions to be taken by members, or actions to be avoided by Members, so as to safeguard the interests of developing country Members. Each of these agreements contains at least one SDT provision in these categories.

### **2.3.3 FLEXIBILITY OF COMMITMENTS, OF ACTION, AND USE OF POLICY INSTRUMENTS**

There are thirty such provisions across the following nine different WTO agreements: GATT 1994 (Article XVIII and Article XXXVI); the Agreement on Agriculture; Technical Barriers to Trade; Trade-Related Investment Measures; Subsidies and Countervailing Measures; GATS; Understanding on Rules and Procedures Governing the Settlement of Disputes; GATT 1994 Article XVIII; and the Enabling Clause.<sup>86</sup>

These provisions relate to actions developing countries may undertake through exemptions from disciplines otherwise applying to the membership in general; exemptions from commitments otherwise applying to Members in general; or a reduced level of commitments developing countries may choose to undertake when compared to Members in general.<sup>87</sup>

### **2.3.4 TRANSITIONAL TIME PERIODS**

There are eighteen such provisions across the following eight agreements: agriculture; application of SPS measures; technical barriers to trade; trade-related investment

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<sup>86</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:18; Fletcher 2001:17; Jackson and Sykes 1997:20; Lowenfield 2002:34; Matsushita 2002:27; Melaku 2002:25; Tang 1996:18-20; Trebilock and Howse 2001: 38; Van Dijck and Faber 1996:-60

<sup>87</sup> Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:20; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001: 39; Van Dijck and Faber 1996:60

measures; implementation of article vii of GATT 1994; import licensing procedures; subsidies and countervailing measures; and safeguards.<sup>88</sup>

These provisions relate to time bound exemptions from disciplines otherwise generally applicable.<sup>89</sup> It is to be noted that some transition time periods in different agreements have elapsed. In some cases, the relevant provision, in addition to specifying a time-period, include modalities through which an extension might be sought.<sup>90</sup>

### **2.3.5 TECHNICAL ASSISTANCE**

There are fourteen such provisions across the following six different agreements and one ministerial decision: Application of SPS Measures; Technical Barriers to Trade; Implementation of Article VII of GATT 1994; GATS; TRIPS; Understanding on Rules and Procedures Governing the Settlement of Disputes; and the Decision on NFIDCs.

### **2.3.6 LEAST-DEVELOPED COUNTRY MEMBERS PROVISIONS**

There are twenty two such provisions across seven agreements and three decisions: the Agriculture; Textiles and Clothing; Technical Barriers to Trade; Trade-Related Investment Measures; GATS; TRIPS; Understanding on Rules and Procedures Governing the Settlement of Disputes; the Enabling Clause; the Decision on Measures

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<sup>88</sup> Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:18; Fletcher 2001:17-28; Jackson and Sykes 1997:20; Lowenfield 2002:40; Matsushita 2002:16-27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>89</sup> Article 10.2 of the SPS agreement is provided in annexure4, the transition time-period in question relates to longer time-frames for compliance to be accorded to products of interest to developing countries with SPS measures introduced by Members; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>90</sup> Shanahan 2004:20; Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:16; Melaku 2002:20; Tang 1996:18; Trebilock and Howse 2001:25; Van Dijck and Faber 1996:37

in Favour of Least-Developed Countries; and the Waiver for preferential market access for LDCs.<sup>91</sup>

These provisions, whose applicability is limited exclusively to the LDCs, all fall under one of the above mentioned five types of provisions. Five fall into the category of provisions aimed at increasing trade opportunities; eleven in the category of provisions under which WTO Members should safeguard the interests of developing country Members; one relating to the flexibility of commitments, of action, and use of policy instruments; three in the category of transition time periods, and two in the category of technical assistance for LDCs.<sup>92</sup>

### **2.3.7 DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES**

All the other provisions, which apply to developing countries in general, as well as provisions of the Decision on Net Food Importing Developing Countries (NFIDCs) and paragraph 27.2 (a) of the Agreement on Subsidies and Countervailing Measures, apply to Least Developed Countries (LDCs). Trade capacity-building measures for least-developed states were set when the Ministers of member states recognised the plight of the least-developed countries. The member states therefore decided that in order to ensure their effective participation in the world trading system and to improve their trading opportunities, all the members should recognise the specific needs of the least-developed countries in the area of market access where continued preferential access remains an essential means for improving their trading opportunities.<sup>93</sup>

The members therefore reaffirmed their commitment to implement fully the provisions concerning the least-developed countries contained in paragraphs 2(d), 6 and 8 of the

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<sup>91</sup> Athukorala 2004:883; Charnovitz 2002:14; Chuan 2001:18; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>92</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>93</sup> Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:17; Jackson and Sykes 1997:20; Lowenfield 2002:34; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries and also took regard to the commitment of the participants as set out in Section B (vii) of Part I of the Punta del Este Ministerial Declaration and finally decided that; if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least-developed countries shall be given additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization.<sup>94</sup>

Finally, they also agreed that<sup>95</sup> (i) Expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through, *inter alia*, regular reviews. (ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries. (iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries.<sup>96</sup>

To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees. (iv) In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII of GATT 1947 and the corresponding

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<sup>94</sup> Athukorala 2004:888; Charnovitz 2002:20; Chuan 2001:18; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:36

<sup>95</sup> Details of Paragraph 2 are provided in annexure 4

<sup>96</sup> Athukorala 2004:887; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:27; Van Dijck and Faber 1996:60

provision of GATT 1994, special consideration shall be given to the export interests of least-developed countries. (v) Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets.<sup>97</sup>

They further<sup>98</sup> agreed to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures, which facilitate the expansion of trading opportunities in favour of these countries.

## **CONCLUSION**

All the stipulated provisions show that all multilateral trade processes also cater for development so that in the long run each member state would participate on the same level. To achieve that, each and every agreement in the WTO offers SDT to the low economies. Even though the multilateral agreements provisions portray a positive objective, namely to cater for development needs while trading, the sad part is that the practical implementation of these provisions is problematic to the extent that they lose their value. The main cause to these negative effects is basically related to their evolution.

## **2.4 EVOLUTION OF SPECIAL AND DIFFERENTIAL TREATMENT**

SDT underwent several changes over the course of time most of which gave a different picture from its historical perspective. The key periods of change are the period 1948 to 1953; from 1954 to 1955; from 1964 to early 1970s; and the post-1970s era.<sup>99</sup> Keck and

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<sup>97</sup> Athukorala 2004:883; Charnovitz 2002:14; Chuan 2001:18; Fletcher 2001:17; Jackson and Sykes 1997:20; Lowenfield 2002:34; Matsushita 2002:16; Melaku 2002:20; Tang 1996:18; Trebilock and Howse 2001:25; Van Dijk and Faber 1996:37

<sup>98</sup> Details of Paragraph 3 are provided in annexure 4

<sup>99</sup> Fukasaku 2000:11; Gulati e.a 2003-4; Youssef 2000:12



Low<sup>100</sup> show a similar understanding by identifying four phases in the evolution of SDT. According to them

the first phase is from the creation of the GATT in 1948 to the beginning of the Tokyo Round in 1973. The second phase is the Tokyo Round itself, from 1973 to 1979. The third phase is from the end of the Tokyo Round to the end of the Uruguay Round that is from 1979 to 1995. The fourth phase is from the end of the Uruguay Round until the present time.

These are indeed remarkable phases as they encompass significant events and tendencies in relation to the participation of both developed and developing countries in the multilateral trading system which its study helps in the analysis of whether SDT provisions as they were, encouraged sustainable development for developing countries as perceived.

#### **2.4.1 THE HAVANA CHARTER REFERENCE TO SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

The basic post-World War II debates on world trade and economy dealt with the concept of SDT. During these discussions the few independent third world states insisted that trade and development should not be divorced in order for them to be able to participate in multilateral trade issues. According to Youssef, 'development concerns and the special needs of developing countries figured in the ideas embodied in the Havana Charter and the International Trade Organization (ITO) respectively'.<sup>101</sup>

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<sup>100</sup> Keck and Low 2004:16; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:-30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:-40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijk and Faber 1996:60

<sup>101</sup> The ITO never materialised due to a considerable opposition from the United States Congress, which did not want to give up its sovereignty in trade matters. On its place came in effect the GATT. GATT was a total revision of the ITO and contained a little consideration to developing countries needs. See Kumar 1998:9:1; Hoda e.a 2003:1; Athukorala 2004:883; Charnovitz 2002:14; Chuan 2001:18; Fletcher 2001:17; Jackson and Sykes 1997:20; Lowenfield 2002:34; Matsushita 2002:16; Melaku 2002:20; Tang 1996:18; Trebilock and Howse 2001:25; Van Dijk and Faber 1996:37

## **2.4.2 THE PRE-URUGUAY ROUND SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Youssef<sup>102</sup> states that since the inception of GATT and until the Tokyo Round, there were mainly two special and differential provisions in GATT, namely Articles XVIII and Part IV. These dealt with government assistance to economic development, and trade and development, respectively. The Tokyo Round came out with codes that contained special provisions for developing countries.

## **2.4.3 ARTICLE XVIII OF GATT: GOVERNMENT ASSISTANCE TO ECONOMIC DEVELOPMENT**

This Article is divided into four sections namely sections A, B, C and D. According to Fukasaku through Article XVIII developing countries are allowed to withdraw tariff concessions<sup>103</sup> and apply non-tariff<sup>104</sup> measures under certain conditions, in order to promote a particular infant industry and deal with balance-of- payments difficulties.<sup>105</sup>

The underlying history to this Article covers market access questions, in particular the conditions of access for developing country exports to developed country markets. A notable landmark during this period was the twelfth session of the GATT Contracting Parties, held at ministerial level in 1957. As explained by Keck and Low, 'in this meeting; agricultural protectionism, fluctuating commodity prices and the failure of export earnings to keep pace with import demand in developing countries were labelled undesirable features of the international trading environment.'<sup>106</sup> Subsequently, a panel of experts

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<sup>102</sup> Fukasaku 2000:7; Houtte 1995:14; Youssef 2000:7

<sup>103</sup> Under Section A

<sup>104</sup> Under Section B developing states can restrict the quantity or value of imports in order to control the level of imports while under Sections C and D developing countries can follow certain procedures which are otherwise not consistent with other provisions of GATT agreement in order to protect infant industries.

<sup>105</sup> Youssef 2000:10; Fukasaku 2000:9

<sup>106</sup> Keck and Low 2004:18; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebillock and Howse 2001:38; Van Dijck and Faber 1996:60

was established to examine trends in international trade in the light of these concerns. This culminated in to a panel chaired by Gottfried Haberler. The 1958 Haberler Report confirmed the view that ‘developing country export earnings were insufficient to meet development needs,’<sup>107</sup> it also focused primarily on developed country trade barriers as a significant part of the problem, although the report also criticised some developing country trade barriers. In response to Haberler, GATT contracting parties established three committees to develop a co-ordinated programme of action directed towards an expansion of international trade.

Committee III focused on barriers to exports maintained by developed countries. By 1963 Committee III had drawn up an eight-point Plan of Action, which, among other things, called for a freeze on all developed country trade barriers on products of interest to developing countries and the removal of all duties on tropical and other primary products. The Programme of Action became part of the Kennedy Round (1964-1967) and was never implemented to a significant degree. The impression of repetitious similarity between what was happening in this area forty years ago and the discussion today is unavoidable.

On the institutional front, the shift in development thinking initiated by the Prebisch-Singer thesis<sup>108</sup> was enshrined in the United Nations Conference on Trade and Development (UNCTAD), established in 1964.<sup>109</sup> The birth of UNCTAD, the growing number of newly independent states following decolonisation in Africa, Asia and the Caribbean, the Cold War, and the success of developing countries in placing their issues

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<sup>107</sup> <http://www.twinside.org.sg/title/undp2.htm> History and Evolution of Trading System: Free trade Myths and Realities [accessed 09-04-2005]; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:19; Fletcher 2001:18; Jackson and Sykes 1997:25; Lowenfield 2002:34; Matsushita 2002:17; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:28; Van Dijck and Faber 1996:37

<sup>108</sup> Prebisch 1964:30

<sup>109</sup> It was curious that developing countries were pushing hard in GATT for improved market access for their primary exports at the same time that “export pessimism”, and fear of deteriorating developing country terms of trade resulting from reliance on primary product exports dominated the development debate. The latter reasoning provided part of the justification behind the argument that developing countries should diversify into manufacturing industry through import substitution policies.

centre-stage in the GATT all contributed to the decision to establish Part IV of the GATT in 1965.<sup>110</sup>

#### 2.4.4 THE TOKYO ROUND

This round came up with basically two provisions to address the special situation of the developing countries. These were the codes to deal with non-tariff measures and the agreement on differential and more favourable treatment, reciprocity and fuller participation of developing countries, normally referred to as the enabling clause.<sup>111</sup> The record of this round relates to the time of the second phase<sup>112</sup> in the evolution debate. During this time the pendulum in trade policy discussions had started to swing away from import substitution and towards favouring greater export orientation.<sup>113</sup>

In this time the inherent limitations and trade-distorting effects of excessive reliance on import substitution were becoming better understood. The move towards a more neutral stance in respect of trade policy incentives implied opening up more to import competition as well as removing the policy bias against exports.<sup>114</sup> From the institutional perspective, Part IV already presaged this second aspect of the trade and development debate in GATT, which was to focus increasingly on developing countries' own trade policies as well as market access for their exports. It was this tendency, coupled with a strong emphasis on non-tariff trade measures in the Tokyo Round that distinguishes the second phase from the first.<sup>115</sup>

Much of the negotiating involvement of developing countries in the Tokyo Round aimed at limiting the extent to which the new agreements (the Tokyo Round "Codes") on non-

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<sup>110</sup> The numerical preponderance of developing countries was beginning to assert itself at this time. In 1960, 21 members of GATT were developed countries and 16 developing countries. By 1970 the figures were 25 developed countries and 52 developing countries.

<sup>111</sup> Houtte:1995:1-3; Kumar:1998: 9:2; Fukasaku:2000:5;Youssef :2000:13

<sup>112</sup> Houtte:1995:7; Kumar:1998: 9:2; Fukasaku:2000:8;Youssef :2000:13

<sup>113</sup> Houtte:1995:9; Kumar:1998: 9:4 Fukasaku:2000:10;Youssef :2000:15

<sup>114</sup> Houtte:1995:11; Kumar:1998: 9:5Fukasaku:2000:12;Youssef :2000:16

<sup>115</sup> Houtte:1995:2; Kumar:1998:9:6; Fukasaku:2000:5;Youssef :2000:16

tariff measures would impose policy limitations or undue administrative or financial burdens on developing countries. This objective, together with continued insistence on the importance of non-reciprocity in market access negotiations, led to three principal results for developing countries. First, developing countries agreed to limited market access commitments and relatively few tariff bindings. Second, the “code approach” was adopted in respect of the new non-tariff measure agreements, meaning that the agreements only applied to signatories. Many developing countries refrained from signing the various codes, which covered technical barriers to trade, customs valuation, import licensing, subsidies and countervailing measures, anti-dumping and government procurement.

Developing countries considered this clause very special because of its nature. This is what led the observers to praise the flexibility that the Tokyo Round results afforded developing countries. This clause is believed to be supportive of these countries’ development needs. However, there is concern that the degree of non-engagement implied by these arrangements meant that developing countries gained little from the system. This argument was based on two points, namely that the GATT did not support developing countries in the formulation of better trade policies, and that because developing countries offered as little as they did in the negotiations, they received little in return from their trading partners. The problem with both these positions, which tended to inform a good deal of the debate during the post-Tokyo Round years, is that they over-simplified reality by failing to distinguish adequately among the dozens of developing countries in the system who faced very different situations and had very different needs. This is a tendency that has persisted to the present and underlies some of the difficulty that the WTO is currently experiencing in its efforts to address SDT issues.<sup>116</sup>

#### **2.4.5 PART IV OF GATT: TRADE AND DEVELOPMENT.**

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<sup>116</sup> Keck and Low 2004:15

Part IV consists of three Articles on Trade and Development.<sup>117</sup> While designed to promote development and developing country interests in the trading system, Part IV was never more than a set of “best endeavour” undertakings with no legal force – a fact that has been the source of dissatisfaction among many developing countries to the present day.<sup>118</sup>

One particularly significant feature of Part IV, however, was the assertion of the principle of non-reciprocity in Article XXXVI: 8. Non-reciprocity meant that developing countries would not be expected, in the course of trade negotiations, to make contributions inconsistent with their individual development, financial and trade needs. Non-reciprocity has never been more clearly defined than that, and just like the later and closely linked concept of SDT, a definition of reciprocity or its inverse has eluded the precise formulation that might have avoided some of the debates which continue to dominate the discussion of developing country participation in the trading system.

This part emphasises preferential market access for products originating from developing states; it consists of Articles XXXVI to Article XXXVIII. Houtte<sup>119</sup> elaborating on this provision explains that,

Part IV recognises some fundamental needs of developing countries, including: increased income from export of mainly agricultural products; increased share in international trade; greater access to the world markets for their manufactured products; financial participation from industrialised countries in the economic development of the developing countries.

Article XXXVI enunciates the concept of non-reciprocity in trade negotiations between developed and developing countries, where it clearly stipulates that developing countries

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<sup>117</sup> Article XXXVI – Principles and Objectives, Article XXXVII – Commitments, and Article XXXVIII – Joint Action.

<sup>118</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:-60

<sup>119</sup> Houtte 1995:-54; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:-60

are not expected to make contributions, during negotiations with developed states, which are inconsistent with their individual development and financial trade needs, taking into consideration past trade developments.<sup>120</sup> Houtte states that this was an encouragement for individual states to participate in multilateral trade.<sup>121</sup>

Article XXXVII incorporates the commitment by developed countries to take specific measures for the improvement of the export prospects of developing countries in the markets of developed countries.<sup>122</sup> Article XXXVIII approves the principles of and objectives for the granting of preferences to developing countries' products; these include increasing the export earnings of developing countries; promoting their industrialisation; and accelerating their economic growth.<sup>123</sup>

#### **2.4.6 THE ENABLING CLAUSE**

The Enabling Clause forms a new framework established to define and codify key legal rights and obligations of developing countries under the GATT. It is the result of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries which provides a permanent legal cover for the Generalised System of Preferences, for SDT provisions under GATT agreements, for certain aspects of regional or global preferential agreements among developing countries, and for special treatment for least-developed countries. It restates the principle of non-reciprocity, as first spelled out in Part IV, and further stated that developing countries expected their capacity to make contributions or negotiate

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<sup>120</sup> Hoda and Gulati. 2003:3; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>121</sup> Houtte:1995:103; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:25-38; Van Dijck and Faber 1996: -60

<sup>122</sup> Youssef 2000-6

<sup>123</sup> Timothy.e.a:1993:4; Youssef 2000: 8

commitments to improve with the progressive development of their economies and improvement in their trade situation. This was the origin of the notion of “graduation”.<sup>124</sup>

According to Kumar<sup>125</sup>, the effect of the agreement on differential and more favourable treatment reconfirms the principle of non-reciprocity under Part IV<sup>126</sup> and “marks a turning point in international trade relations by recognising tariff and non-tariff preferential treatment in favour of and among developing countries as a *permanent legal feature of the world trading system*.”<sup>127</sup>

The developing countries were therefore, firstly, exempted from the requirements of Article XXIV;<sup>128</sup> they can exchange trade preferences among themselves without extending such treatment to developed countries. However, such treatment should not be designed in such a way as to raise barriers to or create undue difficulties for the trade of any other contracting parties. In addition these preferences should not constitute impediments to the reduction or elimination of tariffs and other restrictions to trade on a MFN basis. Furthermore, the preferences should in the case of developed contracting parties be designed and, if necessary, modified to respond positively to the development, financial and trade needs of the developing countries.<sup>129</sup> For purposes of averting difficulties and dissatisfaction in the due process of granting differential and more favourable treatment, “each system of preferential treatment must be notified to GATT. Each contracting state may request consultation on specific preferential systems.”<sup>130</sup>

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<sup>124</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:-30; Fletcher 2001:-28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:-27; Melaku 2002:25; Tang 1996:-20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>125</sup> Kumar 1998: 9:36; Youssef 2000:14

<sup>126</sup> Youssef 2000.14; Article XXXVI

<sup>127</sup> Emphasis added. Kumar 1998:9:36 Athukorala 2004:-890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:-35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:-38; Van Dijck and Faber 1996:60

<sup>128</sup> This refers to the MFN Principle in Article 1 of GATT.

<sup>129</sup> Kumar 1998:9:36-37; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:-40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>130</sup> Kumar 1998:9:37. According to Houtte the combined effect of the clause of non-reciprocity and the enabling clause is that an industrialised country may grant tariff and non-tariff preferences to a developing country: without receiving reciprocal trade preferences from



Secondly, as stated by Kumar, the enabling clause provides the “legal basis for the continuation of the generalised system of preferences (GSP)”<sup>131</sup> and other similar schemes, for example, the EU-ACP scheme.<sup>132</sup>

Thirdly, Houtte<sup>133</sup> states that the “graduation rule”, which is part of the enabling clause, establishes that “the developing countries must gradually submit to the common GATT rules as their economic development improves.” This is in consideration with the fact that not all developing states are at same level of economic under-development.

Finally, the enabling clause categorises least-developed countries as the group in need of attention compared to the rest of the developing countries. This clause therefore seeks that this group should be awarded more favourable treatment in respect of their special economic situation and their development, financial and trade needs.

#### **2.4.7 THE POST-URUGUAY ROUND ERA**

The third phase in the evolution of developing countries in the trading system saw a change in direction in the SDT debate. By the end of this period in 1995, when the Uruguay Round was completed, developing countries had assumed a much higher level of commitments within the system than ever before.<sup>134</sup> A number of factors explain this trend. First, some developing countries had enjoyed rapid growth and had succeeded in diversifying their economies, particularly in Asia and to some degree in Latin America. This made them better equipped to participate more fully in the trading system and

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that country and without being compelled to give the same preferences to other contracting parties which are not developing countries.(Houtte 1995:105)

<sup>131</sup> Youssef 2000:14; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:-60

<sup>132</sup> Fukasaku 2000:15; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>133</sup> Houtte.1995:108; Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>134</sup> Houtte.1995:109; Athukorala 2004:-890; Charnovitz 2002:-20; Chuan 2001:30; Fletcher 2001:19; Jackson and Sykes 1997:26; Lowenfield 2002:38; Matsushita 2002:18; Melaku 2002:23; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:37

changed the nature of their interests in international negotiations. Second, the decade of the 1980s opened with a significant realignment in economic thinking in some major economies, especially the United States. This approach, while not always pursued consistently in the trade policy field by the large trading nations, nevertheless militated against government intervention and emphasised the role of markets, including for development.

A third factor was the sense that the trading system itself needed fixing. The system was trying to confront the challenge of contingency protection provisions, with the increased use of voluntary export restraint arrangements. Regionalism was appearing on the trade policy scene in a more significant way and governments were concerned about the multilateral consequences of this development. Some governments felt it was time for the GATT to tackle agriculture, something it had failed to do for the forty years of its existence. Similar sentiments applied in the case of textiles and clothing. In addition, some developed country governments wished to see the trading system encompass new areas, in particular investment, trade in services and intellectual property rights. Finally, the idea that developing countries ought to assume higher levels of obligation within the system was also increasing in currency.

The single undertaking of the Uruguay Round meant that all WTO members had to accept all agreements<sup>135</sup>, in sharp distinction to the code approach of the Tokyo Round. This alone meant an important range of new developing country commitments within the system. Many developing countries significantly increased their tariff bindings, especially in agriculture. In addition, new agreements in services and intellectual property applied to all through the single undertaking.

The fourth phase began with a significant challenge for developing countries as they prepared to absorb their new Uruguay Round obligations legislatively and administratively, although in many instances developing countries were accorded phase-

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<sup>135</sup> The only exceptions were the plurilateral agreements on government procurement, trade in civil aircraft and dairy and meat products; Athukorala 2004:883; Charnovitz 2002:18; Chuan 2001:18; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:-40; Matsushita 2002:-27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijk and Faber 1996:60

in periods for the assumption of new obligations. This period also began with a sense among many developing countries that they had not been given an adequate opportunity to participate in the closing stages of the Uruguay Round and had been presented with a *fait accompli*, particularly as a result of the single undertaking. Linked to this feeling of exclusion was the conviction that not all the obligations assumed under the Uruguay Round package were consistent with national economic interests and development priorities.<sup>136</sup>

Discussions have been held in different contexts over years on how to improve the internal working methods of the WTO in order to ensure that all parties who wish to participate in negotiations and decision-making are able to do so.<sup>137</sup> This matter is very important and will continue to be discussed,<sup>138</sup> but does not explicitly form part of the Doha agenda. On the policy side, however, the “implementation” debate was soon engaged and became a major element in the discussions at Seattle, at Doha and beyond. Two distinct elements inform the implementation discussions.<sup>139</sup>

One concerns the difficulty some developing countries are encountering as they seek to implement their obligations, bearing in mind the costs, administrative aspects and human capital requirements of implementation. Efforts are being made to address this aspect of implementation through augmented technical assistance and capacity building efforts. The other aspect of implementation relates to the substantive provisions of various WTO agreements. Developing countries are seeking modifications to many provisions on the grounds that they need to be made more supportive of development

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<sup>136</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:17; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:-38; Van Dijck and Faber 1996:60

<sup>137</sup> For example in different WTO rounds from Uruguay to Doha; Athukorala 2004:883; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>138</sup> As declared in some agreements for example, Agreement on Agriculture under Article 20

<sup>139</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

and/or less restrictive in relation to the degree of policy flexibility afforded developing countries.<sup>140</sup>

Some progress was made on implementation issues at Doha, but elements of this discussion are continuing. At Doha, another exercise was launched, focusing specifically on making SDT provisions more effective. At the same time, paragraph 44 of the Doha Declaration calls for a review of all SDT provisions “with a view to strengthening them and making them more precise, effective and operational”. Both the implementation and SDT discussions have been the focus of many hours of meetings and many issues remain unresolved.<sup>141</sup>

During this period the concept of SDT took on a totally different dimension from what it used to be, that is, it was no longer based on the urge to protect “infant industries.”<sup>142</sup> This time this principle ought to operate with the objective of achieving a complete participation of all members in the World Trade Organisation. In this scenario parties would be treated equally, there ought to be a “single undertaking”<sup>143</sup> by all parties.<sup>144</sup>

Post-Uruguay Round SDT demands that the implementation of World Trade Organisation Agreements and commitments or measures to increase trading opportunities for developing countries can be achieved through the awarding of longer time periods. This is in accordance with Fukasaku’s assessment at that time that,

since the infant-industry argument is discredited, the justification of SDT for developing countries rests primarily on the argument on ‘costs of adjustment’ to market opening, which makes much of SDT provisions to aim at assisting

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<sup>140</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:27; Melaku 2002:20-25; Tang 1996:20; Trebilock and Howse 2001:38; Van Dijck and Faber 1996:60

<sup>141</sup> Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:40; Matsushita 2002:16; Melaku 2002:20; Tang 1996:20; Trebilock and Howse 2001:25; Van Dijck and Faber 1996:60

<sup>142</sup> The Leutwiler Report, GATT 1985

<sup>143</sup> The Leutwiler Report, GATT 1985

<sup>144</sup> Winters 2000: 18; The Leutwiler Report, GATT 1985; Fukasaku 2000:7; Youssef 2000:14

developing countries in the implementation of WTO Agreements by providing a longer period of transition.<sup>145</sup>

In a nutshell the post Uruguay round SDT are mainly provisions for the time being in order that the developing states conform to the general principles as outlined in the GATT/WTO agreements. The main aim in the recent times is that all WTO members should operate on an equal footing without any exceptions.

## **2.5 CONCLUSION**

The erosion of SDT in the WTO overtime overrule the objective of development and trade in the WTO leaving behind the fact that the main element that drew the world nations together was to oversee economic growth of every state. The impression that trade and development cannot be divorced seems to have died as different states adopted a different interpretation of SDT.

## **CHAPTER THREE: DIFFERENT INTERPRETATIONS OF SPECIAL AND DIFFERENTIAL TREATMENT BY DEVELOPED AND DEVELOPING COUNTRIES**

### **3.3. INTRODUCTION**

As special and differential treatment provisions evolved there were more of negative effects than positive effects. Apart from watering down the strength of these provisions their evolution caused confusion between developed and developing countries concerning their interpretation. Special and differential treatment provisions were subjected to negotiations ever since their inception, where basically the nitty-gritty and

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<sup>145</sup> Fukasaku 2000:10. Athukorala 2004:890; Charnovitz 2002:20; Chuan 2001:30; Fletcher 2001:28; Jackson and Sykes 1997:35; Lowenfield 2002:34; Matsushita 2002:17; Melaku 2002:25; Tang 1996:20; Trebilock and Howse 2001:25; Van Dijck and Faber 1996:37

implementation strategies of these provisions were discussed.<sup>146</sup> The resolutions reached in different meetings affected the historical understanding of the background principle. 'While the principle of special and differential treatment for developing countries has been accepted historically as a development oriented principle and a number of related steps taken towards expressing it through special provisions, recent trade and trade-related negotiations are however premised on the recent single undertaking principle which demand that every member of the WTO operate on the same level and no discrimination whether or not fair should be awarded to other members except least developed countries.'<sup>147</sup> The developing countries in the same milieu insisted that special and differential treatment should be retained. These differing arguments promote different understandings, which lead to two interpretations of the concept of special and differential treatment, namely an interpretation by developing countries and an interpretation by developed states. Drexel refers to a similar situation when he writes that,

The conflict between the European Community and developing countries... is not going to disappear easily. In the light of its proposals, it seems that Europe has a particular trade interest in... developing countries. Conversely developing countries seem to avoid corresponding trade concessions that would play into the hands of multinational firms from the richer world. Support for the validity of this latter interpretation may be drawn from the European proposals themselves. They opt for the application of fundamental principles of WTO trade agreements.... In particular, the WTO Multilateral Framework Agreement is proposed to provide for binding international law enforceable according to the rules and principles of the WTO Dispute Settlement Understanding. No wonder that, in the light of such proposals, many developing countries distrust European promises that poorer countries would benefit most from a WTO agreement. It is difficult to explain why the world needs a binding obligation of WTO members to introduce domestic ...laws if such law is in the best interest of the obliged state itself.<sup>148</sup>

The rationale for negotiations on the concept of special and differential treatment forms a background for six theories. This is confirmed by Keck and Low, who write that 'special

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<sup>146</sup> <http://desconline.wto.org> WT/GC/W/442; TN/CTD/7; TN/CTD/3;TN/CTD/W20; TN/CTD/W26; TN/CTD/W/23; WT/COMTD/W/77/Rev.1; TN/CTD/W/19(US); TN/CTD/21(EU)

<sup>147</sup> <http://www.wto.org> Briefing Paper 24-10-2004, even these Least Developed states are awarded certain privileges which do not amount to the same privileges that were agreed upon in the beginning. Most of the provisions have either lapsed or they are scraped off under certain conditions due to developed states contentions.

<sup>148</sup> Drexel 2004:422

and differential treatment has evolved into a web of propositions upon which the case for differentiated GATT/WTO provisions has been built over the years.<sup>149</sup> A range of requests for new and improved special and differential treatment provisions going on in the Doha discussions marks this.<sup>150</sup> The *raison d'être* for these proposals forms the background for the understanding that there are basically five premises upon which the claim for special and differential treatment is based.<sup>151</sup> These are categorised as follows. Firstly, special and differential treatment is considered an acquired political right. Secondly, developing countries should enjoy privileged access to the markets of their trading partners, particularly the developed countries. Thirdly, developing countries should have the right to restrict imports to a greater degree than developed countries. Fourthly, developing countries should be allowed additional freedom to subsidise exports, and fifthly, developing countries should be allowed flexibility in respect of the application of certain WTO rules, or to postpone the application of rules.

Keck and Low<sup>152</sup> in addition recognise the sixth category of special and differential treatment and state that, while 'many of the special and differential treatment proposals currently under consideration in the Doha negotiations and work programme fit within one or other of the theories, some, however, do not.'<sup>153</sup> The provisions falling outside the designated theories are those that entreat WTO Members to take or prioritise action favouring developing country trade interests, or to refrain from new actions that prejudice those interests. This includes provisions entreating developed countries to provide technical assistance to developing countries. The key characteristic of these provisions is that their effectiveness depends on the willingness of governments to take action or refrain from doing so, and not on legally enforceable commitments.

This essentially voluntary character of certain provisions intended to benefit developing countries is usually obvious from the language in which they are couched. This type, however, carries the most weight of special and differential treatment provisions. It is concisely stated in a report by SAWTEE that 'special and differential treatment

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<sup>149</sup> Keck and Low 2004:37; <http://www.wto.org> Statistics Division. World Trade Organisation publications

<sup>150</sup> <http://desconline.wto.org> WT/GC/W/442; TN/CTD/7; TN/CTD/3; TN/CTD/W20; TN/CTD/W26; TN/CTD/W/23; WT/COMTD/W/77/Rev.1; TN/CTD/W/19(US); TN/CTD/21(EU)

<sup>151</sup> Keck and Low 2004:40

<sup>152</sup> Keck and Low 2004:40-41

<sup>153</sup> Keck and Low.2004: 42-50

provisions in most WTO agreements exist in the form of “best endeavour clause” and only a handful of special and differential treatment provisions are binding in nature.’<sup>154</sup>

The interpretation of special and differential treatment is divided due to the fact that developed and developing countries do not have similar perspectives on the understanding of this concept.

### **3.4. DEVELOPING COUNTRIES’ PERSPECTIVE**

The developing countries base their interpretation on the understanding that special and differential treatment is essential for development purposes.<sup>155</sup> The basic ground for this understanding is the argument that developing countries have infant industries, which should be allowed opportunity for growth and be saved from the strict application of some of the WTO principles of liberalisation, which may harm their growing industries.<sup>156</sup> It would also be very difficult for developing countries to maintain the competitive standard as these states lack technical know how which affects their competitiveness as that causes low productivity and affects quality of products. Thus these products will not meet the acceptable standards under the WTO.

Originally, in order to get the developing states aboard, the developed states aware of both the economic and political situation of developing states, decided to award them special treatment which they called special and differential treatment. The developing states understand special and differential treatment as a means available to enable developing states to mature into compatible economic competitors. On these grounds, developing states regard the expectation that they should compete on an equal footing with the developed states as indirect discrimination, which is clearly prohibited in international trade. These states therefore expect unwavering support from developed

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<sup>154</sup> [www.sawtee.org](http://www.sawtee.org). South Asia Watch on Trade, Economics and Environment, Briefing Paper No. 3, 2004

<sup>155</sup> <http://www.ictsd.org/ministerial/cancun/tds/Session-2-4.htm> Putting Human Development into Trade Negotiations. 11 September 2003; <http://www.ictsd.org/dlogue/desc.htm>. Making Special and Differential Treatment More Effective and Responsive to Development Needs. 2003-05-06; [www.mfat.govt.nz](http://www.mfat.govt.nz). Trade Matters. ‘Trade and Development: Lifting all Boats.’ August 2003

<sup>156</sup> Article XVIII of GATT



states. In fact, the expected support forms a major premise upon which developing states joined the World Trade Organisation.

Developing states have the urge to graduate into developed states and have hope that the older members – mostly the developed states – will guide them through economic trade development because developed states attained a higher economic status long before they could bring the formerly colonised states aboard. Developing states therefore perceive special and differential treatment to be emphasising sustainable trade development. Sustainable trade implies a trading system that does not deteriorate social conditions while promoting economical growth. On that basis sustainable trade development demands that economic trade should be coupled with development which aspect is well addressed by the principle of special and differential treatment. Accordingly developing states consider trade that is not supportive of development improper and unjustifiable. Where such trade exists, it constitutes unfair trade practices. Such situations include worst instances where foreign products flood local markets and the domestic industries cannot market their products locally because they will be expensive and yet of low quality as compared to imported high quality products.<sup>157</sup> Developing states insist that the proper enforcement of special and differential treatment will enforce sustainable trade development.

Developing countries take special and differential treatment as a tool to deal with economic hurdles facing developing countries, because it allows time to adjust and for complementary reforms to work. They believe that the best way to ensure that the WTO contributes to development is to move beyond the mere principle of differentiation to the substance of individual provisions of special and differential treatment. For example, the enforceability of each provision should be measured against the ability of an individual developing country to achieve appropriate environment for it to comply with the necessary conditions for the enforcement of the relevant provisions. This cannot happen where a special and differential provision sets a common time period for all developing

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<sup>157</sup>

Prebisch 1964:18

states without a thorough assessment of each country's capabilities.<sup>158</sup> This is qualified by the 'increased emphasis in recent years upon the need to see sustainable trade policy as an integral element of a broader guideline of development policies, rather than as an externally imposed "add-on", supports.'<sup>159</sup> Developing states do not wish to remain in the role of beggar. These states maintain that they have a potential to develop into economically independent states, if given a chance and necessary economic mechanisms.

According to developing states special and differential treatment rules should not be seen as a means to avoid reform, but as a mechanism to assist developing countries to achieve trade benefits to a possible extent in the long run, while aiming at meeting their commitments under the WTO agreements.<sup>160</sup> Special and differential treatment should for example, enhance the limited trade resources through the development of the technical know how and implementation of vital social and economic infrastructure in order to achieve relevant trade standards. Upon the accomplishment of these factors, there will be increased export variation and the developing states will be able to alleviate poverty and cater for their local food supply.<sup>161</sup>

Special and differential treatment must provide continued and improved technical assistance and capacity building. Preferential support should also mean funding and expertise to address constraints such as inadequate negotiating capacity, problems in meeting international standards, trade promotion support, finance, market information and trading skills at the government, private sector and community level, including companies, exporters, co-operatives and farmers.<sup>162</sup> On these grounds developing states suggest that there should be no demarcation line between developing states, which is common in multilateral trade, where least-developed states are considered for

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<sup>158</sup> <http://econ.worldbank.org/docs/1143.pdf> Machalopoulos, 2000:20; Keck and Low 2004: 54; <http://www.wto.org> Briefing Paper,24 -10- 2004; SAWTEE Special and Differential Treatment Issues For South Asia. Volume No.3. South Asia.

<sup>159</sup> Keck and Low 2004:55

<sup>160</sup> Oyejide 2001:19; <http://www.ictsd.org/ministerial/cancun/tds/session-2-4.htm> Putting Human Development into Trade Negotiations. Cancun Trade and Development Symposium Publications. 04/05/20

<sup>161</sup> <http://www.ictsd.org/dlogue/2003-05-06/06-05-03-desc.htm>. The International Centre for Trade and Sustainable Development. Making Special and Differential Treatment More Effective and Responsive to Development needs. 04/05/20; Sharer 2000:30

<sup>162</sup> [www.mfat.gov.nz/Trade](http://www.mfat.gov.nz/Trade) Matters Trade and Competition Policy in the WTO. August 2003

differential treatment as opposed to the rest of the developing states. Instead differentiation should be based on specific trade areas where a particular state depends for its trade development needs.<sup>163</sup>

Developing states do understand the need to undertake trade reforms, but they expect such reforms to be implemented in such a manner that these states benefit fully from trade liberalisation which means that trade liberalisation should not only affect developing states negatively while developed states achieve positive results from the same process.

### **3.5. DEVELOPED COUNTRIES' PERSPECTIVE**

Developed states do not have a similar concern as developing states, although they acknowledge the concept of sustainable trade development, they are loathe to give it a similar interpretation to that of Developing states. Developed states advocate for a “single undertaking” approach and believe that one size fits all. This line of interpretation demands that there should be no discrimination between members; each member should compete on the same level on trade matters. Developing states are therefore supposed to stand on their own and have to face the general challenge in multilateral trade.<sup>164</sup> Developed states based their understanding on several principles, for example, the MFN rule, which demands that there should not be discrimination in international trade matters. If a member awards a benefit to another member, the rest of the members should also be entitled to the same awards.

Developed states argue that, since special and differential treatment is the exception to the MFN rule, it should be applied discreetly and that developing states except the least developed should aim at graduating from special and differential treatment within specified period of time.<sup>165</sup> This understanding is enshrined in the case of European Communities (EC) – Measures Affecting Differential and Favourable Treatment of

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<sup>163</sup> [www.sawtee.org](http://www.sawtee.org) South Asia Watch on Trade Economics and Environment. Brief Paper No 3, 2004; Sharer:2000:31; Fukasaku 2000:30; Stevens 2002:15

<sup>164</sup> [www.mfat.gov.nz](http://www.mfat.gov.nz). Trade Matters, Trade and Competition Policy in the WTO. August 2003.

<sup>165</sup> Keck and Low 2004:53

Coffee,<sup>166</sup> where Brazil<sup>167</sup> complained of the special and differential treatment under the EC's generalised system of preferences (GSP) and asserted that the EC GSP scheme was applicable to products originating in the Aden Group of countries and the Central American Common Market Countries which were conducting programmes to combat drug production and trafficking. In the case of soluble coffee, the special preferential treatment, contained in Council Regulation (EC) No 1256/96 amounted to duty-free access into the EC market. Brazil stated that it was aware that there was a proposed Council Regulation that would unify all EC laws and regulations concerning the operation of the GSP scheme for both agricultural and industrial products. Brazil contended that the special treatment adversely affects the importation into the EC of soluble coffee originating in Brazil. Brazil alleged that the special and differential treatment was inconsistent with the enabling clause, as well as with Article I of GATT 1994. Brazil further alleged that the special treatment nullified or impaired benefits accruing to Brazil directly or indirectly under the cited provisions.

Brazil's contention goes hand in hand with developed states interpretation that special and differential treatment is effective only in the case where developing states are assisted to achieve compatibility with the world trade rules and unless that is the situation, special and differential treatment is an impediment to fair trade. The concern by the Developed states emanates from the concept of graduation due to the fact that even though the enabling clause can be relied on as the legal basis of special and differential treatment the 'Enabling Clause restates the principle of non-reciprocity, as first spelled out in Part IV, and further states that developing countries expected their capacity to make contributions or negotiate commitments to improve with the progressive development of their economies and improvement in their trade situation.'<sup>168</sup>

### **3.4 THE EFFECT OF DIFFERING INTERPRETATIONS ON THE APPLICATION OF SDT**

The emphasis is on the principle of reciprocity, which demands that for purposes of enhancing trade competition no state ought to receive without advancing a favour in

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<sup>166</sup> WT/DS154/1

<sup>167</sup> Brazil although a developing state used an argument based on the single undertaking principle that is why its case can be used to illustrate an argument to support the single undertaking principle.

<sup>168</sup> The enabling clause and Part IV of GATT

return. This is why donor states would demand that the receiving state should adhere to certain foreign rules and structured policies as opposed to the policies liked by the assisted states. Due to these pressures, developing countries surrender their planned policies in order to get special and differential treatment from the developed countries.

These states therefore receive a package of foreign incompatible policies for the sake of any aid or assistance. On the same subject, Keck and Low<sup>169</sup> observed that the Preferences have proved helpful to some countries for certain periods of time when certain other conditions have been present. Such conditions may be either economic or political. Onguglo<sup>170</sup> explains these conditions:

[t]he beneficiaries of...preferential schemes have to meet certain, often non-economic, conditions to be designated as such and to maintain the beneficiary status. For example, the CBI and ATPA of the United States provides that a country will not be designated as a beneficiary if it is a communist country, has allowed the expropriation or nationalisation of the property of a citizen of the United States or a corporation owned by the United States, provides preferential treatment to the product of another developed country that could negatively affect trade with the United States, lacks adequate and effective protection of intellectual property rights and government broadcast of copyrighted material; and does not provide internationally recognised workers rights.

Reciprocity is not fully acknowledged by the struggling economies. The strong insistence on this principle by developed states is in deed the cause for the economic regression of developing states. The attitude of the developed states has more often than not caused a division among developing states in that these states normally choose which states to award special and differential treatment and this leads to the detriment of other developing states economies. This issue was debated in the EC Banana Regime where EEC had set up a banana import regime that gives preference to bananas originating in ACP countries over bananas originating in 'third world' countries, primarily Latin America" the dollar zone countries." Another case, which illustrates this, is the matter where Brazil, Australia, and Thailand accused the EU of breaking global trade rules by providing export subsidies for sugar industry in excess of the concerned commitments.

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<sup>169</sup> Keck and Low 2004:14

<sup>170</sup> Onguglo 1999:39

This was said to distort world prices and cause other states to lose revenue. South Africa was in full support of this matter and applauded the WTO preliminary ruling that the EU subsidies are illegal. EU on the other hand contented that the elimination of the subsidies in issue will hurt poorer developing countries sugar producers, in the ACP area. This benefit excluded other developing countries including South Africa. The adherence to EPA'S as the main way of realising special and differential treatment have serious repercussions, apart from causing economic clashes between developing states it also affects the negotiation strength of developing states. A living example, is the 'collapse of global trade talks in Cancun, Mexico, when most developing states refused to agree to compromises proposed by their counterparts because they feared they would have negative impacts on their commitments with several developed states which aspect might harm the individual states economic affairs.' These problems call for a new way of understanding special and differential treatment.

### **3.5 RE-INTERPRETATION OF SPECIAL AND DIFFERENTIAL TREATMENT**

The problem of interpreting special and differential treatment in an acceptable way has led to the confusion in the WTO. This conflict of interest caused a lot of problems in the WTO and an immediate solution is therefore needed.<sup>171</sup> This is evident as this principle remained a subject on the agenda of most of the WTO meetings and negotiations; however, it was a thorny subject to touch on and most related issues were considered time consuming and were more often than not postponed.<sup>172</sup>

In the previous chapter the origin of special and differential treatment was explained.<sup>173</sup> This chapter also shows that this concept was later on subjected to severe pruning by several WTO rounds, which made its existence quite insignificant.<sup>174</sup> It is on the basis of these developments that the concept of special and differential treatment acquired the different interpretations instead of leading to clarification of relevant misconceptions.

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<sup>171</sup> IISD. Special and Differential Treatment. Doha Briefing Series. Vol 1 No 13 of 13

<sup>172</sup> IISD. Special and Differential Treatment. Doha Briefing Series. Vol 1 No 13 of 13

<sup>173</sup> See Chapter Two subheading 2

<sup>174</sup> See The Evolution of special and differential Treatment in Chapter Two subheading 2.4

To solve this problem there is a need to strike a compromise between the disagreeing members. While developing states cannot be allowed to over-compromise the objective of the WTO, namely, to get rid of inequality in multilateral trade, one should not lose sight of the fact that they cannot live up to expectations of their well-advanced counterparts. The interpretation of special and differential treatment should strike a balance between the two conflicting interests. The starting point should be the will on both sides to fully engage in proper means towards finding a real solution to the problems encountered in the attempt to interpret special and differential treatment.

These relate to the design that will respond to the needs of developing countries as they undergo economic transformation through a process of development, but exclude relevant issues such as those pertaining to the question of better market access for products of export interest to developing countries, which are addressed in the next chapter. The discussion in the next chapter includes the ways in which special and differential treatment provisions can be developed or improved in order to strengthen the ability of developing countries to pursue effective development policies.

In line with Keck and Low's suggestion, the best interpretation should be based on a more analytical approach to a sub-set of proposals on the table<sup>175</sup> that carry real implications for the development prospects of developing countries and maintain that this might yield a more fruitful outcome.<sup>176</sup>

The starting point should be to revise the existing provisions to show where they hamper development. Furthermore, there is a need to be innovative in the reform of special and differential treatment provisions to ensure that they are adequately modified and respond to a clear and systematic formulation of the national economic interest. In searching out more promising prospects for agreement on the fundamental question of how to define and manage access to special and differential treatment provisions under the WTO, the understanding should be that a five-fold distinction<sup>177</sup> among key elements that appear to drive the debate on special and differential treatment works as a guideline and conclude

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<sup>175</sup> See infra Chapter Five

<sup>176</sup> Keck and Low 2004:58

<sup>177</sup> The five elements in the case typically made for special and differential treatment include a political right, a right to preferential market access, a right to additional levels of import restriction, a right to export subsidies otherwise prohibited, and a right to flexibility in the application of a range of non-tariff or "behind-the-border" rules

that special and differential treatment proper is about legal rights and obligations, not legally unenforceable statements of intent or best-endeavour undertakings.<sup>178</sup>

If for practical reasons certain provisions may or may not lend themselves to transformation into mandatory instruments it would be better to take them off the negotiating table.<sup>179</sup> Where analysis shows that making a non-mandatory provision mandatory is a needed contribution to development, then developing countries would gain from pursuing the relevant proposals.

Proposals for special and differential treatment should in addition, take account of the underlying welfare analysis, rather than merely being based on a desire to maximise legal flexibility.<sup>180</sup> Special and differential treatment provisions should not be interpreted to give the meaning that they are a safe haven from poorly framed rules that compromise development objectives. In the same manner special and differential treatment provisions should not be interpreted to be loop holes for the introduction of policies that are not compatible with developing countries' development as in the case of GSPs where the donor states force developing countries to accept certain agendas before they are entitled to the short-lived benefits of the relevant agreements. Where new policy areas or new rules are under negotiation, or consideration for negotiation, the best interests of developing countries would be served through engagement with respect to the substance of core proposals. Seeking exemptions via special and differential treatment should not be merely postponing any difficulties that might arise from inherently flawed rules. Nor should it mean that special and differential treatment provisions be absent from a well-constructed set of rules.

Special and differential treatment should not primarily be treated as a political right, rather than as a rule-specific instrument to support development in particular policy areas, as this could lead to a recipe for inconclusive discussion and mutual frustration.<sup>181</sup> Reliance on generalised precepts about entitlements, or the lack of them, tends to lead to extreme positions. One such example is the often unspoken assumption behind

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<sup>178</sup> Keck and Low 2004:18-20; <http://docsonline.wto.org>. WTO 2000. Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions. WTO document No. WT/COMTD/66

<sup>179</sup> Stevens 2002:28

<sup>180</sup> Sharer 2000:31-40

<sup>181</sup> Mangeni 2003:28; Youseff 1999:31



special and differential treatment debates that, since special and differential treatment is a right, the fewer the obligations that developing countries assume, the greater is the contribution of the WTO to development. This understanding promotes stereotypes in the sense that some developing countries fail to gain a benefit where they could do so instead of insisting on special and differential treatment. For example, the concerned governments fail to convince relevant policy makers within their states and focus on special and differential treatment which makes these states believe that the little which they get within a short time is better than pursuing the possible long term goals.<sup>182</sup>

A similarly unhelpful politicisation of special and differential treatment discussions arises from the tension between non-reciprocity and graduation. 'Graduation, in particular, cannot be usefully discussed in a binary, aggregated fashion whereby countries calling themselves developing are deemed at one stroke to have graduated to developed country status. The process should be gradual, provision-specific and driven by detailed analysis of development needs.'<sup>183</sup> To classify a country as a graduated country before hand may defeat economic development of that state.

As preferences have proved helpful to some countries for certain periods of time when certain other conditions have been present, exports from such countries have gained footholds in industrial country markets in the presence of preferences.<sup>184</sup> This is a concrete proof that effective application of special and differential treatment can actually yield success to the developing countries. Countries which lack the supply of capacity to benefit from such arrangements should be provided with an alternative remedy to counter the worst condition that they may not be able to negotiate for better benefits elsewhere. It would be better if the preference-giving states would also see to the effective implementation of the preference concerned, since transactions costs often reduce the value of the preference margins, or if the margins are small, nullify the benefits altogether. Where this is the case, there should be remedial conditions.

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<sup>182</sup> Keck and Low 2004:30-49

<sup>183</sup> Keck and Low 2004:49-50

<sup>184</sup> It is important to note that successful exporters will have assembled a range of necessary conditions for exports to take of and so it is difficult to gauge how much export success to attribute directly to the existence of preferences.(Keck and Low 2004)

The fact that preferences for some developing countries mean discriminatory exclusion and potential losses for others should be brought to a remedial situation, for example where two developing states are treated differently by offering one state preferences which may negatively impact on the economic development of another state. States should be encouraged to avoid entering into a web of agreements, which prove futile in the end and negatively affect the economic trade of other developing states. This may be so because the larger the number of countries seeking preferential treatment and the more similar their export structures, the less will be the competitive benefit each country enjoys. When beneficiary countries are "too successful", they may be dropped from schemes and left with over-capacity or a production structure that is not based on comparative advantage.

Keck and Low also add that, because 'preferential arrangements create vested interests that oppose multilateral trade liberalisation, negotiators should bear in their mind, the inevitably temporary nature of preferences and inherent limitations in the benefits they offer, and the potential distortions they imply in order to calculate their value in terms of negotiating currency.'<sup>185</sup>

Keck and Low advise that flexibility to subsidise must be carefully designed to avoid wasteful subsidy competition. Some accommodation within general rules or as a matter of special and differential treatment can be provided for clearly defined purposes, which, more often than not, have only minimal trade-distorting effects. However, they observe that export subsidisation cannot be generally justified in economic terms. Yet, given revenue constraints militating against the use of production subsidies and limited administrative capacities in certain countries, there may be a case for extended phase-outs of export subsidy elements. To the extent that export subsidies are provided, these will typically be less distorting the more generally available and directed they are to infrastructure.<sup>186</sup>

Flexibility as to when developing countries should assume WTO obligations reflects an appreciation of the adjustment costs of change as well as administrative and infrastructural capacity needs that might be associated with implementation. However,

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<sup>185</sup> Keck and Low 2004:50

<sup>186</sup> Keck and Low 2004:52; Melamed 2002:36

the need for flexibility should not be a blank cheque and the determined deadlines should be compatible with the relevant economic circumstances. In addition, there is a need for objective purpose for offering and receiving special and differential treatment. Special and differential treatment should not be offered as means for subsidy competition where developed states would claim domestic subsidies for purposes of food aid to developing countries.<sup>187</sup>

Parties should take part in the negotiations of the terms of the agreements and should have a means of retreating if such agreements no longer work for them. This is also Keck and Low's concern where they write that, 'special and differential treatment should not be a blunt or mechanical instrument made available on uniform terms to all developing countries and reliance on discretionary decision-making by WTO Members as to the terms and conditions of access to special and differential treatment on the part of individual Members should also be avoided.'<sup>188</sup>

Such a step will be valuable because it will remove the inequality in trade negotiations where special and differential treatment has opened gates of abuse of the financially disadvantaged states. This will, in addition, elevate special and differential treatment agreements to agreements that adhere to the basic principles of contract governing agreements.

Special and differential treatment provisions themselves should be defined to the maximum extent possible in terms of economic needs that automatically identify the beneficiary Members.<sup>189</sup> As these measurable needs diminish and disappear, so too would the right of a Member to the special and differential treatment provision in question. Eligibility thresholds should be development-related. In some cases, only once-off time periods may be obtained, with the possibility of affording longer time periods to weaker Members. In others, exemption time may be directly linked to the fulfilment of the threshold criteria.

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<sup>187</sup> [http://www.wto.org/english/tratop\\_e/devel\\_e/sem01\\_sdt\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/sem01_sdt_e.htm) WTO: Development: Seminar on Special and Differential Treatment for Developing Countries.4/10/04

<sup>188</sup> Keck and Low 2004:54

<sup>189</sup> [http://www.org/english/docs\\_e/legal\\_e/enabling1979\\_ehtm](http://www.org/english/docs_e/legal_e/enabling1979_ehtm). WTO: Legal Texts-Marrakesh Agreement Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries. 04/10/02

## CHAPTER FOUR: SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN THE AGREEMENT ON AGRICULTURE AND POSSIBLE LIMITATIONS TO EFFECTIVE IMPLEMENTATION

### 4.1 THE PURPOSE OF THIS CHAPTER

This chapter discusses special and differential treatment provisions in the agreement on agriculture to find whether or not their application is subject to limitations and impediments, which hamper their effective and efficient implementation and consequently have a potential to affect economic development in developing countries. The importance of this discussion is based on the premise that agriculture is a basic concern in developing states for a number of reasons. It fulfils several needs in a developing state, which form the basis for sustainable economic development. Egesa, confirms that '[a]griculture is a key sector in many developing countries. Many developing countries hold a comparative advantage in the area of agriculture and therefore agricultural trade can play a crucial role in economic development of developing states.'<sup>190</sup>

Todaro's analysis on economic development in developing states points that agriculture is the major sector for development in developing states. He explains that in developing countries 'agriculture, both subsistence and commercial, is the principal economic activity in terms of the occupational distribution of the labour force,<sup>191</sup> if not in terms of proportionate contributions to the gross national product.'<sup>192</sup> He goes on to illustrate this through a figure.<sup>193</sup> The figure marks agriculture as the major source of income in developing states for both individual and respective states.

While agricultural trade proves to be of a major concern in the economic development of developing countries, the Agreement on Agriculture, which governs international trade in agriculture, is identified as an important international trade agreement in the facilitation

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<sup>190</sup> Egesa 2003:18

<sup>191</sup> See figure 1 Annexure 1

<sup>192</sup> Todaro 2000:40-41; Addison-Wesley 2000:1-2; G/AG/NG/W/13

<sup>193</sup> See figure 2 Annexure 2

of economic development for developing countries. It is considered the main bridge for trade in developing countries.

Although this agreement is of importance to economic development of developing states there is an outcry that the general provisions of this agreement including the provisions on special and differential treatment are not benefiting developing countries.

## **4.2 GENERAL DISCUSSION OF SPECIAL AND DIFFERENTIAL TREATMENT ON AGRICULTURE**

The agricultural package is conceived as part of a continuing process with the long-term objective of securing substantial progressive reductions in support and protection. In this light, it calls for further negotiations in the fifth year of implementation which, along with an assessment of the first five years, would take into account non-trade concerns, special and differential treatment for developing countries, the objective to establish a fair and market-oriented agricultural trading system and other concerns and objectives noted in the preamble to the agreement.<sup>194</sup>

Under the agreement on agriculture developing states are bound by similar commitments as developed states. These states are, however, awarded longer periods of implementation. Generally these commitments are being implemented over a six-year period and in the case of developing countries over a period of ten years. The implementation period began in 1995.<sup>195</sup>

Along the same lines developing states are to reduce tariffs on a lesser schedule as compared to developed states. While developed states are to reduce tariffs by an average thirty-six per cent, developing countries are to reduce by twenty-four percent, with minimum reductions for each tariff line being required. The general requirement is to reduce the value of mainly direct *export subsidies* to a level thirty-six per cent below the

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<sup>194</sup> Terence (ed) 1986-1992:171; Boston e.a 1999:28

<sup>195</sup> Onguglo 1999:41. *Developing Countries and Unilateral Trade Preferences in the New Trading System*. The Brookings Institution Press. Washington D.C.

1986-90 base period level over the six-year implementation period, and the quantity of subsidised exports by twenty-one per cent over the same period.<sup>196</sup>

In the case of developing countries, the tariff reductions are two thirds those of developed countries over a ten-year period (with no reductions applying to the least-developed countries) and subject to certain conditions, there are no commitments on subsidies to reduce the costs of marketing exports of agricultural products or internal transport and freight charges on export shipments. Where subsidised exports have increased since the 1986-90 base period, 1991-92 may be used, in certain circumstances, as the beginning point of reductions, although the end-point remains that based on the 1986-90 base period level.<sup>197</sup>

Domestic support measures that have, at most, a minimal impact on trade (“green box” policies) are excluded from reduction commitments. Such policies include general government services, for example in the areas of research, disease control, and infrastructure and food security. They also include direct payments to producers, for example, certain forms of “decoupled” (from production) income support, structural adjustment assistance, direct payments under environmental programmes and under regional assistance programmes.<sup>198</sup>

In addition to the green box policies, other policies need not be included in the Total Aggregate Measurement of Support (Total AMS) reduction commitments (the Total AMS covers all support provided on either a product-specific or non-product-specific basis that does not qualify for exemption and is to be reduced by 20 per cent (13.3 per cent for developing countries, with no reduction for least-developed countries)). During the implementation period, these policies are direct payments under production-limiting programmes. Certain government assistance measures encourage agricultural and rural development in developing countries and other support which makes up only a low proportion (5 per cent in the case of developed countries and 10 per cent in the case of developing countries) of the value of production of individual products or, in the case of non-product-specific support, the value of total agricultural production.<sup>199</sup>

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<sup>196</sup> Terence (ed) 1986-1992:170-171; Boston e.a 1999 28

<sup>197</sup> Terence (ed) 1986-1992:80; Boston e.a 1999 12

<sup>198</sup> Terence (ed) 1986-1992:90; Boston e.a 1999 28

<sup>199</sup> Terence (ed) 1986-1992:90-100; Boston e.a 1999:28

This agreement like other WTO agreements contain special and differential treatment provisions, which are looked at in this chapter.

### **4.3 THE PLACE OF SPECIAL AND DIFFERENTIAL TREATMENT IN THE AGREEMENT ON AGRICULTURE**

The place of special and differential treatment in the Agreement on Agriculture constitutes a unique setting as compared to similar provisions in other World Trade Organisation agreements and this makes this agreement a rather complex issue. The exceptional nature of this agreement relates to the central issue in this agreement namely, that this agreement special and differential treatment provisions are mainly time limit special and differential treatment and ought to lapse within a stipulated period of time. Their applicability is therefore short-lived and may be of limited benefit to developing countries because these states are lacking in technical know-how and appropriate agricultural skills. Another important factor is that the very central issue pertaining to the reduction of subsidies does not prove beneficial to developing states, which are not in the position to provide acceptable subsidies<sup>200</sup> to their farmers while developed states are in the position to do so. It is a common perception that unlike other trade issues which were decided on the basis of extensive deliberations, trade in agriculture was given a scanty consideration and for that purpose the basis of the Agreement on Agriculture may not fully represent developing states views.

The fact that trade in agriculture came in to picture late in the Uruguay Round negotiations<sup>201</sup> through the recommendations of a scholarly report, the Leutwiler report may be considered a crucial point to support developing countries allegations.<sup>202</sup> This report suggested that '[a]gricultural trade should be based on clearer and fairer rules, with no special treatment for particular countries or commodities. Efficient agricultural

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<sup>200</sup> The green box subsidies

<sup>201</sup> Trade in Agriculture was not subjected to international trade rules from the beginning because many states especially developed states such as the United States could not agree to surrender their authority in this respect.

<sup>202</sup> Terence (ed) 1986-1992:170; Boston e.a 1999:28

producers should be given the maximum opportunity to compete.<sup>203</sup> In a nutshell these recommendations emphasised the entrenchment of international trade competition policy in agricultural matters.

Due to this limited observation trade in agriculture, among the subjects of the current Uruguay Round negotiations, is characterised by both extensive government involvement and intense interest on the part of private sector. Although parties have attempted in previous negotiating rounds to bring agriculture under the GATT discipline, to the present day it remains largely outside international norms applicable to other areas of trade. Because agriculture has for ages remained largely unregulated by the GATT, individual nations, or groups of nations have developed complex systems of agricultural regulations and import barriers. These programs take widely divergent forms, both among countries and among commodity groups within individual nations and make legal governance of agriculture very difficult.<sup>204</sup>

The Agreement on Agriculture focuses on three areas, which are the subject of the discussions to follow, namely export subsidies, market access and domestic support. In addition, this agreement deals with food security and safety standards. It also covers issues on rural development.<sup>205</sup> For purposes of this research only special and differential provisions of these sectors will be considered.

#### **4.3.1 SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN AGREEMENT ON AGRICULTURE**

The Agreement on Agriculture together with the Decision of Members Concerning the Possible Negative Effects of the Reform Programme on Least-Developed states provides for special and differential treatment in aspects of agriculture. These include provisions aimed at increasing trade opportunities for developing countries contained in the preamble; and provision on transition time periods contained in article 15.2. Articles 6.2; 6.4; 9.2(b) (iv); 9.4; 12.2; 15.1; annex 2 and annex 5 deal with flexibility of commitments, of action, and the use of policy instruments. Last but not least are

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<sup>203</sup> McMahon (ed) 2001:117

<sup>204</sup> Terence (ed) 1986-1992:170; Boston e.a 1999:28

<sup>205</sup> Jackson and Sykes: 1997:21; Athukorala 2004:883; CUTS Centre For International Trade, Economics and Environment. 2004. Farm Agenda at the WTO. CUTS Publications



provisions relating to measures of developed country members contained in articles 16.1 and 16.2. These provisions can be classified under the following categories: market access, domestic support, exports subsidies and restrictions.<sup>206</sup>

#### **4.3.1.1 DOMESTIC SUPPORT SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Domestic support benefits states that can afford to provide it because it encourages domestic production and is necessary for purposes of altering free-market outcome in product markets. The subsidies transfer some costs of production from producers to the government, allowing production at above-market costs. In order to effect these benefits in developing countries Article 6 of the Agreement on Agriculture provides, among others, that the *de minimis* level for developing countries is 10 percent of the value of production of the product concerned or of total agricultural production in the case of non-products, while that of the developed countries is 5 percent on both accounts.

The prescribed *de minimis* percentage is applicable to non-exempt or trade distorting domestic support as minimal percentage of reduction where a subsidy level is not indicated in the schedule of commitments. This provision brings the agricultural sector under multilateral rules and gradually reduces government spending on trade distorting domestic support.<sup>207</sup> This is why the European Union's (EU) action in subsidising sugar farmers was challenged by Brazil, Australia and Thailand before the DSB. A preliminary finding delivered in August 2004 was that the EU had affected the livelihoods of farmers in the rest of the world by breaching agreed limits of financial support for exported sugar.

#### **4.3.1.2 EXPORT SUBSIDY SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Export subsidies are for export cost to local producers of goods. They are advantageous both locally and externally to consumers of the subsidised goods although in most cases

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<sup>206</sup> *ibid*

<sup>207</sup> Croome, J., 1995; FAO 2003, 18; Michaelopoulos, C., 2003 28; Stevens, C., Devereux, S. and Kennan, J., 2003;46, WTO 1994, *Doha Work Programme: Decision Adopted by the General Council on 1 August; 2004*, WT/L/579, Geneva, World Trade Organisation

these create problems for the receiving countries and they can affect world prices and distort trade flows as importers no longer buy the least costly goods of the most efficient exporter, but instead purchase from whatever source can offer the lowest price net of the government subsidy. Hence, the quantity delivered to foreign markets does not depend upon the prices of the exporter and the prices of competitors in these markets, but rather on the government's decision of how much quantity to remove from the domestic market. In addition, countries can use export subsidies to limit internal market fluctuations by forcing more into export markets during years of high production and fewer exports during years of low production. Employing export subsidies to stabilise internal markets increases world market volatility as the trade flows depend less upon world market conditions and more upon the subsidising country's internal policies. Hence, the subsidised exports are a market distortion, which bloat the country's trade, leading to lower world prices, and reduce or eliminate price transmission from the world market to the domestic market

The Agreement on Agriculture provides that the member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies at the conclusion of the implementation period should not be greater than sixty-four percent and seventy-nine percent of the 1986-1990 base period levels, respectively. For developing countries these percentages are seventy-six percent and eighty-six percent, respectively. During the implementation period, in accordance with Article 9.4, developing countries are exempted from commitments in respect of a number of exports subsidies as prescribed by the agreement on agriculture. This gave a developing country the flexibility to provide certain export subsidies, which can be used during the implementation period but in most cases developing countries are not able to provide these subsidies and therefore the special and differential treatment provision yield these states a very limited benefit.

#### **4.3.1.3 MARKET ACCESS SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

These are catered for through the provision that the developed states should bear in mind, upon the implementation of commitments on market access, their responsibility to safeguard the particular needs and conditions of developing countries by providing for a greater improvement of opportunities and terms of access for agricultural products of

particular interest to these countries, including the fullest liberalisation of trade in tropical agricultural products and those of a particular importance for the diversification of production away from that of illicit nicotinic crops.<sup>208</sup>

#### **4.3.1.4 SPECIAL AND DIFFERENTIAL TREATMENT FOR NET FOOD IMPORTING COUNTRIES**

These resulted from the Marrakesh Decision on the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, which is included within the package of the UR Agreements was a specific Ministerial Decision called the Decision on Measures Concerning the Negative Effect of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (Decision henceforth), which articulated the concern as follows:

Ministers recognize that during the reform programme leading to greater liberalization of trade in agriculture least-developed countries and the net-food importing developing countries may experience negative effects in terms of availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.<sup>209</sup>

To deal with the negative effects, the decision provided for four response mechanisms, namely food aid; short-term financing of normal levels of commercial imports; favourable terms on agricultural export credits; technical and financial assistance to improve agricultural productivity. The two groups of countries eligible for assistance under the decision are the least-developed countries and the net food-importing developing countries.

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<sup>208</sup> Paragraphs 3(c) of Article XXXVII of GATT 1947 and corresponding provision of GATT 1994; paragraph 27.2 of the Agreement on Subsidies and Countervailing Measures; Paragraph 2(d)6 and 8 of the Decision 28 No 79 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; Section B(VII) of Part 1 of Puncta Del Este Ministerial Declaration. See also Terence (ed) 1992:171; Boston e.a 1999 28

<sup>209</sup> FAO Geneva Round Table on Selected Agricultural Trade Policy Issues. 21 March 2001. Room XII, Palais Des Nations. Geneva, Switzerland.

#### **4.4 THE IMPLICATIONS OF SPECIAL AND DIFFERENTIAL TREATMENT IN AGREEMENT ON AGRICULTURE**

The abovementioned special and differential treatment provisions are crucial to the recipients in order to promote agriculture. Trade in agriculture is promoted for the purposes of significant economic development, which will help in the reduction of poverty and the enhancement of food security and cater for the balance of payments situation in these countries. Without effective provisions to this effect, the disadvantaged position of developing states due to their different economic, financial, technological and development circumstances as compared to the advantaged developed states, will forever remain static and there is a high possibility that these states will resort to begging as a remedy to the mentioned problems. If that situation gets worse, the involved states will lose their food security, national security, political and economic stability.

#### **4.5 THE APPLICATION OF SPECIAL AND DIFFERENTIAL TREATMENT AND THE CHALLENGES**

The Agreement on Agriculture, like other World Trade Organisation agreements, is among other issues subjected to a similar concern of reducing non-tariff protection so as to achieve maximum liberalisation of international trade. Likewise the application of the concept of special and differential treatment in this agreement is limited to the extent that developing states enjoy minimal protection for adjustment purposes.

This is in line with the DSU ruling that the main purpose of the Agreement on Agriculture is to establish a basis for initiating a process of reform of trade in agriculture which is basically a fair and market-oriented agricultural trading system in order to achieve a greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines.<sup>210</sup> Be that as it may, special and differential treatment demands from developing states are considered to be a subsidiary concern compared to

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<sup>210</sup> WT/DS113/R, also see Desta 2002:1-18; Malzbender 18-28; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:6; Zunckel 2004:8

other pressing trade issues. The brief by the WTO Agriculture Negotiations Backgrounder explains this:<sup>211</sup>

[S]ubstantial reductions in tariffs, domestic support and export subsidies are prominent issues in the negotiations. In addition, some countries say an important objective of the new negotiations should be to bring agricultural trade under the same rules and disciplines as trade in other goods. Some others, (sic) reject the idea for a number of reasons. This is sometimes translated into conceptual differences, reflecting the importance that members attach to the major issues in the negotiations. Some countries have described the mandate given by Article 20 as a tripod whose three legs are export subsidies, domestic support, and market access (these are more commonly called the three pillars of agricultural trade reform). Non-trade concerns and special and differential treatment for developing countries would be taken into account as appropriate. Others say it is a pentangle whose five sides also include non-trade concerns and special and differential treatment for developing countries as separate issues.<sup>212</sup>

This confirms that the implementation of special and differential treatment provisions of the agreement on agriculture is also challenged on the basis of other peripherals of the agreement, which include the open provisions for domestic support in agriculture in the form of green box subsidies. The agreement provides for domestic support in the form of subsidies under three categories, namely the green box, the amber box and the blue box.<sup>213</sup>

The green box concerns non-trade distorting or minimal trade distorting subsidies which are government-funded and do not involve price support. Green box subsidies include, for example, programmes that are not directed at particular products, and include direct income support for farmers that are not related to current production levels or prices - environmental protection and regional development programmes fall in the similar

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<sup>211</sup> [www.wto.org](http://www.wto.org) 21/05/2005; WT/DS113/R, also see Desta 2002:18; Malzbender:28; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:4-6; Zunckel 2004:8

<sup>212</sup> *ibid*

<sup>213</sup> Articles 6 see also Bernal e.a 2003:1-30; WT/DS113/R, also see Desta 2002:1-18; Malzbender 18-; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:6; Zunckel 2004:8; <http://www.Southcentre.org/publications/occasional/paper10/toc.htm> The Doha Negotiations and Local Communities; WT/DS113/R, also see Desta 2002:18; Malzbender :28; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:6; Zunckel 2004:-8; [http://www.wto.org/English/tratop\\_e/agric\\_e/negs\\_bkrnd13\\_boxes\\_e.htm](http://www.wto.org/English/tratop_e/agric_e/negs_bkrnd13_boxes_e.htm) The Agricultural Negotiations. WTO Agriculture-backgrounder domestic support.

category. Green Box subsidies are allowed without limits, provided they comply with the relevant requirements.<sup>214</sup>

The blue box is an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal *de minimis* levels. It covers payments directly linked to acreage or animal numbers, but under schemes, which also limit production, by imposing production quotas or requiring farmers to set aside part of their land.<sup>215</sup>

The amber box contains all domestic support measures considered to distort production and trade (with a few exceptions) and are subject to reduction under the existing agreement.<sup>216</sup>

#### **4.6 THE ASSESSMENT OF THE EFFECTS OF DOMESTIC SUPPORT ON DEVELOPING COUNTRIES**

Domestic support provisions of the agreement on agriculture cause a lot of problems, especially for developing states. Read together with special and differential treatment provisions they imply that special and differential treatment is offered with the one hand, while its actual implementation is withdrawn with the other hand, basically through the contradictory domestic support provisions of the same agreement. This amounts to a nullity of any preferential treatment for developing countries. Under the agreement on agriculture, developing states operate on a clean slate, while developed states maintain an uplifted position. The present observation is confirmed by the study analysis of the Committee on Agriculture, which identified the shortcomings brought by the implementation of the provisions of Annexure 2 to the Agreement on Agriculture. According to this Committee, green box subsidies have provided the legitimacy for higher rather than lower overall OECD domestic support levels. Green box subsidies are potentially vulnerable in that they can be twisted around to accommodate other types of subsidies, which would otherwise be legally forbidden. To illustrate this possibility the Committee reports;

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<sup>214</sup> See above

<sup>215</sup> See above; See also Articles 1-13 of Agreement on Agriculture

<sup>216</sup> *ibid*

While the AOA assumes that the domestic support, decoupled from production, will have no or minimal impact on production levels, studies have shown that it is virtually impossible to break the links between income support and marginal costs and returns, particularly when the support runs into billions of dollars. Huge amounts of decoupled payments will inevitably increase farm input use and allow access to improved technology, hence increasing farm investment and production. Furthermore, decoupled payments are often provided in such a way as to increase land values. This maintains land in farming which might otherwise have been diverted for other purposes. Production is therefore indirectly increased.<sup>217</sup>

The Green Box is also criticised for its lack of transparency in that it masks huge supports that continue to be provided by OECD countries. This is due to the problem that the green box criteria have not been clearly defined. The problematic phrase – namely that ‘no or at most ‘minimal’, trade-distorting effects’ – is subjected to individual government which may wish to provide subsidy at a particular time. This is the case with the United States of America, whose AMS supports amounted to \$24 billion in the base period. In the first year of implementation in 1995, its AMS supports dropped drastically to just over \$6 billion. However, its Green Box supports increased by \$22 billion. This shows that subsidies previously classified as trade distorting were obviously shifted to the non-trade distorting category.<sup>218</sup>

According to Bernal, the fact that the duty to foresee that special and differential treatment is provided to developing state is entrusted on developed states rather than developing states is blamed for the WTO’s trade rules which open the door to unequal trade rules because developed states aim at such rules to make sure that their priorities are taken care of on the expense of the poorer states. Bernal points out that due to these rules, overall levels of subsidies have increased rather than decreased in OECD countries since the base year 1986-88, from US dollars 247 billion in 1998. In contrast, developing countries, which have traditionally not provided subsidies, have not been allowed to do so. While the special and differential treatment subsidies allowed to developing countries are highly specified and limited to only input and investment subsidies, developed countries have recourse to the blue box and the very broad and

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<sup>217</sup> ABARE Current Issues, August 1998, No 98.4; WT/DS113/R, also see Desta 2002:1-18; Malzbender 18-28; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:4-6; Zunckel 2004:1-8

<sup>218</sup> *ibid*

vaguely defined green box. Furthermore, the use of green box subsidies is not subject to limits and it is even given maximum protection under the due restraint clause.<sup>219</sup>

Import barriers in developed countries have risen, rather than decreased, especially on the sensitive products. When compared to non-tariff barriers of the 1990s, an ESCAP<sup>220</sup> study reveals that the EU's final binding for the year 2000 are almost two-thirds above the actual tariff equivalent for 1989-1993. For the United States, they are more than three-quarters higher. Furthermore, for major agricultural products, developed countries' tariffs are about twice as high as those of developing countries. For 2 major cereals wheat and maize, the bound tariff rates for developing countries are 94% for wheat and 90% for maize. In contrast, the OECD average in the first year of implementation (1995) was calculated at 214% for wheat, 197% for barley, and 154% for maize.<sup>221</sup>

All forms of dumping are prohibited in GATT through article VI but legalising export subsidies in agricultural trade forms an indirect permission to dumping. The same condition happens where other forms of domestic support are permitted. This is due to the fact that very few developing countries provide export subsidies as well as domestic support. Developing countries operate under very tight and limited levels of export subsidies while developed states are allowed to maintain 64% of their subsidy outlays in the base level.<sup>222</sup>

As a result of these, imbalances caused by the self-contradictory Agreement on Agriculture, developing states are victims instead of beneficiaries of trade liberalisation. According to the 1996-1999 study by FAO, the results of agricultural liberalisation and the implementation of the Agreement on Agriculture have been varied, but in general, the impact has not been positive especially for developing countries. This is confirmed by a case study undertaken by FAO on fourteen developing countries, which shows that

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<sup>219</sup> Bernal e.a 2003:11

<sup>220</sup> ESCAP 1996 'Agricultural Policy Reform Under the Uruguay Round Implications for Developing Countries of ESCAP Region,' Asian and Pacific Developing Economies and the First WTO Ministerial Conference: Issues of Concern, United Nations, New York.

<sup>221</sup> Terence (ed) 1986-1992:100; Deventer e.a 1999:19

<sup>222</sup> Konandreas and Jim Greengfield 1996:12



these states experienced improvements in agricultural exports in the post-Uruguay Round era.<sup>223</sup>

Basically it was found that there was a slight change in the volume exported, or in diversification of products and destinations. Food imports were rising rapidly in most developing states. Some regions were facing difficulties coping with import surges due to detrimental effects on the competing domestic sectors. On the whole it was observed that, while liberalisation brought about an almost instantaneous surge in food imports, these countries were not able to raise their exports due, amongst other factors, to supply side constraints.<sup>224</sup>

There was a general trend towards the concentration of farms in a wide cross-section of countries. While the concentration of farms led to increased productivity and competitiveness, in the absence of safety nets, the FAO found that this process marginalised small farmers and added to unemployment and poverty. For many developing countries, key agricultural sectors that were vital for the economy in terms of food supply (i.e. also food security), employment, economic growth and poverty reduction were being seriously eroded due to the inability to compete with cheap imports.<sup>225</sup>

The general conclusion given by the FAO report is that developing countries on the whole are not benefiting economically from agricultural liberalisation. In fact, their balance of payments situation has worsened. From a socio-economic perspective, food security, unemployment and poverty seem to have increased.<sup>226</sup>

The conclusion given by FAO expresses similar sentiments to the comments by Bernal, who writes:

Although developing countries, as the preamble of the agreement stipulates, were expected to benefit the most (especially where special and differential provisions were considered to be the

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<sup>223</sup> FAO 1996-1999 Study on the Implementation of Agreement on Agriculture; Terence (ed) 1992:100; Boston e.a 1999 28

<sup>224</sup> Konandreas and Greengfield 1996:23

<sup>225</sup> Terence (ed) 1986-1992:170-180; Deventer, Jordan and Beard 1999:13; WT/DS113/R, also see Desta 2002:18; Malzbender 28; WT/MIN(01)/DEC/1; WT/DS103/AB/R; WT/DS108/AB/R; Zunckel 2003:6; Zunckel 2004:8

<sup>226</sup> Konandreas and Greengfield 1996:31

integral provision in the agreement) from the adoption of multilateral rules on agricultural trade during the Uruguay Round, the results of the implementation of the Agreement on Agriculture...have been very disappointing. Ironically, the agreement legitimised the practices and policies of the developed countries in support of their agricultural sectors. This has resulted, amongst others, in making dumping a structural feature of agricultural trade. In contrast, the ability of Developing countries to protect their small farmers and promote the development of their agricultural sectors has been undermined by lack of resources; constraints imposed by multilateral financial institutions; and disciplines on trade that limit their ability to respond to unfair competition.<sup>227</sup>

The conclusion drawn is that special and differential treatment in the agreement on agriculture is not easy to apply for several reasons; for example, the presence of contradictory provisions within the agreement negatively affects their application. Apart from this factor the provided special and differential provisions in the agreement on agriculture lapsed for most developing countries before they could be in a position to apply them. The most common and obvious reason that applies to the entire special and differential treatment provisions is that they are basically 'a gentleman's agreement' bearing no legal force. This factor has contributed most to the failure of developing states to seek DSU intervention on special and differential treatment matters. These factors have lead developing states to cry out for a proper facilitation of effective and efficient enforcement of special and differential treatment either through reformed provisions or otherwise.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

The conclusion of this work is premised on the issue of whether we still need special and differential treatment herein after referred to as SDT. Evidence has proved that the world is divided concerning the usefulness of SDT.<sup>228</sup> The majority of World Trade Organisation membership demands the effective implementation of SDT.<sup>229</sup> The decision-making body of the WTO persists in claiming that SDT was an accident and that it has to be dropped; after all, it has been abrogated by disuse.<sup>230</sup> The fact that remains is that the Uruguay Round has effectively cut off most of the provisions on SDT for developing countries. It will take a few years before all the states, except least developed states, participate on an equal footing in multilateral trade.

The problem, however, lies with the objective of SDT - why was it ever part of international trade negotiations? How did it find a place in WTO Agreements and where does it come from? To answer all these questions it is important to highlight the objective of the World Trade Organisation.

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<sup>228</sup> Matthews 2003:10; Hoda e.a 2003:1;Langhammer and Lücke 2003:148 -149;Michalopoulos 2000:14; Das 1998:13;Whalley 1999:24 Fukasaku 2000:4; Youssef 1999:7; Melamed 2002:3; Gibbs 1998:14; Davenport 2001:3; Kessie 2000:7 Mele`ndez-ortis and Dehlavi 1998:13; Onguglo 1999:8; Oyejde 2001:10; Stevens 2002:15;CarlosP`erez DelCastillo 2003:14; WTO(1999a); WTO(1999b) W/T/COMTD/W/77; G/AG/NG/W/13; G/AG/NG/W/102; G/AG/NG/S/10.

<sup>229</sup> The Majority of the WTO Membership is the Developing States. These states hope the effective implementation of special and differential treatment even though their impact on decision making forums is insignificant due to their lack of expertise in international trade issues. This incapacity may be perpetrated by both international and domestic policies as some policies from these categories are stamping blocks to efficient implementation and management on trade issues. For example, certain individuals who are experts in a developing country may not be elected negotiators because of domestic politics. For example, if an expert within a state does not belong to the ruling party that person may not be sent to negotiate on behalf of the country in this way that particular country's available skills are sacrificed in the name of the ruling party by sending for negotiation purposes any other favourable person even if that preferred person does not have negotiation skills. Internationally, the developed states turn to postpone issues that affect developing countries especially issues on special and differential treatment. In the coming WTO discussions it is the hoped that developing countries issues will be given priority.

<sup>230</sup> Langhammer and Lücke 2003:149

In Chapters One and Two of this work, the objective of the World Trade Organisation was explained as mainly the liberalisation of world trade.<sup>231</sup> It was the members of the predecessors of the World Trade Organisation who created several principles in order to explain the elements of trade liberalisation - SDT was among the basic principles of trade liberalisation together with the twin principle - the MFN clause. Basically developing states, as the name indicates, were lesser economies as compared to their counterparts the developed states.

The capability of these states to participate on the same level with the developed states had to be objectively considered. Developed states knew well the conditions of developing countries as they had administered their economic affairs during the period of colonisation and they knew that something ought to be done in order to get these states to the level fit for international economic competition. To confirm this understanding, Rwegasira quoting Rathborne writes that 'the current state of economic affairs in developing states, especially in Africa, may not be an accident.'<sup>232</sup> He maintains that it is consistent with the continent's socio-economic historical development, which can be assumed in this case of Africa's relationship with the North, where Africa was introduced to new administrative, legal and cultural understandings. Africa ought to transform and adapt to these new ways, but this process needs quite some time.

– A study by the South Centre<sup>233</sup> Addresses the disparities in economical status of the developed states (the North) and the developing states (the South). It mentions that John Maynard Keynes had observed that 'in order to move away from the world economic disaster and maintain equilibrium in the balance-of-payments between countries and do away with impoverishment and social discontent there should be some smoothly functioning mechanism.' In pursuit of this observation multilateral arrangements were made for managing the international financial system under the Bretton Woods institutions, which dealt in part with the economic matters in a coordinated manner. In principle, payments imbalances between countries ought to be resolved at varying levels of world output and employment. Thus richer states ought to

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<sup>231</sup> See paragraph two in chapter one and paragraph two of chapter two; See also the Preamble of the Agreement on Agriculture; refer also to Prg 3.2.6 in chapter 3 of the present work.

<sup>232</sup> Rwegasira 1996:15; Rathborne 1981:30

<sup>233</sup> South Centre Report 1998.13 The Uruguay Round Agreements and the WTO work Programme. Tasks for Developing Countries, Geneva.

share the indebtedness of struggling economies. In pursuit of the same idea the GATT and WTO introduced the concept of SDT.<sup>234</sup>

The WTO agreement recognises the special needs of developing countries, and the need for efforts to ensure that developing countries secure a share in the growth of international trade in line with their economic development needs; however, there are a few provisions attempting to translate these broad objectives into concrete action and these include several phrases appealing to developed countries to pay special attention to the needs of developing countries and stating that the purpose of trade is to contribute to sustainable development.<sup>235</sup> Industrialised countries are also asked to provide technical assistance.

This, however, does not specify the amount of assistance and the type of assistance referred to. Apart from these general provisions the 1979 enabling clause allows WTO members to grant more favourable market access to developing countries than they do to industrialised countries. This provides a legal justification under WTO rules for the non-reciprocal access provided to developing countries under the generalised system of preferences - GSP - schemes by industrialised countries. Chapter Three of this work dealt with the evolution of SDT. Vegamota summarises this:

The idea that countries at a lower level of development should be accorded special and different treatment compared to industrialised countries has a long history in the WTO and in its predecessor, the General Agreement on Tariffs and Trade (GATT), and this concept has undergone various changes over time. Originally, the concept of SDT () referred to the provision of a range of flexibilities and additional policy leeway for poorer countries. Following the Uruguay Round of trade negotiations over 1986-94, the concept of changed to refer to the provision of time-limited waivers from WTO rules, including more favourable treatment regarding tariff reductions and subsidy reductions and some policy flexibility concerning specific WTO obligations.<sup>236</sup>

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<sup>234</sup> Langhammer and Lücke 2003:148-

<sup>235</sup> See The WTO Preamble.

<sup>236</sup> Vegamota 2003:14

The problem of interpretation, however, distorted the meaning of these noble clauses.<sup>237</sup> This was evident in the implementation stage, when the developed states insisted on certain values which were the opposite of what developing states had thought they were acceding to.<sup>238</sup> According to developing countries, SDT provisions are intended to assist developing countries in gaining a greater portion of the gains from trade. By joining the World Trade Organisation, these countries, for example, expected to gain greater market access for their exports. But in addition to this, Kuluwa<sup>239</sup> states, 'they are faced with increasing pressure to liberalise their economy and open up their markets to foreign competition,' although these countries in general are far from being able to compete with industrialised countries on an equal basis as they are at a different stage of development.<sup>240</sup>

Developing states would expect SDT to allow for differentiated rights and obligations between industrialised and developing countries.<sup>241</sup> They insist that the meaning of SDT could be best understood by considering the basic economic differences between developed and developing states.<sup>242</sup> This they maintain is shown, for instance, by the lower levels of income in developing countries, their reduced access to technology and finance and deficiencies in human resources and infrastructure.<sup>243</sup> They therefore affirm that SDT was meant to consist of measures to compensate for the economic disparities in multilateral trade in order to address the ailing economic situation of developing countries.<sup>244</sup> Developing states ought to be emancipated in order to achieve their successful participation in multilateral trade, with measures to help them in achieving

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<sup>237</sup> Matthews 2003:10; Hoda e.a 2003:1;Langhammer and Lücke 2003:148 -149;Michalopoulos 2000:14; Das 1998:13;Whalley 1999:24 Fukasaku 2000:4; Youssef 1999:7; Melamed 2002:3; Gibbs 1998:14; Davenport 2001:3; Kessie 2000:7 Mele`ndez-ortis and Dehlavi 1998:13; Onguglo 1999:8; Oyejide 2001:10; Stevens 2002:15;Carlos P`erez Del Castillo 2003:14; WTO(1999a);WTO(1999b)W/T/COMTD/W/77;G/AG/NG/W/13;G/AG/NG/W/102;G/AG/NG/S/10.

<sup>238</sup> Due to the fact that most of the developing states were still under the direct administration of the developed states (during colonial rule)Developing states had not actively participated in the early negotiations and changes pertaining to special and differential treatment and were hardly conversant with the new understanding of the concept.

<sup>239</sup> Kaluwa 2003:33

<sup>240</sup> South Centre 1996:1-8.Liberilisation and Globalisation: Drawing Conclusions for Development. Geneva.

<sup>241</sup> [www.mfat.gov.nz/Trade](http://www.mfat.gov.nz/Trade) matters: Trade and Development, "Lifting all boats" 2003;WT/MIN/(03)/W/17

<sup>242</sup> Fukasaku 2000:-15

<sup>243</sup> Matthews 2003:13

<sup>244</sup> Gulati e.a 2003:11

development and reducing poverty, and so also contribute to sustainable development. As Youssef states,<sup>245</sup>

Facing inequalities in markets without ... compensatory mechanisms would risk worsening inequity by increasing the already existing gap between rich and poor countries. It could perpetuate a disadvantaged situation of developing countries so that, rather than helping the integration of developing countries, particularly the least developed, trade would lead to developing countries becoming increasingly marginalised, increasing poverty and hindering development. Intervention has generally been an essential means to provide an environment for industries to develop in their early stages and reach a stage where they can compete at an international level.

Most developing countries are at an early stage of economic development with infant industries, which lack the experience, technology and know how to produce standard products compared to those of industrialised countries. Developing countries' companies need experience to improve efficiency, to increase productivity and reduce the cost of production in return for higher income on exports. The technical know how and experience are also required to improve the quality of products, which is of increasing importance for export to countries with higher standards, in particular industrialised countries.<sup>246</sup>

Due to these factors developing countries often require protected markets to develop their industries and products, which cannot compete in the international market, and need to provide incentives for the private sector. The rules of SDT need to be central in allowing developing countries this much-needed flexibility. The developing countries query the principle of liberalisation. As far as they are concerned, liberalisation is not a desirable or useful end. According to these states, what is needed is a strategic approach to trade policy. Melamed<sup>247</sup> argued that it is managed trade rather than liberalisation that has contributed most to development in the world. According to him,

If WTO agreements are to contribute to development and poverty reduction, developing countries must be given , which allows them to use trade policy in an interventionist and

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<sup>245</sup> Youssef 1999:7

<sup>246</sup> Langhammer and Lücke 2003:149; Ogunkola 2003:4; Workshop Report Nigeria's Imperative in the WTO Trade Order. Nairobi. Kenya; Orden 2004:-4; Onguglo:1999:5

<sup>247</sup> Melamed 2002:-3;South Centre Report 1996:8 Liberalisation and Globalisation Drawing Conclusions for Development.Geneva; Yeats e.a 1999:4

flexible manner, to support the development of domestic industry, the diversification of the economy and the generation of sufficient wealth to lift their populations out of poverty.

It appears fundamental, therefore, that developing country governments need the policy flexibility to manage markets and provide an incentive structure for the private sector in line with their development goals.<sup>248</sup> The aim is not to adopt a protectionist stance, but rather to allow governments to provide an incentive structure for the private sector and the development of the industrial sector, thereby promoting economic growth. This would not be a strange phenomenon, considering that it was what was formerly in practice; Vegamota confirms this:

When analysing the development path that today's industrialised countries followed to develop their economies, and more recently the well-known experience of a number of East Asian countries, it is apparent that managed trade or interventionist trade policy has been central in determining developmental success. Intervention has generally been an essential means to provide an environment for industries to develop in their early stages and reach a stage where they can compete at an international level. And to be able to intervene in their economy, developing countries require WTO rules to allow them some policy leeway and hence flexibility in their implementation and interpretation of various WTO agreements in order to promote their economic and social development.<sup>249</sup>

As shown above, it is the effects of the Uruguay Round which changed the whole scenario. This round produced an agreement which has limited the policy options available for the parties who acceded to the WTO at a later stage or those parties which, although they joined the WTO early, were very slow in the implementation of the pre-Uruguay Round benefits.<sup>250</sup> Many of the policy instruments that were applied in the economic transformation of East Asian countries are no longer possible under the present WTO rules. There is hope, however, that the on-going negotiations, especially under the Agreement on Agriculture, will reconsider providing flexibility in order to go back the missed steps by giving room to the development of developing countries. SDT ought to be the ground for the differential assurance of sustainable economic development for developing states<sup>251</sup>. Interpreted as such, developing states believed

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<sup>248</sup> Kwa 2003:10

<sup>249</sup> Vegamota.2003:17

<sup>250</sup> For example, China, Latin America and many other developing countries.

<sup>251</sup> <http://www.ictsd.org/ministerial/cancun/tds/session> ICTSD. Cancun Trade and Development Symposium. Putting Human Development into Trade Negotiations. 2003. 04/05/20



that SDT would enforce aspects of economic growth in developing countries, which include issues of technical assistance, market access and many others.<sup>252</sup>

Regardless of the several impediments in the form and implementation of SDT provisions, developing countries insisted that this concept has promising results and begged endlessly that SDT provisions be implemented in an effective and efficient manner in order to achieve the guaranteed results. It therefore remains true that SDT is still needed in multilateral trade.<sup>253</sup>

## **5.2 RECOMMENDATIONS**

This part deals with effective and efficient ways of implementing SDT. It will deal with both international and domestic policies, which ought to be regulated in order to achieve the smooth operation of SDT.

### **5.2.1 REFORM OF THE INTERNATIONAL LAW AND POLICIES**

This concerns the external policies that affect trade in developing countries, mainly issues of SDT, which is the focus of the present thesis. The major elements for reform include the need to reform SDT provisions in general and the need to reform specific articles of the agreement on agriculture whose objective is to award differential treatment to developing countries.

### **5.2.2 REFORMING SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

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<sup>252</sup> ICTSD. Doha Round Briefing Series:Development Since the Fourth WTO Ministerial Conference. February 2003.Vol.1.No 3 of 13.

<sup>253</sup> Chavas\_de\_Bogis.2003:7; Datozeri Rafidah Aziz 2004:14; Matthews 2003:1-10; Hoda e.a 2003:1; Langhammer and Lücke 2003:149; Michalopoulos 2000:14; Das 1998:13; Whalley 1999:24; Fukasaku 2000:4; Youssef 1999:7; Melamed 2002:3; Gibbs 1998:14; Davenport 2001:3; Kessie 2000:7 Mele`ndez-ortis and Dehlavi 1998:13; Onguglo 1999:8; Oyejde 2001:10; Stevens 2002:15; Carlos P`erez Del Castillo 2003:14; Sharer 2000:11;WTO(1999a); WTO(1999b); W/T/COMTD/W/77; G/AG/NG/W/13; G/AG/NG/W/102; G/AG/NG/S/10; WT/MIN/(03)/W/17; WT/MIN/(03)/W/15; WT/MIN(03)/W/10; WT/MIN/(03)/W/12; WT/MIN/(03)/W/16; WT/MIN(03)/W/6; G/AG/NG/S/6

These basically concern the wording of SDT provisions, which to a great extent affect their implementation. To start with the World Trade Organisation, provisions on SDT have several problems and loopholes. The wording of these provisions is not firm in that sense it leaves room for the total abuse of the same provisions. Specifically, SDT provisions are couched in best endeavour language, which makes them lose their validity. It would be best if the rest of these provisions, like the enabling clause, could have strong legal language, which avoids their being mere gentlemen's agreements, which are not actionable before the DSB.<sup>254</sup>

The loose wording of these provisions extends to the failure of these provisions to specifically mention the awardees of specific differential treatment. Keck and Low observe that failure to exclusively outline the categories of developing countries entitled to differential treatment has led to a less meaningful commitment by both parties (developing and developed states). The developing states insist on equal treatment without paying regard to the fact that, although they may be categorised under the same level, they are in fact not of the same economic level - other developing states are more advanced than others. A clearer categorization of these nations is therefore essential. Developed states, on the other hand, pretend to provide more favourable treatment to all the claimants, whilst in fact they are not. They have a leeway to choose to which states they may grant special and differential treatment. For example, through special regional arrangements – not as part of the GSP, and only under specially circumscribed conditions defined by the developed states.

Since the provision of SDT is entirely based on developed states' will to provide it; developing states remain at their mercy where developed states do not wish to grant SDT, even if there were a written agreement to that effect. For example, it was agreed at Doha that countries at a lower level of development should be accorded more favourable treatment; so far no real progress has been made on , since only one proposal at the CTD has been accepted in principle, which is the idea of a monitoring mechanism for provisions. In addition, the Committee on Trade and Development (CTD) was mandated to report to the General Council on the credentials of the proposed form of SDT by developing countries, but failed to do so.

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<sup>254</sup> WT/MIN(03)/W/15 a common wording of special and differential treatment phrases or provisions.

This confirmed the reluctance of developed states to take up seriously issues of SDT. CDT extended the deadline on this issue three times. This has led to uncertainty as to when issues of will be picked up again and in what form they will be taken regardless of the fact that they have important implications for developing countries' economic growth. Only real concessions by developing countries in other areas appear likely to achieve concessions on provisions, rather than an appearance of progress.<sup>255</sup>

Apart from the wording of SDT provisions, their interpretation reveals insufficiency of the same provisions. SDT provisions should provide flexibility for purposes of implementation, which offers the potential of real commercial benefits to them. As a report submitted by workers in developing states indicates, 'Developing states need flexibility to implement trade policies which are in line with their developmental objectives and not simply the capacity to implement agreements that may not support their development objectives.'<sup>256</sup> But developed states vehemently argue that there is flexibility in the WTO.

It could be argued that the allowed flexibility is inadequate, given the fact that it is offered in limited circumstances, for example, on a case by case basis after the expiry of a 'transition period', for example, under TRIPS. this is perpetrated by lack of enforceable SDT provisions. Where these provisions require action by industrialised countries they are ignored by these states as they are mostly not binding – for example, 'market access under Agreement on Agriculture.' Such provisions are therefore simply left to the discretion of the countries involved, which circumstance make them a rather denied privilege than given flexibility in trade. Taking the Agreement on Agriculture as an example, it is quite a complex issue to hope that developed states which feel that it is their right to subsidise their domestic market will, on the other hand, feel the urge to promote market access for developing states, as it is the issue which impacts badly on their domestic policies.<sup>257</sup>

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<sup>255</sup> See the Doha Briefing. Also see IFCU Report.

<sup>256</sup> ICFTU. September 2003:13. Supporting Development at the WTO: A Trade Union Report. <http://www.icftu.org>

<sup>257</sup> The US is reluctant to do away with domestic subsidies in agriculture and due to this developing states experience massive imports and stand no chance to get a benefit in agribusiness.

### 5.2.3 FLEXIBILITY CONCERNING THE IMPLEMENTATION PERIOD

The next concern is the difficulty on implementation of SDT, which is caused by the limited period within which the developing states are expected to fully liberalise their trade. Such exemptions, to make matters worse, are only offered on the grounds of difficulties in the implementation of World Trade Organisation agreements - developing states are bound to be WTO compatible. This demands a full integration of these states in multilateral trade, which demands full liberalisation of their trade.

Developing countries argue that they need potentially long-term exemptions, if necessary, on the grounds of development needs. As argued above, the analysis of the development path that successful industrialised countries followed suggests that a range of policy instruments may be required in specific cases to promote and support the domestic private sector rather than simple temporary exemptions.<sup>258</sup> The presently prescribed requirements are tantamount to crippling the developing states by cutting off the ladder through which the industrialised states climbed.

Developing states argue that they should be allowed enough flexibility so that they can use a range of necessary policy instruments to adopt a strategic trade approach in support of their development needs, which indicates that exemptions on the grounds of difficulties in implementation are not advantageous for the development of developing countries.

Take agricultural trade as an example: as previously mentioned, agriculture plays a very important role in the economic development of developing states.<sup>259</sup> This aspect makes it the centre of economic development and trade in developing countries. The provision that developing states should be WTO compatible within the limited time period leaves agricultural trade and development in these states in a crisis, which leads to a decline of

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<sup>258</sup> ICFTU. September 2003:18. Supporting Development at the WTO: A Trade Union Report.  
<http://www.icftu.org>

<sup>259</sup> Todaro 2000:59; Kumar 1998:2:4; G/AG/NG/S/6

production in these states. These provisions leave developmental policy goals of particular importance to developing countries in peril and this leads to a reduced capacity to maintain food security, employment and livelihood opportunities for the rural poor and domestic food production capacity (hence the degrading remarks against developing states that they are poor and hunger stricken).

This one-sided nature of SDT excludes the very same developmental and trade fundamentals outside the legal exemption. It would therefore be illegal to claim SDT in order to address developmental issues in developing countries. Reform concerning these provisions would then prove to be a matter of urgency where the concerned WTO provisions would be improved.

#### **5.2.4 REFORM ON THE GENERAL PROVISIONS OF THE AGREEMENT ON AGRICULTURE**

According to Article 15.1, the general requirement of the Agreement on Agriculture is that SDT should be reflected in the commitments undertaken. This ought to be implemented with respect to market access, export subsidy and domestic support commitments by mandating reduction commitments, which is two thirds of the percentage required of developed country Members. It would therefore be essential for countries to exempt certain products from Agreement on Agriculture commitments by either declaring, under the positive approach list, which agricultural products they would agree to be disciplined under the Agreement on Agriculture provisions, or under a negative list approach, where countries would identify specific agricultural (food security) products which they would wish to exempt from reduction commitments.<sup>260</sup>

#### **5.2.5 MARKET ACCESS**

In order to achieve the required extent of commitment, tariff reductions should be linked to reductions in trade-distorting support to agriculture in developed countries. Basic food security crops should be exempt from tariff reductions or other commitments. There should be a right to renegotiate (upward) the low tariff bindings that apply to food

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<sup>260</sup> Roberts *ea* 2002:3

security crops where those bindings are low. Developing countries with domestic support below *de minimis* ceilings should be allowed to maintain 'appropriate' levels of tariff bindings to protect rural populations. Special safeguards providing automatic increases in tariffs, with a provision to impose quantitative restrictions under specified circumstances in the event of a rapid increase in imports or decline in prices, should be allowed. Developing countries should be exempt from any obligation to provide any minimum market access.<sup>261</sup>

## 5.2.6 DOMESTIC SUPPORT

Article 6.2 of the Agreement on Agriculture exempts from domestic support reduction commitments investment subsidies which are generally available to agriculture, agricultural input subsidies generally available to low-income or resource-poor producers and support to encourage diversification from growing illicit narcotic crops. Article 6.4(b), on the other hand, provides that the higher *de minimis* percentage for AMS commitments is ten percent for developing countries as opposed to five percent for developed countries.

The effective differential treatment would be that *de minimis* support ceilings for product- and non-product-specific support in developing countries should be doubled to twenty per cent each. This will expand Article 6.2 exemptions by allowing subsidised credit and other capacity-building measures as exemptions when provided to low-income or resource-poor farmers. Developing countries should be allowed to offset negative product-specific support against positive non-product-specific support measures. These countries should be permitted to increase domestic production of staple crops for domestic consumption.<sup>262</sup>

## 5.2.7 EXPORT MEASURES

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<sup>261</sup> Ruffer *ea* 2002:1

<sup>262</sup> Roberts *ea.* 2002:12;Ruffer *ea* 2002:9

In the case of differential export measures Article 9.2(b) provides for a lower rate of reduction for export subsidy commitments on budgetary expenditure and quantities benefiting from such subsidies. Article 9.4 in addition provides that certain export subsidies are excluded from reduction commitments and lists them to include subsidies to reduce the costs of marketing exports of agricultural products, and providing internal transport charges on export shipments more favourable than those for domestic shipment. These provisions can be further improved to accommodate flexibilities for developing countries to provide export subsidies in certain circumstances, including those that reduce the costs of marketing and those that reduce charges for export shipments, should be continued. Under the negative list approach, the Agreement disciplines would apply to all agricultural products except for a group of 'food security crops' nominated by developing country members. Under the positive list approach, all products would be exempt except those listed by developed country members.<sup>263</sup>

## **5.2.8 FOOD SECURITY**

The Agreement on Agriculture under Article 12.2 exempts developing country net food importers from the requirement to give due consideration to the effects of export prohibitions and restrictions on other importing Members' food security and to give notice and to consult with other importing Members on such measures. According to Annex 2, governmental stockholding programmes for food security purposes whose operation is transparent and in accordance with officially published criteria, as well as domestic food aid and subsidy programmes, are deemed to be Green Box measures. It would be better to amend Article 12.2 to include the requirement that on Food Aid aspects the recipients should have a say whether they would require such aid. In addition, the other developing states that might be affected by such food aid should have a say over the whole transaction and should be allowed to suggest an alternative. For example, in the situation of South Africa and Lesotho, Lesotho being a net-food importing country affects South African market in that South Africa cannot export to Lesotho where Lesotho has a flow of free food and cheaper brands of food from the assisting developed country. This presents South Africa with a serious challenge, especially when it does not have a say on a matter that will greatly affect it.

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<sup>263</sup> Roberts *ea* 2002:19; Ruffer *ea* 2002:12.

### **5.2.9 THE SYSTEM OF TARIFFICATION**

The Agreement on Agriculture in Annex 5 exempts predominant staples from tariffication, if certain minimum access opportunities are provided. This is considered too limited as far as agricultural trade in developing countries is concerned. The recommendation is therefore that developing countries should be allowed to use either a positive list approach to declare which agricultural products they would agree to be disciplined under the Agreement on Agriculture provisions, or a negative list approach where countries would identify specific agricultural (food security) products which they would wish to exempt from reduction commitments.

In addition to that, developing countries have to be enabled to maintain an appropriate level of tariff bindings in keeping with their agricultural development needs. They should be allowed to re-evaluate and adjust their tariff levels (at a minimum, for food security products). The general enforcement of these recommendations should not attach the general proviso under the WTO rules, which allows for adjustment of tariff bindings with payment of compensation to principal suppliers adversely affected. Developing countries should be exempted from this requirement; they should be allowed to adjust their tariff levels without payment of compensation.

Matthews qualifies the expansion of SDT in the form of tariffs and explains that such a move would be rational because it would address essential development and trade issues, which include the support of long-term protection to food security crops in developing countries. This enables tariff flexibility even if the target domestic price is related to past world prices in some way and is not intended to provide long-term protection. And guards the pace of tariff reduction in developing countries with the pace of reduction of trade-distorting support in developed countries. Matthews groups such



advancement under four segments, namely development tariffs, food security tariffs, stabilisation tariffs and compensatory tariffs.<sup>264</sup>

These explain that the provision of high tariffs for developing countries will improve production as developing countries will begin to take agriculture as a priority because they would be assured of a lucrative outcome. This in turn will alleviate poverty and will elevate agricultural growth. The general outcome will be development through agriculture. The level of national food security will be enhanced, which aspect is rather undermined by the present system, which only achieves levels of food self-sufficiency at world market prices or with only low tariff bindings. High tariffs enforce stabilised tariffs, by allowing developing countries the ability to vary applied tariffs to offset most or all of the volatility in world market prices. They are also compensatory tariffs meaning that they are justified as a form of countervailing measure as long as developed countries continue to provide significantly larger amounts of trade-distorting support.

#### **5.2.10 THE NEED FOR REFORM ON DOMESTIC POLICIES**

Various studies<sup>265</sup> show that efficient and effective SDT can be achieved through the intertwined efforts of both the international and domestic arena. Diaz-Bonilla makes the same observation that domestic policies and laws are the key factors in the enhancement of trade and economic development of individual states.<sup>266</sup> Langhammer and Lücke emphasise that domestic policy reforms should enable developing states to reap the gains from international integration. They add that, without specific policy reforms, international integration would seem a zero-sum game.<sup>267</sup>

In the attempt to achieve effective and efficient implementation of SDT, it is essential to base our suggestions on effective and operational policies. It is essential that developing states should also focus as a matter of urgency on internal matters that may hamper the enforcement of SDT.

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<sup>264</sup> Matthews 2003:10

<sup>265</sup> Dorward e.a 2003:77;Kakonge 1996:71

<sup>266</sup> Diaz-Bonilla e.a 2003:15

<sup>267</sup> Langhammer and Lücke 2002:151

From past experience it is evident that for various reasons developing states lacked implementation of available SDT due to bad policies and constrained laws. Yeats confirms that indices of the quality of national governance show that developing countries have generally adopted the most inappropriate policies and laws. Sub-Saharan Africa as a region is identified as applying governance policies and laws that are less conducive to industrialisation and growth than almost any other developing region.<sup>268</sup> Yeats and Ng further explain that a common trade dilemma in most of Sub-Saharan Africa is that these states have a continuing struggle between traditional forms of governance and social organisation and modern forms of government - this is evident in their trade administration laws. They explain that this problem hampers efficient policy making.<sup>269</sup>

Kumar<sup>270</sup> observes this problem in the land law of Lesotho when he comments that in Lesotho agricultural land administration is governed through both customary law and statutory law. He shows, for example, that these laws empower different persons with similar duties (Chiefs and District Agricultural officers) and this leads to inefficiency and therefore lack of enforcement of the very same laws. The Chiefs would leave the task to the District Agricultural officers, while the very same officers would regard certain duties as the Chiefs' duties.

In this regard it would be very challenging to enforce certain aspects of the law, for example, the provisions on punishment due to the fact that the dual legal system in Lesotho offers different punishments concerning inappropriate exploitation of agricultural land - customary law has lesser punishments, while the statutory law is extensive and has higher penalties. This creates laxity in the respect of law. In Lesotho the traditionally allocated agricultural land is not fully utilised, even if it can be beneficial for trade purposes, because it takes a rather lengthy time to revoke the allocation where the holder of such a land is not using it efficiently.

A number of similar problems in developing states coupled with inefficient SDT cause lack of production and therefore a decline in economic development, for example,

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<sup>268</sup> Yeats e.a.1999:25

<sup>269</sup> Yeats and Ng 2003:32

<sup>270</sup> Kumar 1998:3:9-11

agribusiness, which promotes decreased participation of developing countries in multilateral trade. Yeats affirms that, although agriculture is considered to play a major role in the development of developing countries, it has been sidelined for ages.<sup>271</sup> This is in fact the case with Sub-Saharan Africa, where policies and laws did not favour agricultural trade and led to the neglect of agriculture. For example, more than a decade ago South Africa experienced problems regarding agricultural laws and policies which led to the neglect of agriculture to a greater extent by the majority of South Africans.

Most of the people opted for employment in the gold mines or chose to be ordinary farm labourers, which caused a large gap in agricultural production and creativity.<sup>272</sup> The laws and policies of South Africa before the 1990s did not only have a negative impact on its citizens, but they also affected its neighbouring countries. Lesotho, which is totally embedded in South Africa, for example, suffered a decline in agricultural production.<sup>273</sup> Along the same lines, Lesotho suffered labour migration into the gold mines of South Africa and as ordinary farm labourers. Most SADC countries shared the same dilemma. According to Dikotla *et al.*, this situation coupled with other factors such as insufficient individual states domestic laws and policies then led to the dependence of these states on South Africa. A serious calamity has now befallen these states as the mines are now closing and the value of gold is declining. Agriculture has remained the immediate option for trade and is a means of earning income.<sup>274</sup>

The SADC region in particular is undergoing reform of relevant agricultural laws and policies in order to achieve the most possible benefits in agriculture. To start with, South Africa recognises the essential role played by ownership of agricultural land. According to the white paper on South African land policy, land ownership will enhance production and improve the livelihoods of the most deprived. This will eventually address the issue of food security for the poor.<sup>275</sup> In addition, efficiently distributed land would stimulate the enactment of relevant legislation and the enforcement of new policies with appropriate strategies.

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<sup>271</sup> Yeats e.a 1999:26; Dorward e.a 2003:74

<sup>272</sup> Minnaar e.a 1994:34

<sup>273</sup> During the years 1860 – 1900 Lesotho supported South Africa with agricultural produce and there were no food problem in this state.

<sup>274</sup> Dikotla e.a 2002:8

<sup>275</sup> Department of Land Affairs 1998:18. White Paper on South African Land Policy. Pretoria

Poostchi emphasises that land reform brings positive developmental changes in that land reform also refers to changing and restructuring land tenure rules and procedures in order to make the land tenure system consistent with an overall requirement of economic development. According to him, the relationship between land reform and national or rural development in any country is that it can serve as both a distributive instrument and a vehicle for achieving increased productivity, but this necessitates changes in the pre-reform structure of supporting services such as marketing, credit, inputs processing, storage, extension and research.<sup>276</sup> It is therefore apparent that increased productivity of crops and animal products and the related progress of agricultural business can enhance the quality of life for the under-privileged millions in developing countries.

This is also perceived to be true by Minnaar, who maintains that 'access to and affordability of land is sometimes cornerstones of the economic sector, in particular the growth and potential of the *agricultural*<sup>277</sup> economic sector.' He lays the background of this analysis of Southern African states in that these states had a common experience of colonial rulers and later experienced governments that prevented Africans from farming on an economic basis. This in turn excluded them from competing with white commercial farmers, and thus from being a factor in the national economy. He blames the twisted policy structures for the whole scenario, saying that the inequality was by and large accomplished by discriminatory legislation restricting African farmers to less productive agricultural areas by promoting subsistence farming in these areas, and by failing to provide financial aid and other support services.<sup>278</sup>

The strategic plan for South African agriculture emphasises that, as a first step, it is important to deal efficiently with land reform to ensure rural stability and market certainty. The process of economic empowerment in South African agriculture starts with improved access to land and the vesting of secure tenure rights on people and to areas where these do not exist. The plan in addition confirms Poostchi's analysis, because this plan is a result of land reform policy.<sup>279</sup> The plan aims at generating equitable access and participation in a globally competitive, profitable and sustainable agricultural sector

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<sup>276</sup> Poostchi 1986: 71

<sup>277</sup> Added emphasis

<sup>278</sup> Minnaar 1994:104

<sup>279</sup> Department of Agriculture 2004:13. Annual Report 2003 and 2004. Pretoria.South Africa.

contributing to a better life for all. This can be achieved through the full participation of all stakeholders.<sup>280</sup>

Lesotho, on the other hand, is reviewing its land policies and laws.<sup>281</sup> In the attempt to achieve uniformity in the implementation of the dual system laws, namely the customary land tenure and statutory land tenure laws, Lesotho will introduce a single statute which has merged the two systems into a single law. The preamble of the new bill - the Land Bill of 2004 - provides that the new Act will provide for the granting of titles to land; the conversion of titles to land; the better securing of titles to land; the management of land; the granting of public servitudes; the settlement of disputes relating to land; the repeal of certain laws relating to land; and connected purposes. In order to improve agricultural land tenure in Lesotho the Bill penalises the transfer of agricultural land for purposes other than agriculture without prior approval by the authorities

This element will prevent overwhelming agricultural land erosion, where land holders are building on the agricultural land instead of using such land for the purpose it is designated. In order to rectify ineffective agricultural land use, the Bill allows the immediate holder to sell the lease hold title to the next person who can utilise the land.<sup>282</sup>

This new law does not, however, redress basic inequality. This is not strange, however, with the rest of the SADC region where dual legal systems are in place. In these states, only married males qualify for land allocation<sup>283</sup>. Married women in these states have no rights of ownership to agricultural land. In Lesotho, for example, inheritance of family land passes from the father to the first male child of the family.<sup>284</sup>

The wife can only guard the family land on behalf of the son or the husband in his absence. Minnaar analyses the economic impact of this situation in that it is very difficult for women to utilise the land commercially where they do not own it, because they cannot have access to agricultural development loans, where declaring the land is a prerequisite before one can be granted a loan. This causes poverty and lack of

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<sup>280</sup> Department of Agriculture 2001:18. The Strategic Plan for South African Agriculture. Pretoria. South Africa.

<sup>281</sup> Ramodibedi e.a 2000:15

<sup>282</sup> Part VI read with Part VII of the Lesotho Land Bill of 2004

<sup>283</sup> Minnaar e.a 1994:104

<sup>284</sup> The Lesotho Laws of Lerotholi Part III. Mazenod Book Centre. Maseru.

development in these states, because most of the time women are left with families when the men go job hunting, which is the scenario in the SADC region, where men from countries surrounding South Africa leave families to work in the South African mines.<sup>285</sup>

The present problem serves as a challenge in policy and law reforms. Governments should see to it that relevant laws and policies are reviewed in order to address the gender inequality, which in essence affects the economic development of developing states to a greater extent. Mr Selebalo, the chief planner at the Lesotho Lands and Survey Department,<sup>286</sup> recommends that the Lesotho Law Reform Commission should look into the law of inheritance in Lesotho, which is the basic law that will affect the implementation of the Land Bill of 2004. Botswana also recommended the revision of several laws in order to rectify the undermined status of women and therefore enhance their economic participation. According to Mathuba, there should be a revision of Botswana Marriage Act, the Married Persons' Act and the Deeds Registry Act in order to remedy this situation.<sup>287</sup>

There is a need for reform of our domestic policies and laws that impact negatively on economic trade development in order to achieve an effective and efficient enforcement of SDT. Developing states have often acknowledged that there is an urgent need to that effect. For example, the combined states of Africa declared that, amongst other commitments, they recognised that there has been an old historic injustice in Africa for centuries due to inappropriate laws and policies and that these need to be corrected. In an attempt to achieve the central injunction of the new global partnership, it is a demanding factor that there should be a combined effort by Africa and its associates in order to improve the quality of life of Africa's people as rapidly as possible. They maintain that in this attempt there are shared responsibilities between Africa and the rest of the world.<sup>288</sup>

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<sup>285</sup> Minnaar e.a 1994:105

<sup>286</sup> As per our Discussion on the possible loop holes in the implementation of the Bill.

<sup>287</sup> Mathuba 1993:34

<sup>288</sup> [www.org.com](http://www.org.com) The Constitutive Act of the African Union and A New African Initiative. Merger of the Millennium Partnership for the Recovery Programme(MAP)and Omega Plan. July. 2001:37

### 5.2.11 STRATEGIES FOR POLICY AND LAW REFORM

Policymaking as a basic ground for the economic development of a country should be orientated towards a particular objective. Obviously a proper policy is one which addresses the basic economic needs of a state. These needs, however, cannot be totally divorced from the objectives of the global community, which is where the state exists. To start with, a state should measure its capabilities against the needed effort to participate as part of the whole world. Having genuinely assessed itself, that state should then embark on the appropriate policy making. Developing states therefore have to explore the possible international trade avenues and base their policies on the positive side of what is available for them, while trying to persuade the international world to offer what is available for example, the benefits which are brought by the present SDT provisions. This will also help them to realise the negative impacts of the same offer and they will have the appropriate mechanisms to ward off any possible repression and urge for reform where necessary. This argument goes hand in hand with Okpara's point:

The essence of national trade policy by nation states is to formulate a strategy for the national trade in unusually competitive context; making sure that earnings, as well as the attendant social benefits are maximised, while losses are minimised. In this, governments must of course take into account their own domestic socio and political circumstances, as well as the position of the rest of the world. The rationale or *raison d'être* for trade policy development could therefore be summarised as follows; the existence of international trade in a complex inter-dependent world economy makes trade policy imperative among nation states; the desire to maximise foreign exchange earnings through exports, and thereby improve a nation's balance of payments position, informs the necessity to conduct foreign trade in the context of specific trade policies, the need to communicate a country's economic "demands" and needs to the external world through its trade policy; and the necessity to safeguard and protect national economic interests by means of specific trade policies, such as boosting domestic production.<sup>289</sup>

The most appropriate strategy for policy making can be associated with Akindele's suggestion that, at the basis of every policy-making effort, there ought to be a structured

process of strategic planning and decision making in which different and often opposing interest groups struggle to influence policy outcomes. For example, the use of forums such as the independent Law Reform Commissions for policy and law making would be beneficial. Neutral forums such as these encourage the participation of private sectors and civil societies in law making. This will do away with dirigiste-based economic policies which normally undermine certain economic factors and prove to be negative towards economic development.<sup>290</sup>

Proper policymaking will enable the beneficial operation of SDT provisions, which are marked by enhanced economic trade through trade capacity building. According to Fukasaku,<sup>291</sup> trade capacity building can be simplified to include three elements, namely capacity of a state to negotiate with its trading and investment partners; capacity of the particular state to implement trade and investment rules; and capacity of that state to compete in the international market.

These three elements, if properly addressed by the domestic trade policies, will improve the economic development. It has to be understood that economic development, although premised on similar grounds worldwide, can be achieved through different structural policies; this aspect probably indicates that the circumstances that surround policy making vary from state to state. However, the fact remains that proper policy making has the greatest impact on the economic development of a particular state.<sup>292</sup>

It is therefore essential for developing countries to concentrate on policies that enhance capacity building as the first step in order to be able to gain insight to their undertakings and be able to plan carefully for any economic trade activity. It is observed that essential policies can fall under different classes and there is a need to prioritise; for example, Fukasaku suggests that 'for purposes of export promotion and diversification, focus should be shifted away from sector-specific policies towards more generic policies, such as infrastructure development, human capital formation, customs and other administrative reforms.'<sup>293</sup> Cornea and Court, on the other hand, addressing the effects of inequality and poverty on economic growth, recommend for purposes of economic

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<sup>290</sup> Akindele 1988:85;Okpara 1999:10

<sup>291</sup> Fukasaku 2002:165

<sup>292</sup> Diaz-Bonilla e.a 2003:15; Dorward e.a 2003:77;Kakonge 1996:71

<sup>293</sup> Fukasaku 2002:165



growth the adoption of a careful approach towards reviewing policies regarding domestic financial liberalization and capital account liberalization; land reform policies; education; active regional policies; policies regarding public expenditure on education and strengthening financial markets; macroeconomic policies; equitable labour market policies and innovative tax and transfer policies.<sup>294</sup> The stated elements by Cornea and Court are essential for development and if they are not put in place it is very difficult to attain sustainable development.

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<sup>294</sup> Cornea and Court 2001:33; Doward e.a. 2003:77



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## GLOSSARY OF TERMS

<b>Amber box</b>	This refers to price support and production-linked support (i.e. subsidies) measures that have to be reduced or eliminated as a result of the WTO Agreement on Agriculture (AoA). Support of this kind was quantified according during the Uruguay Round as the <i>Aggregated Measure of Support</i> (AMS). The AMS for each WTO Member is listed and is subject to reduction as part of each WTO Members' WTO commitments.
<b>ASEAN</b>	This refers to the Association of Southeast Asian Nations. Member countries are the following: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. However, only Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, and Thailand are WTO Members.
<b>Assessment of trade in services</b>	Evaluating the impact of trade in services is a mandate, enshrined in Article XIX.3 of the General Agreement on Trade in Services (GATS), for the Council for Trade in Services (CTS). Indeed, in view of the preparations for a new round of services negotiations and in order to establish guidelines and procedures for the negotiations, the CTS is requested to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS.
<b>Blue box</b>	This refers to agricultural support (i.e. subsidies) measures provided by WTO Members under Art. 6.5 of the WTO Agreement on Agriculture (AoA). This provision allows WTO Members to provide direct payments to agricultural producers under the condition that such payments are part of programmes aimed at limiting agricultural production and that they meet the production-related criteria specified therein. These payments are not subject to reduction commitments – i.e. they do not need to be reduced or eliminated.
<b>Bound tariffs</b>	This refers to the tariff rates or levels specified in the tariff commitments listed down by each WTO Member for each tariff line. These tariff levels represent the maximum tariff that may be applied by each Member at any point in time for a specific product. Bound tariffs may be different from the actual applied tariff in that the latter could be below or at the bound tariff level.
<b>Cairns group</b>	This refers to an informal grouping of WTO Members established during the Uruguay Round in order to coordinate action aimed at promoting liberalization in agriculture trade at

the multilateral level. Currently, the Cairns group includes 17 WTO members: Argentina, Australia, Bolivia, Canada, Chile, Colombia, Costa Rica, Fiji, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.

**Civil society organization**

Domestic, regional, or international non-profit organizations, associations, federations, or social movements that advocate public interest or welfare-related issues or concerns such as, but not limited to, animal welfare and protection, fair trade, environment, development, gender rights, labor rights, human rights, anti-corruption, rural reconstruction and development, poverty reduction, North-South dialogue, migrant worker rights, or consumer protection.

***De minimis* provisions**

This refers to Art. 6.4 of the WTO Agreement on Agriculture (AoA) which allows WTO Members to exempt from the calculation of the “amber box” (i.e. AMS) product-specific and non-product-specific support below a certain threshold level. For developed countries that threshold has been set at 5 per cent of the value of agricultural production of the product concerned in the case of product-specific support, and at 5 per cent of the value of total agricultural production for non-product-specific support. For developing countries, the threshold is 10 per cent.

**Developed countries**

States or separate customs territories that are members of, or have been accepted for membership in, the Organization for Economic Cooperation and Development (OECD), the European Union (EU), or the European Free Trade Area (EFTA).\*

**Developing countries**

States or separate customs territories that are not “developed countries” as described above.

**Doha Ministerial Decision on Implementation-related Issues and Concerns**

This decision was approved by the WTO Ministerial Conference in Doha, Qatar, in November 2001, and provides for a two-track approach to resolving the approximately 100 implementation-related issues and concerns raised by developing countries in the run-up to the Doha ministerial conference. Some items were settled at or before the Doha conference, supposedly for immediate delivery; but the vast majority of the remaining items were supposed to be the subject of immediate negotiations. The latter includes concerns related to agriculture, textiles and clothing, technical barriers to trade, trade-related investment measures, anti-dumping, and other issues. Negotiations on implementation-related issues and concerns, however, have become deadlocked due to differences between developed and developing countries over how to address and resolve such

issues and concerns through the negotiations. These negotiations were supposed to have been concluded by the end of 2002.

### **Doha issues**

This refers to the following study processes on: (i) how technology transfers from developed to developing countries can be enhanced through trade mechanisms and vice-versa; (ii) how trade, debt, and finance mechanisms interrelate and can be used to address development needs of developing countries in a coherent manner; and (iii) how the participation and development of small economies can be supported through integration into the trading system. These are called “Doha issues” because they became part of the work programme of the WTO as a result of the Fourth WTO Ministerial Conference held in Doha, Qatar in November 2001.

**Doha Ministerial Declaration (DMD)** This is the main document agreed to by the Ministers of WTO Members at the conclusion of the Fourth WTO Ministerial Conference held in November 2001 in Doha, Qatar. Adopted by consensus, it established new, and/or integrated existing, negotiating mandates on agriculture, trade in services, non-agricultural products, WTO rules (anti-dumping, subsidies and countervailing measures, and regional trade agreements), and some aspects of trade and environment, into a single negotiating package. It also established various working groups and other activities to be undertaken with respect to enhancing trade-related technical cooperation, capacity-building and other trade-related issues. It contains instructions for the WTO General Council and the WTO Secretariat vis-à-vis the mandated negotiating areas, review and study processes. It also established the work programme and institutional mechanism for the supervision and implementation of the negotiating agenda.

### **Doha Ministerial Declaration on TRIPS and Public Health (TRIPS and Public Health Declaration)**

Among other things, this declaration (issued by the WTO Ministerial Conference in Doha, Qatar, in November 2001) recognizes that the TRIPS Agreement “does not” prevent WTO Members from taking measures to protect public health, and recognized their right to protect public health and, in particular, to promote access to medicines for all. It also recognizes the right of WTO Members to grant compulsory licenses as it deems fit (including national emergencies and public health crises), and mandates negotiations on how WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector can make effective use of compulsory licensing. The latter negotiations, however, have been stalled by the refusal of the US to agree to a compromise text intended to resolve the issue. These negotiations were supposed to have been concluded by the end of 2002.

**Economic needs tests**

The term economic needs test (ENT) is not defined in the GATS. Basically, it refers to any provision in national regulations, legislation or administrative guidelines which imposes a test that has the effect of restricting the entry of service suppliers, based on an assessment of “needs” in the domestic market. Such measures can affect both domestic and foreign supplier or apply solely to foreigners.

**Green box**

These are agricultural support (i.e. subsidies) measures that meet the general and programme-specific criteria identified in Annex 2 of the WTO Agreement on Agriculture (AoA). In general, such measures must be government-funded and do not entail price support. In addition, they must fall within and comply with the additional conditions specified for each programme listed in Annex 2. These measures may include direct payments provided to agriculture producers which should not affect the farmer’s production decisions (de-coupled payments). These measures are given the “green light” in that they are not subject to reduction commitments – i.e. they do not need to be reduced or eliminated.

**Least Developed Countries (LDCs)**

This refers to a category of countries whose distinctness lies in the profound poverty of their people and in the weakness of their economic, institutional and human resources, often compounded by geophysical handicaps. Currently, 49 countries are identified as LDCs.

**MERCOSUR**

This refers to the Southern Common Market Agreement. Member countries are the following: Argentina, Brazil, Paraguay and Uruguay. Bolivia and Chile are associate States to MERCOSUR and cooperate with its Members on a broad range of issues. All six countries are WTO Members.

**Modes of supply of services**

Under the GATS, there are four (4) ways in which trade in services can take place (i.e. the supply of a service). These ways are described in the GATS by defining “trade in services” as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member (cross-border supply);
- (b) in the territory of one Member to the service consumer of any other Member (consumption abroad);
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence);
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (movement of natural persons).

<b>Multilateral Trading System (MTS)</b>	This refers to the international framework of treaty rules, obligations, and commitments that govern the movement of goods and services across borders. At the core of this system is the body of rules and commitments assumed by States and separate customs territories pursuant to their membership or participation in the WTO as well as other bilateral and regional trade treaties and agreements.
<b>Non-governmental organization (NGO)</b>	See “civil society organization”
<b>Singapore issues</b>	This refers to issues relating to the relationship between trade and competition policy, the relationship between trade and investment, transparency in government procurement, and trade facilitation. These are called “Singapore issues” because their entry into the official work programme of the WTO came about as a result of the First WTO Ministerial Conference held in Singapore in December 1996.
<b>Special and differential treatment (SDT) provisions</b>	These are provisions in the WTO’s legal texts that seek to provide for a lower degree or level of obligations or commitments from developing countries as compared to those from developed countries in recognition of the lower level of economic development of developing countries.
<b>Tariffs</b>	These are taxes imposed by a State or separate customs territory on imported goods.
<b>Tariffication</b>	This is the process by which all non-tariff measures existing previous to the Uruguay Round were converted to a tariff equivalent which provided a similar level of trade protection. The resulting tariffs were, therefore, in some cases, very high.
<b>Tariff Rate Quotas (TRQs)</b>	These are treaty commitments or obligations made or assumed by WTO Members as a result of the Uruguay Round to provide a specified quota (i.e. level or volume) of market access opportunities for imported goods that would benefit from a lower tariff rate than the tariff rate resulting from tariffication. Goods imported over the quota would be subject to the higher tariff rate resulting from tariffication.
<b>Uruguay Round agreements</b>	The various trade agreements and decisions agreed to by States at the conclusion of the 1986-1994 round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) 1947 and brought into force on 1 January 1995 as an integrated package of trade treaties to be implemented by States pursuant to their ratification of the Agreement Establishing the World Trade Organization (WTO)

charter). These agreements include not only the WTO's charter treaty but also various trade-related agreements annexed to that treaty such as: several agreements governing different aspects of trade in goods such as the GATT 1994; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); the Dispute Settlement Understanding (DSU); the Trade Policy Review Mechanism (TPRM); and several "plurilateral" trade agreements that are binding only on those WTO Members that have ratified them.

**World Trade Organization (WTO)**

This is the multilateral intergovernmental body, currently composed of 146 Member States and separate customs territories, tasked with overseeing the implementation of the Uruguay Round agreements, and for promoting global trade liberalization and establishing and implementing new global trade rules through negotiations among its Members. Its headquarters is in Geneva, Switzerland.

**TABLE 2.13** Population, Labor Force, and Production in Developed and Less Developed Regions, 1995-1997.

Region	Population (millions)	Urban (%)	Rural (%)	Labor Force in Agriculture (%)	Agricultural Share of GNP (%)
World	5,840	43	57	49	—
Developed countries	1,175	74	26	5	3
Europe	729	72	28	7	5
North America	298	75	25	3	2
Japan	126	78	22	7	2
Less developed countries	4,666	36	64	58	14
Africa	743	31	69	68	20
South Asia	1,417	27	73	64	30
East Asia	1,958	35	65	70	18
Latin America	490	72	28	25	10

Sources: Population Reference Bureau, 1997 *World Population Data Sheet* (Washington, D.C.: Population Reference Bureau, 1997); World Bank, *World Development Report, 1997* (New York: Oxford University Press, 1997), tabs. 4 and 12.

**TABLE 2.3** Industrial Structure in Seventeen Developing Countries, United States, and the United Kingdom, 1996

Country	Percentage of Labor Force <sup>a</sup>		Percentage of GDP	
	Agriculture	Industry	Agriculture	Industry
<b>Africa</b>				
Congo, Dem. Rep.	75	12	64	13
Kenya	81	7	29	16
Nigeria	54	5	43	25
Tanzania	90	5	48	21
Uganda	86	4	46	16
<b>Asia</b>				
Bangladesh	64	14	30	18
India	65	13	28	29
Indonesia	55	10	16	43
Philippines	46	16	21	32
South Korea	21	27	6	43
Sri Lanka	46	13	22	25
<b>Latin America</b>				
Brazil	31	27	14	36
Colombia	30	24	16	20
Guatemala	60	12	24	20
Mexico	28	19	5	26
Peru	37	19	7	37
Venezuela	16	28	4	47
All developing countries	60	17	20	38
United States	2	25	2	29
United Kingdom	1	24	2	37

Sources: United Nations Development Program, *Human Development Report, 1996* (New York: Oxford University Press, 1996), tab. 31; Central Intelligence Agency, *The World Factbook, 1994* (Washington, D.C.: Central Intelligence Agency, 1994); and World Bank, *1998 World Development Indicators* (Washington, D.C.: World Bank, 1998) tabs. 2.5 and 4.2.

<sup>a</sup>Data are for 1994.