

REVIEW OF THE EXISTING SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS: IMPLEMENTING THE DOHA MANDATE

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I. BACKGROUND

1. By placing Special and Differential Treatment (hereafter referred to as ‘S&DT’) at the heart of the WTO Agreements¹, the Doha Ministerial Declaration explicitly acknowledged that S&DT is a fully accepted core principle in the WTO legal regime.
2. Special and Differential Treatment should not be understood as a set of *concessions* made in favour of developing countries -- and the objectives recalled in the preamble of the Doha Ministerial Declaration are clear about this²

¹ Paragraph 44 of the Declaration: “We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements.”

² According to paragraph 2 of the Preamble of the Doha Ministerial Declaration: “We seek to place their [developing countries] needs and interests at the heart of the Work Programme adopted in this Declaration”; and

- but as a *right* that these countries acquired in order to have a chance of participating in the multilateral trading system.
3. If the objective that members are pursuing is greater participation of poor countries in international trade, S&DT provisions should be considered as a bridge between the potential benefits in the agreements and the actual level of development of developing countries. (Just as an object that is placed too high on a shelf requires a ladder to be reached, also S&DT provisions are a ladder that give developing countries an opportunity of acceding to certain benefits in WTO agreements³). This legal tool is made all the more necessary by a trade regime that seems to be based on the 'one-size fits all' approach and on the Single Undertaking principle.
 4. Nevertheless, even if the principle of S&DT has been restored to a central place in the system, developing countries are still not achieving most of the objectives that motivated the inclusion of S&DT provisions in the WTO Agreements. Several provisions have never been used, because they are difficult to invoke and/or unclear and/or not binding. Thus, the need to review and improve S&DT provisions has been a priority for developing countries in the context of Implementation Issues as well as in the preparations for the Fourth Ministerial Conference. This need was further expressed in the submission of a "Proposal for a Framework Agreement on Special and Differential Treatment" by a group of developing countries (WT/GC/W/442).
 5. Discussions in this session of the Committee on Trade and Development are to concentrate initially on the identification of the provisions to be made mandatory and on the consideration of the legal implications of doing so. Nevertheless, even if transforming non-mandatory S&DT provisions into mandatory provisions is a crucial step in the process of strengthening them, it is not enough. Making S&DT provisions mandatory will create an obligation of implementation, which is a goal in itself, but this will not ensure that they are well and properly implemented, nor will it ensure that the objectives that motivated their inclusion in the Agreements are actually achieved.
 6. An S&DT provision is a tool, or an instrument. An instrument is absolutely meaningless if observed without the purpose that it is meant to serve. A ladder is not too short or high enough in itself. It can only be high enough, and therefore useful, if we know what it is that we are trying to achieve. Similarly, a S&DT provision can be made mandatory and still be inappropriate to achieve a particular objective.

"Recalling the Preamble of the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least –developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development".

³ The Doha Ministerial Declaration recognises a series of positive actions that can serve this purpose: "... In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes have important roles to play."

II. MAIN CHARACTERISTICS OF THE REVIEW PROCESS

7. The Doha Ministerial Declaration mandate on the review of Special and Differential Treatment provisions is multiple and can be understood as containing four - complementary but different - obligations. Paragraph 44 clearly states that all S&DT provisions shall be reviewed with a view to making them stronger, more precise, more effective, and more operational.
8. It can be argued that a narrowly legalistic transformation of non-mandatory into mandatory provisions *per se* will satisfy only the first obligation, that is, they are “strengthened”. Therefore, restraining the discussions to whether to amend the Agreements by replacing “should” S&DT provisions by “shall” provisions is leaving aside other important considerations, such as the efficiency, clarity, accessibility and simplicity of a measure.
9. The three characteristics of a proper review process to examine S&DT provisions require that discussions take account of the content of the provisions, the language used in them, and finally a monitoring and assessment mechanism of their implementation. A formula can be extracted from these considerations and applied to almost all provisions.

A. Content of the Provisions

10. As stated above, the Single Undertaking and the underlying ‘one-size fits all’ approach used in the WTO require that members that have difficulties implementing the Agreements find flexibility in the texts if these latter are to benefit at all from the Agreements. S&DT provisions are a possibility of finding some fairness and equity in unbalanced negotiations and texts. Many S&DT provisions will be responsible for - or are the only chance of - attaining the ultimate goal of development. Thus, they must be designed in a way that corresponds to the objectives members want to pursue. A first step in reviewing a provision could be undertaking an analysis of its content in view of its apparent objective. The provision must be proportional to the task assigned. If the objective of an article is, for instance, to increase the participation of developing countries in world trade in any sector, there are quantifiable instruments and precise actions that need to be taken, proportionate to this goal. General principles or best endeavour conduct might not be enough. All provisions should designate an actor from whom an action is expected, it should spell out the action that is expected, possibly with a time frame. The provisions should preferably describe the situation or context in which a S&DT provision is automatically triggered. In some other cases, it should make S&DT provisions available upon request by developing countries and in that case, it should clearly point out the competent body who receives the request, the time frame for action, who takes the action and what action is required. It should also indicate

the organ that could undertake a monitoring and evaluation of the implementation of the provision. Finally, it should contain some indication about how beneficiary countries could contest the non-implementation or incomplete implementation of S&DT obligations.

B. Language of the Provisions

11. The language is of utmost importance when it comes to implementing a provision. Yet, questions that arise from the formulation of a provision go beyond the “should” or “shall” choice. WTO history has proven that “shall” provisions are superior to “should” wordings, because they create a higher level of obligation. Using the verb “shall” is therefore very useful as an initial step. Nevertheless, a mandatory provision (“shall”) only becomes truly binding from the moment when the absence of implementation can trigger an action to enforce it (whether this is done or not through the Dispute Settlement Mechanism). Furthermore, a “shall” provision might still be too imprecise and vague, and not call for specific concrete actions. The provision has to clearly point out who are the actors involved (beneficiaries and those who should take an action). The action itself should be clearly spelled out (including technicalities and time for action). Merely changing the word “should” by “shall” is not enough to guarantee respect for the S&DT principle.
12. Concerning the Secretariat distinction between obligations of result and obligations of conduct, developing countries have to be careful not to accept that a hierarchy be imposed upon these two types of provisions. All the provisions should be understood as obligations of result (similarly to the ‘directives’ in the European Union), that is, a number of objectives have to be achieved, but in some cases members have some flexibility as to the means or ways of achieving it. It must be kept in mind that concrete results are expected from both types of provisions. Due to a WTO practice that is not inclusive of the smaller members, and often faced with a *fait accompli*, developing countries tend to insist that general obligations of conduct such as ‘respect of their interests’ and ‘account of their particular condition’ be included in the agreements. These principles are obviously important and they should be the basis of any fair international negotiation. Respect for the interests of all members, and especially for the weaker of them, should be an underlying principle of conduct needing not be constantly recalled. Rather such provisions should be strengthened by the use of “shall”, and by an interpretation that recalls their main objectives.
13. Finally, no distinction should be made between individual or collective obligations. Unless a clear mention of an individual actor is made in the Agreements or Declarations (such as the WTO Secretariat, the Secretary General, Committees, other International Organisations, etc.), the wording “developed countries” should be understood as creating both an individual and a collective obligation. Each member should endeavour to comply with all its

obligations, both individually and collectively. An individual action does not exempt a member from promoting other collective actions and vice versa.

C. Monitoring and Assessment Mechanism

14. Lastly, even a provision that is clear and binding is not complete if it is not monitored. A follow up mechanism ensures that it is being implemented in addition to also pointing out difficulties that have been encountered and ways of improving it. Moreover, an efficient monitoring and evaluation of S&DT provisions should also measure, quantify, in a word undertake an *a posteriori* assessment of how the provision is serving the objectives that motivated its incorporation and implementation. In case it is not being enough to achieve its objectives, the provision could be further strengthened. An assessment can be all the more useful since commercial trends can change fairly quickly and since development is a long and complex process. Without any monitoring or a good assessment, it is not possible to evaluate the real efficiency of a provision.
15. Any evaluation has thus a double task. First, it monitors the good implementation of a measure. Secondly, it evaluates its impact vis-à-vis the objectives that were previously set out. The Trade Policy Review Body for instance could indicate in its reviews how pertinent certain provisions were in the increase of trade in a sector or could indicate problems that were faced in particular sectors (opening the way for new S&DT provisions). Other bodies could also be entrusted with such an analysis (according to the relevant agreement). Members could further be required to report on their actions to the competent bodies, and provide any other information for further evaluating the efficiency of a provision.

III. A POSSIBLE FORMULA FOR THE REVIEW PROCESS

16. In summary, a review of S&DT provisions should take into consideration four aspects, namely: 1) strengthening where needed, 2) precision, 3) effectiveness, and 4) operationalisation. Transforming non-mandatory provisions into mandatory provisions should preferably cover all the four aspects.
17. Based on discussions in the previous section and to cover all the four above-mentioned aspects, elements of a general framework for the transformation of non-mandatory provisions into mandatory ones be can specified as consisting of the following 7 steps:
 - (a) Determination of the objective: What is the objective that motivates the adoption of a particular S&DT provision?
 - (b) Determination of action: What is the action that is to be taken (including the flexibility to not take an otherwise required action)?

- (c) Determination of actors: Who is responsible for the action (members collectively and individually, individual members or group of members, international organisations, etc.)?
 - (d) Determination of beneficiaries: Who are the beneficiaries of such actions (all developing countries, groups of developing countries fulfilling a specified criteria, etc.)?
 - (e) Determination of timeframe: What is the timeframe for an action to be taken (including whether it is a one time or a recurrent action)?
 - (f) Establishing a monitoring and evaluation mechanism: Which is the Body entrusted with the monitoring and evaluation of the efficiency of an S&DT provision?
 - (g) Specifying the enforcement mechanism: Can potential beneficiaries file a complaint for non- or inappropriate action and what is the possible enforcement mechanism in case of non-compliance?
18. Each provision could undergo this “quality test”. This would ensure that S&DT provisions are strengthened, clearer and simpler to implement. A qualitative improvement would also require the establishment of a mechanism of evaluation and monitoring. Bringing non-compliance to the knowledge of all other members can create enough pressure for action. Otherwise, there might be need for the use of mediation, conciliation and dispute settlement mechanisms.

IV. LEGAL IMPLICATIONS

19. Bringing these changes about is difficult. Amending the Agreements is a time and effort-consuming procedure. The danger for developing countries in negotiating such amendments is that they face pressure from developed countries to make concessions in other fields. This choice of procedure might also bring divergences among developing countries to the fore. The priority countries give to each provision or sector is variable, and re-opening the texts (even for a single word) can lead to dangerous trade-offs.
20. Other alternatives to transform non-mandatory provisions into mandatory provisions are to be explored. Authoritative interpretation (IX:2 of the WTO Agreement) is an option. International Law, the Vienna Convention and all international courts (including WTO panels and appellate body) have interpreted treaties in the light of the purpose and general goals that are pursued in the treaties. Preambles are usually of help in determining the will of parties, and in the case of WTO Agreements, “equitable international trade” and “development” are quite recurrent objectives. Moreover, authoritative interpretation of the texts comes down to another expression of the good will and good faith principles.
21. Authoritative Interpretation of the “should” provisions in the Agreements to comply with the above 7-step framework can also be a more consensual

strategy. S&DT commitments have been accepted by member states, and that is not under question. Authoritative Interpretation will only add technical “auxiliary” measures and will aim essentially at making the provisions operational. Their role could be compared with national subsidiary or secondary legislation that completes and provides precision for laws that state a general principle. These support rules could recall all the terms contained in a provision, strengthening and giving precisions when needed (the 7-steps test could be useful then). Finally, this set of ‘implementation technicalities’ could be contained in a text adopted by all members that would also give guidelines to the body responsible for monitoring and evaluating their effective implementation. This process could be undertaken for all S&DT provisions to avoid complaints that certain areas are being excluded from the review.

22. Nevertheless, Authoritative Interpretation has still never been used in the WTO and might result in a long process. Instead, a Decision adopted by the Ministerial Conference, which has full competence to do so, can have a similar binding effect. Besides, it has a precedent in WTO law. In the period between the Ministerial Conferences, the General Council is also fully competent to adopt any decision⁴. Such a decision could contain the implementation technicalities mentioned above. The only remaining point that would lack certainty is the weight of such a decision in case of a dispute settlement case. So far, panels have yet not had to express their position on the legal value of a decision by the Ministerial Conference or the General Council.

V. AGREEMENT AND PROVISION-SPECIFIC COMMENTS

23. According to the ‘Allocation of Agreements and Decisions to be discussed in the meetings of the Special Session of the CTD’⁵, the South Centre has produced a series of papers containing some comments and proposals for possible improvements in existing S&DT provisions in a number of selected WTO Agreements.
24. Because of time and capacity constraints, not all the Agreements were covered. Neither were all the provisions in each Agreement always covered. It is worth noting that the exclusion of certain provisions is without prejudice to developing countries other priorities and to the need to improve them other provisions and WTO Agreements.

Following are comments on these Agreements:

⁴ Article IV:1 and IV:2 of the Agreement establishing the WTO.

⁵ Document distributed by the Chairman of the Committee on Trade and Development in Special Session containing a list of Agreements and Decisions to be discussed at the Third Special Session (16 May 2002) and at the Fourth Special Session (14 June 2002).

Annex I – Dispute Settlement Understanding

Annex II - Agreement on Subsidies and Countervailing Measures;

Annex III - Agreement on Trade-Related Investment Measures;

Annex IV - Agreement on Agriculture;

Annex V - Agreement on Sanitary and Phytosanitary Measures;

Annex VI - GATT 1994, Article XVIII:B (Balance of Payment provision);

Annex VII - Agreement on the Implementation of Article VI of the GATT 1994
(Agreement on Anti-Dumping);

Annex VIII - General Agreement on Trade in Services;

Annex IX - Agreement on Trade-Related Aspects of Intellectual Property Rights
(TRIPs); and

Annex X - Decision on Measures in Favour of Least-Developed Countries.

ANNEX I: DISPUTE SETTLEMENT UNDERSTANDING

Identification of the S&DT Provisions contained in the Understanding:

A) Provisions under which Members should safeguard the interests of DC members:

(a) Mandatory Provisions

1. Article 8.10
2. Article 12.10
3. Article 12.11
4. Article 21.7
5. Article 21.8

(b) Non-Mandatory Provisions

1. Article 4.10
2. Article 21.2

B) Provisions calling for Technical Assistance

a) Mandatory Provision

1. Article 27.2

C) Provisions specific to Least Developed Countries

a) Mandatory

Provision-Specific Analysis and Proposals

1. Article 24.1
2. Article 24.2

Article 8.10

Full text of the provision:

When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

Analysis:

This paragraph introduces an obligation of result (include a panelist from a developing country) that is applied to all member states individually (for every dispute opposing a developed to a developing country). Experience shows that the implementation of this provision seems to be satisfactory.

All the elements that contribute to effectiveness and clarity of S&DT are met in this provision (the action, the actor and the beneficiary are all clearly pointed out).

Two elements remain unclear though. The first one is whether conditioning the presence of a panelist from a developing country to a request by the developing country party in the case is necessary or even positive. Developing countries have still scarce experience with the dispute settlement mechanism and it would thus appear reasonable to include systematically a panelist from a developing country every time a developing country is involved in the dispute.

Proposal:

“The phrase “if the developing country Member so requests” should be deleted. The whole provision would read as follow:

“When a dispute is between a developing country Member and a developed country Member the panel shall, ~~if the developing country Member so requests~~ include at least one panelist from a developing country Member.”

Article 12.10

Full text of the provision:

In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

Analysis:

Two obligations emerge from this paragraph. First, there is a possibility of extending the consultation period.. This decision is to be taken by the parties or by the Chairman in case both parties cannot agree to it. Second, enough time has to be granted for the preparation of a developing country argumentation.

This provision is a good example of a provision that, even though relatively clear, does not respond to an adequate objective. The objective here is to create favourable conditions that avoid that tight timelines constitute an additional burden and constraint on developing countries. The rationale is that developing countries need more time to prepare their argumentation, access the relevant information, etc. due to their lack of

experience and limited capacity concerning the dispute settlement mechanism. Keeping this objective in mind we realise that this provision contains two contradictions.

Firstly, the language employed, members “*may agree to extend*” periods under articles 4.7 and 4.8, is too weak. Experience shows that developed countries would rather try to make procedures as short as possible, and thus would not necessarily agree to a time extension. Therefore, it is advisable to make the first part of this provision mandatory by replacing the word “may” by “shall”. Moreover, the extended timeframe could be indicated in the text (30 additional days for Art. 4.7 and 10 additional days for article 4.8).

Secondly, the last sentence of this provision imposes a condition that nullifies the flexibility granted by the authorised time extension. Indeed, the total time of the proceedings must remain under the limits and conditions of Article 20.1 and Article 21.4. The reference to these articles should be deleted.

Finally, it is worth noting that extending time periods is certainly important to make the mechanism accessible for developing countries, but it does not ensure *in itself* that consultations will be successful or that developing country constraints will be truly taken into consideration. The exact meaning, conditions and content of consultations for developing countries are dealt with separately under article 4.10.

Proposal:

(1) Change the word “*may*” by “*shall*” in the first phrase and indicate an extended timeline.

(2) Delete the last phrase of the paragraph that refers to articles 20.1 and 21.4.

The whole provision would read as follow:

In the context of consultations involving a measure taken by a developing country Member, the parties ~~may~~ shall agree to extend the periods established in paragraphs 7 (30 additional days) and 8 (10 additional days) of Article 4 if it is so requested by the developing country party to the dispute. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. ~~The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.~~

Article 21.11

Full text of the provision:

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

Analysis:

An obligation of result is clear in this provision. This is a very important provision since it gives S&D provisions a binding legal status, making the S&D system more reliable. Nevertheless, the scope of this provision is limited since it depends on the 'quality' of the provisions covered in the agreements relevant to the dispute.

Furthermore, it is not clear whether a panel would consider S&D provisions that were not raised by a developing country. It should be made clear that, even if a developing country has not raised a particular S&D provision, the panel is still responsible for considering it. The burden of identifying all relevant S&D provisions should not fall on the developing country. In case the panel considers a provision to be irrelevant to the case, the panel should still state explicitly that it has looked into it, and the reasons why it deemed it not relevant. This analysis could become a compulsory part of all panel and Appellate Body reports according to an authoritative interpretation of this paragraph.

Proposal:

Authoritative interpretation of this article should call for systematic analysis of all S&D provisions in all relevant agreements to any dispute settlement case involving a developing country.

Article 21.7

Full text of the provision:

If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

Analysis:

This could be an essential provision in a successful dispute settlement case. It is a well known fact that in the few cases where the dispute settlement mechanism was accessible to developing countries, enforcing panel reports is the most difficult part since developing countries don't have enough bargaining power to exercise pressure upon recalcitrant developed member states.

This provision indicates a beneficiary and an actor responsible for the action, but it lacks clarity concerning the action to be taken.

Firstly, the rest of the wording (“consider”, “might” and “would”) softens the “shall” obligation transforming this provision in a *de facto* non-mandatory provision.

Secondly, defining what “circumstances” are can also be useful in order to improve the effectiveness of this provision. This could be achieved by recalling the objective or rationale of this provision, for instance with Article 21.1.

Lastly, placing the obligation of result upon members collectively (DSB) dilutes the obligation to take appropriate action. Thus, the action to be taken could be proposed by the developing country in the case.

Proposal:

The whole proposal, if amended, would read as follow:

If the matter is one which has been raised by a developing country Member, the DSB shall consider ~~what further action it might take which would~~ and take further action as suggested by the developing country party in the case and as appropriate to the circumstances, with a view of ensuring the prompt compliance with recommendation or rulings.

Article 21.8

Full text of the provision:

If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Analysis:

Providing more precision to Article 21.7 should contribute to rendering Article 21.8 more meaningful.

Article 4.10

Full text of the provision:

During consultations Members should give special attention to the particular problems and interests of developing country Members.

Analysis:

This paragraph serves as another example of how S&D provisions might result inadequate and disproportionate vis-à-vis the objectives set.

What motivates this provision is the recognition that developing countries have to face particular constraints that developed countries do not face. Therefore, developing countries are granted longer periods of time (a whole paragraph is devoted to favourable timelines, Article 12.10 above discussed).

More favourable timelines is not enough though. Experience has shown that other difficulties can arise during the consultation period such as difficulties agreeing on the venue and the schedule of consultations or difficult access to data and information to prepare the argumentation.

Leaving procedural matters aside, “special attention” should also be given to the efforts that developing countries are making to comply with their obligations since WTO agreements require many administrative and legislative reforms that can be lengthy and difficult to accomplish.

In sum, an authoritative interpretation should give this provision as broad as possible an interpretation. This provision should become the incarnation of the good will and good faith of developed country members towards their developing country partners. Besides, it could be made mandatory by replacing the word “should” by “shall”.

Proposal:

During consultations Members ~~should~~ shall give special attention to the particular problems and interests of developing country Members.

An illustrative non-exhaustive list of difficulties faced by developing countries during the consultation period should be drawn.

Article 21.2

Full text of the provision:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Analysis:

This provision has already been used in a few circumstances. Nevertheless, its use could be strengthened and employed systematically.

It was used for instance in the case “Indonesia - Certain Measures Affecting the Automobile Industry”⁶. In this case, the reasoning of the arbitrator was quite worrisome. Indeed, he appeals to this provision in order to justify an extension of the compliance period. Nevertheless, in his argumentation he justifies the extension under the

⁶ WT/DS54/15

particularly difficult situation (“near collapse”) of the Indonesian economy during that time. That would mean that in absence of a peculiar economic context, a time extension would not have been justifiable, and this is certainly too restrictive a scope for this provision. It should be applied to all developing countries, irrespective of their economic situation at a particular period.

It is therefore advisable to render this provision mandatory by changing the word “should” by “shall”.

Proposal:

Particular attention ~~should~~ shall be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

An illustrative non-exhaustive list of conditions particular to developing countries that could justify the use of this provision should be drawn.

Article 27.2

Full text of the provision:

While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

Analysis:

This article contains the only provision calling for technical assistance in the whole DSU, and does not spell out an efficient and satisfactory mechanism. The technical assistance contained in it is actually extremely deceiving. Language changes concerning this article will always prove to be poor, and should remain an *in extremis* option, giving preference to a more consistent review of the DSU.

The Secretariat has limited resources, and it is highly unlikely that any country would be able to follow the dispute settlement mechanism with the help of only one expert. Besides, many members have contested the impartiality of the Secretariat in the past.

Articles 24.1 and 24.2

Full text of the provision:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country

Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Analysis:

So far, this provision has never been used simply because no LDC has ever been involved in a dispute settlement case. This finding is worrisome and some effort should be devoted to understanding the reasons why least developed countries are not using the dispute settlement mechanism at their advantage.

Proposal:

The Secretariat, as well as other international institutions such as the Advisory Centre for WTO Law (ACWL) should undertake detailed studies to understand why Least Developed Countries are not using the dispute settlement understanding.

Final Considerations concerning the DSU:

After analysing individually the S&D provisions contained in the dispute settlement understanding, it is worth mentioning at least two horizontal issues:

One, the application of the discussed S&D provisions cannot become truly efficient and mandatory without a mechanism of monitoring and enforcement. The S&D legal system is a part of the WTO legal regime and consists of a set of concrete obligations on members individually and/or collectively. These provisions should therefore be made enforceable through the dispute settlement mechanism.

Two, improving S&D provisions will not be enough to correct completely unbalanced agreements. As a consequence, a broader review of the Understanding was mandated by the Fourth Ministerial Declaration. Developing countries should keep in mind that it is only by this combined exercise, i.e. improvement of the S&D provisions and the review of the Understanding, that they will obtain a fairer access to the dispute settlement mechanism.

ANNEX II: AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURESGeneral comments on the S&DT Provisions contained in the Agreement:

Special and differential treatment in the Agreement on Subsidies and Countervailing Measures is gathered under a separate chapter. Indeed, Part VIII is entitled “Developing Countries” and Article 27 comes after the following heading: “Special and Differential Treatment of Developing Country Members”

Article 27 lays down S&DT provisions of three main types⁷:

1. Provisions aiming at safeguarding developing countries interests,
2. Provisions allowing for flexibility of commitments and action,
3. Transitional time periods.

Nevertheless, article 27 is also contradictory. From the outset, it states that subsidies may play an important role in developing countries’ economic development. Nevertheless, the content of the rest of the article is deceiving in the sense that it does not give developing countries enough flexibility to use subsidies instruments and paradoxically, it requires phasing out of these instruments. It is contradictory to state that subsidies are important, and then, a few lines further, ask that these same instruments be removed. It is true that transitional periods are also defined, but they merely delay the end of the use of such developmental instruments.

Secondly, the nature of the agreement itself is such that S&D provisions can only have a limited scope. The definition of subsidies provided in Article 1, and the illustrative list under Annex I actually operates an unfair distinction forbidding subsidies that are available and accessible for poor and resources-limited countries and authorising subsidies used by developed countries.

Moreover, the mandate of the Committee on Trade and Development is limited to address the incongruent and unbalanced conditions of the SCM Agreement. The Negotiating group on WTO rules probably represents a better forum to achieving a broader rethinking of this agreement.

Nevertheless, some S&D provisions can be improved and deserve some comments.

To start with, all S&D provisions under Article 27 already contain “shall” wording and are thus in that sense mandatory. That is the case for paragraphs 2 to 15. However, there are complex eligibility criteria for certain paragraphs (for instance Art.27.4), there are exceptions where the provisions do not apply (for instance Art.27.9), and most of the flexibility allowed are temporary.

⁷ According to the Secretariat classification contained in WT/COMTD/W/77/Rev.1/Add.4

A second important characteristic of S&D provisions in the SCM Agreement is that they do not benefit developing countries as a whole. Nor does the agreement benefit the two most commonly found groups, that is, developing and the least developed countries. In fact, Annex VII specifies further categories of beneficiary countries:

- (a) Least Developed Countries
- (b) Developing country Members whose GNP per capita is less than \$1,000 per annum⁸

The Decision adopted during the Fourth Ministerial Declaration concerning the “Procedures for extensions under article 27.4 for certain developing county members” adds yet further criteria for the extension of transitional periods:

- (a) Developing countries whose share in world merchandise export trade is not greater than 0.10%⁹, and
- (b) Those developing countries whose total Gross National Income (GNI) for 2000 was at or below \$20billion.

Provision-specific analysis and proposals

Provisions Commented:

1. Article 27.1
2. Article 27.4
3. Article 27.12
4. Article 27.14
5. Article 27.15

Article 27.1

Full text of the provision:

Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

Analysis:

This is an essential provision because it recalls the reasons that motivated devoting a whole Part of the agreement to developing countries. This provision has also proved important for the interpretation of other Article 27 paragraphs by panels¹⁰.

⁸ “..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.” - From the Agreement.

⁹ Data for eligibility is compiled under G/SCM/38

¹⁰ For instance Brazil - Canada on Civil Aircraft Subsidies, WT/DS46/R

Nevertheless, the recognition of the role played by subsidies in developmental policies is not fully satisfactory because of the softening “may” wording. Furthermore, as explained above, the recognition of the importance of subsidies for developing countries is also limited by several conditions laid down by the following paragraphs, notably the need to phase subsidies out.

Proposal:

The word “may” should be deleted. The whole provision would read as follow:

“Members recognize that subsidies ~~may~~ play an important role in economic development programmes of developing country Members.”

Article 27.4

Full text of the provision:

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 subsidies¹¹, 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 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.

Analysis:

This article represents yet another important provision. The doubtful element concerning its implementation – and thus its efficiency – is how the Committee on Subsidies will deal with the requests for extension of the transitional periods. This will probably depend on the procedures for requests, agreed upon during the Doha Ministerial Conference.

The conditions, criteria, procedures through which developing countries have to go during their requests and consultations make additional time extensions more than uncertain, and in any case, add administrative burden upon small delegations.

¹¹ For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

Ideally, a review or monitoring mechanism could be established to guarantee that disproportionate burden is not being imposed upon delegations requesting extension of their transitional periods. Similarly to the review of Members' notifications, the Committee could undertake a review of the progress made on Members' requests.

Proposal:

The Committee on Subsidies will undertake a review of the progress made on Member's requests for extension of transitional periods under Article 27.4 and the Procedures agreed upon during the Fourth Ministerial Conference.

Article 27.12

Full text of the provision:

The provisions of paragraphs 10 and 11 shall govern any determination of de minimis under paragraph 3 of Article 15.

Analysis:

This paragraph, as well as paragraphs 27.10 and 27.11, needs to be further discussed in order to establish higher overall levels of support.

Article 27.14 and 27.15

Full text of the provision:

27.14 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.

27.15 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.

Analysis:

Neither of these two provisions has ever been used by developing countries and some time should be given to understanding why developing countries are not benefiting from this provision. The Ministerial Decision on implementation-related issues and concerns, under its Article 10.3, entrusted the Committee on subsidies to continue its work on countervailing duties investigations. Work on this area has to be reported to the General Council by July 2002. By then further action can be proposed.

Strengthening the language of paragraph 27.15 would be possible by making its use systematic every time a product originating in a developing country is victim of a countervailing duty, thus, without need of request by the developing country. Nevertheless, this option could run against developing countries since often countries prefer negotiating these duties on a bilateral form.

ANNEX III: AGREEMENT ON TRADE-RELATED INVESTMENT MEASURESIdentification of the S&DT Provisions contained in the Agreement:**Mandatory Provisions:**

1. Article: 4
2. Article: 5.2
3. Article: 5.3

Article 4

Full text of the provision:

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.

Analysis:

This provision of highest interest to developing countries is contradictory. It recognises that developing countries might need to adopt TRIMs that are crucial to foster and facilitate their developmental strategies. Therefore, and accordingly, they must be free to adopt such measures even in cases where they would be inconsistent with some of their WTO obligations, namely the National Treatment and the Prohibition of Quantitative Restrictions principles (Articles II and XI of GATT referred to in Article 2 of TRIMs). Such deviations are temporary.

Notwithstanding members' acknowledgement that these deviations are important for developing countries, the expectations that arise from this provision are voided by an over rigid and complex set of eligibility conditions. Members are indeed asked to comply with the conditions of Article XVIII of GATT, the Understanding on the Balance of Payments provisions and the Declaration on Trade Measures Taken for Balance of Payment Purposes.

Moreover, according to the organisation of the S&D review process, discussions on the Understanding on BOP and GATT will take place at the Fourth Special Session of the CTD. It is therefore difficult, if not impossible, to give any positive input on how to strengthen Article 4 of TRIMs without discussing the other agreements referred to in it.

Proposal:

Discussions on the TRIMs agreement should be postponed to the next Special Session of the Committee on Trade and Development to be held on 14 June 2002.

ANNEX IV: AGREEMENT ON AGRICULTURE**Provisions Commented:**

1. Preamble
2. Article 6.2
3. Article 15.1

PreambleFull text of the provision:

Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;

Analysis:

The preamble to the agreement on agriculture lays down a very important principle namely that developed country members would take fully into account the particular needs and conditions of developing countries by providing for increased market access to products originating from developing countries.

However, the actual benefit that developing countries may have received from this provision is rather doubtful. Going by the interventions and proposals made by developing country members in the committee, it appears that instead of enhanced market access for products of interest to them, there appears to be a plethora of trade and non trade barriers restricting access of these very products. In fact the maximum incidence of tariff peaks and tariff escalation, in addition to stringent non tariff barriers appear to be in products where developing countries have some competitive advantage or export interest.

From such a perspective, it would be useful to make the language of the preamble mandatory by replacing the word “would” with “shall”. However, this by itself may not be able to ensure that this obligation is actually translated into improved conditions of access. Ideally, therefore this change should be accompanied by an inbuilt annual review process, which can be mandated by adding the following sentence at the end, namely that “The COA will at the end of each year review the effectiveness and impact of the steps taken by the developed country members to provide enhanced and improved market access”

Proposal:

Having agreed that in implementing their commitments on market access, developed country Members shall take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;

And in addition,

“The COA will at the end of each year review the effectiveness and impact of the steps taken by the developed country members to provide enhanced and improved market access.”¹²

Article 6.2Full text of the provision:

In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agriculture and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.

Analysis:

These provisions relating to the exemption of certain domestic support measures used by developing countries to encourage agriculture and rural development appear to be mandatory in as much as they use the phrase ‘shall’ before laying out the obligation. However, where this provision falls short in its reach and effectiveness is that (i) it makes no reference to the phrase ‘food security’ even though most of the measures that developing countries would like to adopt would be to address their food security concerns; and (ii) it limits the scope of the exemption from reduction commitments to only certain ‘investment subsidies and agricultural input subsidies’. This no doubt limits the scope and effectiveness of these measures.

¹² However, it may or may not be possible to suggest an addition of this kind since some members may feel that such a change it would be tantamount to changing the agreement

It would be therefore useful to suggest the inclusion of the term 'food security' at the point where there is reference to agricultural and rural development as an integral part of the development programmes of developing countries. In addition, it would also be important to suggest the addition of 'such other measures' where there is a reference to investment subsidies that are generally available to agriculture in developing country Members.

Proposal:

*In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage **food security** agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies **and such other measures** which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.*

Article 15.1

Full text of the provision:

In keeping 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 as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

Analysis:

This is really like a broad all encompassing provision which lays down that special and differential treatment shall be an integral part of the negotiations and shall be so provided as laid out in the schedule of concessions and commitments. While the actual value of a more strengthened article 15.1 can be justifiably debated, it never the less is true that the provision only points towards S&D provisions being an integral part of the agreement and not a mandatory part, as they should be.

Accordingly, it would be important to make a proposal suggesting the inclusion of the phrase 'mandatory' at the appropriate point of the provision.

Proposal:

*In keeping with the recognition that differential and more favourable treatment for developing country Members is a **mandatory and** integral part of the negotiation, special and differential treatment 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.*

ANNEX V: AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

Provisions Commented:

1. Preamble
2. Article 10.2
3. Article 10.3
4. Article 10.4

Preamble

Full text of the provision:

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Analysis:

The preamble of the agreement on sanitary and phytosanitary measures recognises the difficulties that developing country Members encounter in complying with the sanitary and phytosanitary measures of importing Members. However, the import of this recognition is diluted by the use of the preface 'may' since it then implies that this is not necessary the case.

Most developing countries have expressed a difficulty in complying with standards set by importing developed countries and in fact, most of the implementation debate related to the SPS agreement has centred on this difficulty. Hence, it is important to make the reference to the preamble stronger and more pointed, so that specific attention is drawn to the problems of compliance, by suggesting a deletion of the word 'may'.

Proposal:

Recognizing that developing country Members ~~may~~ encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Article 10.2

Full text of the provision:

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

Analysis:

This remains one of the most important provisions in the SPS agreement since it seeks to address one of the most critical areas of difficulty faced by developing countries that is related to the compliance of new SPS measures introduced by their importing trading partners. Developing country members have time again said that introduction of new SPS measures had often resulted in a complete blockage of their exports since they very often do not have the technical know-how or financial capacity to immediately put in place new systems in conformity with these new measures. It is for this reason that developing countries have been saying that they must be given some additional time for compliance, so that their exports are not impeded by the introduction of new measures.

Unfortunately however, the experience of implementing the SPS agreement over the past few years has shown that rarely, if at all, have developing country exporters been given additional time for compliance with new SPS measures. As a result the introduction of new measures has been synonymous with the loss, albeit temporary, of those export markets. One of the main reasons has been the very general nature of the exhortation in the above provision, to give additional time to developing country exporters. It would therefore be important to make this provision mandatory by replacing the term 'should' by the term 'shall'

Proposal:

*Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance **shall** be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.*

Article 10.3Full text of the provision:

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.

Analysis:

This provision was specifically included at the request of developing country member to take into account the possibility of their not being able to fully comply with the provisions of the agreement even after the expiry of any transition period which may be provided. However, it only enables the SPS committee to grant such an exception without being in any prescriptive about such an exception. As a result, such exceptions have rarely been granted. It could also be said that very few, if any at all, requests for such an exception have been sought by developing countries. But then again, very few members even though they may be facing problems in complying with the obligations of the agreement would want to make such a request because of the recommendatory nature of the language of this provision. Moreover, the reference to the 'financial and trade' needs (which are obviously very broad and therefore easier to find loopholes in by members wanting to oppose such a request), in addition to the developmental needs of the members makes pushing such a request through, even more difficult.

It is therefore important to suggest the replacement of the phrase 'is enabled to' with the word 'shall' since this would then make it mandatory for the committee to grant such an exception, unless there are compelling reasons for the contrary. Furthermore, it would also be important to propose that in considering such a request only the developmental needs of the member shall be taken into consideration, since the financial and trade needs can be subject to differing interpretations.

Proposal:

*With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee **shall** ~~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.*

Article 10.4

Full text of the provision:

Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Analysis:

The way in which the SPS agreement is worded, the standards developed by the three international standard setting bodies are deemed to be mandatory and binding on all WTO members. Obviously therefore the participation of developing countries in the standard setting bodies becomes critical, since otherwise these bodies may agree to adopt standards which do not reflect the constraints and concerns of developing countries, and yet it would be obligatory for developing countries to adhere to these very standards. It was in the context of this concern that the above provision was introduced into the SPS agreement so that the participation of developing countries could be facilitated.

However, there have been two stumbling blocks in trying to fulfil this objective. Firstly, the wording of the provision leaves the facilitation of developing country participation in these international bodies only as a best endeavour clause. Secondly, again because of the weak exhortative nature of the provision, developed countries have often said that it is neither possible nor appropriate for the WTO to be too prescriptive about how other international bodies should function, including in the setting of international standards.

These shortcomings can, to some extent, be addressed by making this provision mandatory by replacing the term 'should' by the term 'shall'.

Proposal:

*Members **shall** encourage and facilitate the active participation of developing country Members in the relevant international organizations.*

ANNEX VI: GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, ARTICLE XVIII:B

Article XVIII is a S&DT cornerstone for developing countries within the WTO-GATT legal system. Nevertheless, the types of flexibility, which it was supposed to grant, were never properly implemented, frustrating developing countries expectations. A comprehensive review of Article XVIII (and the rest of Part IV of GATT), which is respectful of the mandate given by the Ministerial Declaration, is a complex exercise that would impose redrafting the entire article.

Because of time constraints, and in order to concentrate as much as possible on concrete discussions during the next Special Session of the Committee on Trade and Development, the improvements proposed hereunder concentrate on only one aspect of Article XVIII, that is, deviations from GATT obligations for balance of payments purposes (Section B). However, it is worth noting that a substantive review of the other sections of Article XVIII could also bring major improvements for developing countries and should not be put aside.

Paragraph 2 of Article XVIII recalls its objective of, inter alia, granting less stringent conditions for developing countries experiencing balance of payment difficulties. Nevertheless, the very peculiar and complex structure of Section B practically nullifies any right granted by imposing numerous conditions and obligations on beneficiaries.

Art. XVIII: B	Right created	Conditions or obligations
Paragraph 8	Recognition that BoP difficulties “tend to” arise.	Developing countries falling under paragraph 4(a) may benefit from this section. One condition seems to be imposed, i.e., that they be “in a rapid process of development”.
Paragraph 9	A developing country may control its general level of imports by imposing import restrictions. (Identical to Article XII)	The restriction must be applied: to safeguard its external financial position, to ensure a level of reserves that is adequate, subject to paragraphs 10 to 12 conditions,
Paragraph 9 (a)	“Due regard” shall be paid to special factors affecting reserves. (Identical to Article XII)	Restrictions shall not exceed those necessary to stop a threat or a serious decline of reserves
Paragraph 9 (b)		Restrictions shall not exceed those necessary to achieve a reasonable rate of increase in reserves.
Paragraph 10	Developing countries may give priority to more essential products. (Identical to Article XII)	Differentiation as far as it: Avoids damages to commercial or economic interests of any other member Does not prevent unreasonably the importation of minimum quantities of

		goods, Does not prevent importation of commercial samples, Does not prevent compliance with IPRs protection.
Paragraph 11	Development policies of developing countries should not be challenged. (Identical to Article XII)	Restrictions shall be progressively relaxed as conditions improve Restrictions shall be eliminated when conditions no longer justify their use
Paragraph 12 (a)		Consultations are mandatory before if practicable, or after application of new restrictions.
Paragraph 12 (b)		Review and periodical review of the restrictions are mandatory.
Paragraph 12 (c)		Members may advise that a restriction be modified if, during consultations, they find it to be inconsistent with Section B. In case of serious inconsistency and threat to other member's trade, members can recommend that the provision be modified. In case of non-compliance, retaliations may be authorised.
Paragraph 12 (d)		Any member can request consultations if it can establish a prima facie case that the restriction is inconsistent and that its trade is being affected. Retaliations may be authorised.
Paragraph 12 (e)	If a country victim of retaliation finds that its development policy is adversely affected, it can withdraw from the Agreement.	
Paragraph 12 (f)	Recalls Article XVIII:2	Consultations must be expeditious.

As the table highlights, the rights created by Article XVIII:B are identical to those created by Article XII. Moreover, to accede to one substantive right, i.e. the right to impose temporary, transparent and “justified” restrictions, developing countries have to comply with more than 20 conditions and obligations. Its lack of operability is further illustrated by the fact that developing countries have showed little interest in invoking it. Currently, only one developing country has restrictions notified. Developing countries can even ask themselves what the need for this article is, since it merely repeats Article XII. In sum, Article XVIII: B is de facto far from being a special and differential treatment provision, let alone a good one.

At the Fourth Ministerial Conference, members reaffirmed that Article XVIII is a

S&DT provision, and that “recourse to it should be less onerous” than to Article XII.¹³ This mandate, coupled with the mandated S&DT review process, gives developing countries a chance to obtain real improvements in this Article. The mandate means that recourse to this article has to be made less onerous than to Article XII and that, in addition, the article should also be strengthened and operationalised. The mandate for this provision is thus broader than the mandate for other S&DT provisions.

Provision-Specific Analysis and Proposals

Paragraphs Commented:

1. Paragraph 8
2. Paragraph 9
3. Paragraph 10
4. Paragraph 11
5. Paragraph 12 (a) to (f)

Paragraph 8

Full text of the provision:

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

Analysis:

Neither does this preambular paragraph create any right nor is it convincing in affirming developing countries particular BoP difficulties. Moreover, its scope is limited to paragraph 4 (a) countries and this, arguably, only when they are in a rapid process of development. This is a source of ambiguous interpretation that could oblige developing countries to justify whether it experienced a “rapid process” of growth or not.

Proposal:

To avoid ambiguity, it is proposed to simplify the text by deleting its unnecessary parts.

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

¹³ Article 1.1 of the Implementation-Related Issues and Concerns, Decision of 14 November 2001.

Paragraph 9Full text of the provision:

In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; Provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

*(a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
(b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.*

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

Analysis:

A panel report examined quite restrictively the justification of a country's restriction for balance of payment purposes¹⁴. Only developing countries themselves should be in a position to determine whether a restriction is needed or not. The adequacy of reserves can only be considered in light of a country's development policy and objectives. Accepting a review of this judgement by panels would require that a set of criteria be drafted explaining what "adequacy" of levels of reserves means. It would also require that the calculation of these levels be done under an agreed methodology. Since it is not possible to develop universal criteria applicable to all developing countries and all cases, this issue should not be within the purview of panels.

Proposal:

It should be clearly accepted that the competence of the Dispute Settlement Body will be limited to the examination of procedural matters only, on the same lines as is its competence under the Anti-Dumping Agreement (i.e. whether public notification was done in due time, whether correct information was provided during consultations, etc.). This can be achieved through an amendment of Appendix 2 of the DSU (Special and Additional Rules and Procedures Contained in the Covered Agreements) which specifically mentions the paragraphs of XVIII:B that fall under panels competence.

Paragraph 10

¹⁴ WT/DS90/AB/R paragraphs 80 to 109

Full text of the Provision:

In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

Analysis:

The main problem with this paragraph is the scope of “essential”. There has not yet been any case that could confirm that the notion of “essential” could be challenged. The term “essential products” is defined in Article 4 of the Understanding on BoP Provisions¹⁵ in a rather ambiguous manner, which could be contrary to Article XVIII. Paragraph 10 of Article XVIII affirms that a product is essential “in the light of [a developing country’s] policy of economic development”, which gives undoubtedly greater discretionary power to developing country policy makers.

Concerning the conditions imposed by this paragraph, it is arguable that they could all be removed in order to make access to Article XVIII easier than to Article XII. Trading interests of other members should nonetheless be respected whenever possible.

Proposal:

Removal of the conditionality in this Paragraph and clarification of “essential”. The paragraph, if amended, would read as follow:

*In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which **it considers to be essential** in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party. ~~and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures~~*

¹⁵ “The term essential products” shall be understood to mean products which meet basic consumption needs or which contribute to the Member’s effort to improve its balance of payments situation, such as capital goods or inputs needed for production.” From article 4 of the Understanding of BoP Provisions of the GATT 1994.

Paragraph 11Full text of the provision:

In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.

Analysis:

The issue of removal of restrictions is important and can be left in the Article as far as developing countries' discretionary power is not further restrained. In the case of this paragraph, even if conditions improve the threat of deterioration might continue to exist, justifying the maintenance or partial maintenance of the restrictions. The "threat" of a decline in reserves is clearly recognised in paragraph 9 as one case that justifies import restrictions. Nevertheless, it is not clear what discretion a panel would give developing countries in determining the existence of threat.

Paragraph 12 (a) and (f)Partial text of the provision:

(a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the Contracting Parties as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties. (...)

(f) In proceeding under this paragraph, the Contracting Parties shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Analysis:

In order to make access to this article less onerous than to Article XII, it could be

argued that a parallel dispute settlement mechanism as presently conceived under paragraphs 12(a) to 12(f) could be removed. Developing countries should be required to provide public notice of new restrictions. During consultations, information could also be provided concerning alternative instruments that were explored before applying trade restrictions as well as any other information concerning the administration of restrictions.

Nevertheless, a clearer division of the work of the General Council, the Committee on Balance-of-Payment Restrictions and the Dispute Settlement Body is required. Only after consultations in the CBoPR would a country be able to file a request of dispute under the DSU. In such case, panels would be competent to examine only procedural obligations of developing countries, and not their choices of development strategies.

Proposal:

All subparagraphs of paragraph 12 that require public notification, transparency and consultations could be gathered under a same paragraph. Other provisions should be removed. The paragraph could read as follows:

Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

The dates and intervals of a periodical review of all restrictions still applied under this Section shall be agreed upon.

In the course of consultations, any CONTRACTING PARTIES can express its interests, and these should be taken into account by the developing country applying restrictions under this Section.

In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

ANNEX VII: ANTI-DUMPING AGREEMENT**Article 15¹⁶**Full text of the provision:*Developing Country Members*

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

Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

Analysis:

This provision is the only S&D provision in the whole AD Agreement. Developing countries should therefore endeavour to make it as strong as possible, and use it as a vehicle for recalling their concerns vis-à-vis the ADA. Assessing the past efficiency and operability of this article is difficult since the only possible reference would consist of dispute settlement cases initiated by a developing country on the basis of non compliance with Article 15 obligations by a developed country. Only once has thus been the case¹⁷.

Article 15 of the AD Agreement creates two separate sets of obligations. While the first sentence introduces a so-called “best-endeavour clause”, it is the second sentence that creates a more concrete obligation. In both cases, the provision lacks clarity in spelling out specific concrete actions to be taken and a possible time frame for action. Moreover, the language of this provision is rather loose and allows for too much ambiguity of interpretation. This has resulted in restrictive reading of it by developed countries, which led to a de facto impairment of the provision benefits.

First Sentence

The first sentence is already binding (“*must*”) and calls developed countries to give “special regard” to the situation of developing countries when considering the application of anti-dumping duties.

An initial weakness of this provision is to require “*special regard*” from developed countries. This loose language contrasts with the “*must*” wording obligation and is

¹⁶ The choice of commenting Article 15 is without prejudice to other articles of the AD Agreement that may as well need substantial improvements, such as Article 5 (de minimis level and threshold) or others.

¹⁷ European Communities – Anti-dumping duties on imports of cotton-type bed linen from India, October 2000. See for instance WT/DS141/R.

difficult to make operational. One improvement could be to further elaborate this obligation by requiring developed countries to explain in written form the ways in which they have considered the “*special situation*” of and the arguments presented by developing countries. This information could be provided systematically and contained in article 12.2 public notices (12.2.1 for provisional measures and 12.2.2 for definitive duties).

Secondly, according to the text, the onus of the action lays entirely on developed countries. Despite its clarity, this obligation has been challenged by a developed country’s view according to which, a developing country might be obligated to identify instances where its essential interests are affected. This could mean that during anti-dumping proceedings, it would be up to the developing country party to identify, justify, provide evidence and prove that its essential interests are affected. This reading obviously runs against developing countries and should be rejected.

Second Sentence

The obligation created by the second sentence is clearer, but still too ambiguous. Firstly, this provision is mandatory (“*shall*”) but its strength is nullified by a series of non-mandatory words: “*possibilities, explored, would*”. Indeed, according to this sentence, developed countries have an obligation of “exploring”, that is, only considering, the possibility of reaching constructive remedies, and not exploring remedies themselves. Language could be improved in order to strengthen and make this provision more effective.

A set of conditions further limits the scope of this provision. It seems that the last part of the sentence could be interpreted restrictively as to exclude certain proceedings of anti-dumping from the application of Article 15. That is, Article 15 favourable conditions currently only apply in cases where “essential interests” of developing countries are at stake. A developing country would be able to invoke Article 15 in case it had been victim of anti-dumping duties on one specific sector or product but not if some other sector or product had been concerned. The criteria that would guide an examination of a developing country’s “essential interest” are not clear and definitely, WTO is not the appropriate forum to discuss poor countries’ priorities. A sector may not be predominant according to its share in a country’s exports but it can still be important because it employs a large part of the labour force or simply because it is part of a national developmental strategy. The scope of this article could be greatly amplified by deleting the last part of the second sentence.

Ambiguous interpretation of this provision also relates to the content of the term “constructive remedies”. Article 15 does not aim at, or at least, does not exclusively aim at providing favourable procedural mechanisms for developing countries (i.e. simplified questionnaires or extensions of time). It creates new obligations, under which developed countries must adopt a pro-active, open-minded attitude towards developing countries requests or “*special situation*”. This means exploring all remedies available in the AD Agreement, and above all, choosing the option that is most adequate not only to reverse

the alleged injury but also to cause least distortion in developing countries trade opportunities. This includes price undertakings, duties in a lesser amount of the dumping margin and application of no duty at all (Article 9.1).

None of the constructive remedies that are mentioned in the agreement should be discarded. Article 15 is not a mere repetition of other provisions. A pragmatic sense should guide negotiations in order to avoid unilateral trade restrictions and accommodate developing countries needs. The panel reading according to which Article 9.1 would not constitute a “constructive remedy” is detrimental to developing countries. On the contrary, developed countries should refrain, whenever possible, from applying duties on developing and least developing countries products. Therefore, the possibilities given by Article 9.1 should not be discarded from the scope of Article 15.

Most importantly, Article 15 calls for negotiations between developed and developing countries, with a serious and strong willingness to reach a positive outcome. There are several ways of acting inconsistently with Article 15 and none of them should be put aside. This includes not giving sympathetic consideration to developing countries requests, not granting enough time for reply or suggestion of undertakings, etc.

A last divergence of interpretation concerning this provision relates to the timing when constructive remedies should be discussed. Developed countries and a panel report argue that “anti-dumping duties” means exclusively definitive duties after the conclusion of investigations. This is equivalent to excluding the investigations phase from the Article 15 benefits and penalises developing countries in various ways. Developing countries are commonly the object of anti-dumping investigations, and often the same sectors are repeatedly concerned. Even though provisional duties must be refunded after investigations in case the final margin of dumping is found to be lower, the mere imposition of these duties affects developing countries exports by making exporters, and importers alike, face an unpredictable and not secure business environment.

Ideally, the unilateral imposition of preliminary duties should be forbidden in anti-dumping investigations concerning products from a developing country. Nevertheless, this option may fall more into the mandate of the negotiating group on rules. An alternative option is to make sure that negotiations aiming at constructive remedies do take place before the end of the investigative period, and in any case, before the imposition of any preliminary or definitive duty.

Proposal:

According to the elements above-discussed, the following improvements are proposed:

1. Developed countries should provide information on how they considered developing countries’ “special situation” and arguments in their Article 12.2 public notes. This obligation can be incorporated to the text.

2. The onus of protecting developing countries' interests and finding mutually convenient arrangements does not lie on developing countries. Article 15 conditions accumulate to the other conditions of the AD Agreement and create a specific obligation for developed countries. Panels and Appellate Body should always examine developed countries' willingness and pro-active steps to find mutually acceptable solutions. Language improvement is needed to strengthen this provision. A starting point would be to replace all loose language in the paragraph.

Another important improvement is to broaden the scope of this provision to all cases where products originating in developing countries are being investigated, without conditions of "essential interests", so "where they would affect" can be replaced by "in order to protect" developing countries essential interests.

Finally, developing countries should insist that no duty be imposed on their exports before the investigative phase has released its results. Meanwhile, the word "any" can be added before "anti-dumping duties" in order to make consultations before imposing duties compulsory at all stages of the proceedings. The provision, if amended, would read as follows:

The entire Article would, if amended, then read as follows:

Developing Country Members

*It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. **Developed countries efforts in this sense shall be contained in their public notices, according to Article 12.2 of this Agreement.***

~~*Possibilities of*~~ *Constructive remedies provided for by this Agreement shall be explored before applying any anti-dumping dut[y] in order to protect ~~where they would affect the~~ essential interests of developing country Members.*

ANNEX VIII: THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The GATS is often hailed to be a development-friendly agreement due to its very structure (i.e flexibilities in making negotiated specific commitments on market access and national treatment in specific sectors and modes of supply). However, the drafters of the agreement nonetheless felt that it was necessary to include some specific provisions granting special and differential treatment (S&D) to developing and least-developed countries. It is these provisions that will be analysed in the following pages.

The WTO Secretariat, in various notes on the S&D provisions in WTO legal texts¹⁸ identified the following categories of provisions:

Type of Provisions	Non-Mandatory	Mandatory
Provisions aimed at increasing trade opportunities	GATS Preamble	Article IV.1 Article IV.2
Provisions under which WTO Members should safeguard the interests of developing country Members	GATS Preamble Article XII.1	Article XIX.3 Article XV.1
Flexibility of commitments, of action and use of policy instruments		Article V.3 Article XIX.2
Technical assistance		Article XXV.2 Paragraph 6, Annex on Telecommunications
Provisions relating to least developed country Members		Article IV.3 Article XIX.3

These articles will be individually analysed and when possible a proposal will be made on how to strengthen them or make them more precise in order for them to be more effective and operational. The suggestions will relate to the identification of provisions to be made mandatory, the indication of how provisions might be made more effective and operational, and the legal and practical implications of making provisions mandatory.¹⁹

It can already be pointed out that the majority of the S&D provisions of the GATS have been identified as being mandatory provisions. Therefore, most of the analysis will focus on ways by which provisions can be made more effective and operational.

Provision-Specific Analysis and Proposals

¹⁸ Implementation Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/77, of 25 October 2000 and Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions Mandatory and Non-Mandatory Special and Differential Treatment Provisions, WT/COMTD/W/77/Rev.1/Add.1/Corr.1, of 4 February 2002.

¹⁹ These points were identified by the Chairman of the CTD as the elements that members should include in their contributions in accordance to paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Doha Decision on Implementation-related Issues and Concerns.

GATS Preamble

Full text of the provision:

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby agree as follows:

Analysis:

This Preamble is one of the few non-mandatory provisions of the GATS. However, the preambular paragraphs of an agreement do not purport to create obligations but are rather used to indicate the general objectives and principles underlying the agreement. The Preamble can also be used to support the request for the strengthening of S&D provisions as it clearly indicates that the overall goal of the agreement is, *inter alia*, the development of developing countries. A change to a mandatory provision is therefore not relevant here. What is relevant and required is that the actual commitments by Members are in accordance with the objectives in the Preamble. If this is not the case,

consideration can be given to the use of dispute settlement mechanism to ensure that commitments are amended to bring them in line with the Preamble.

Article IV.1

Full text of the provision:

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.*

Analysis:

The general objective of this article is rather broad - the increasing participation of developing country Members in world trade. However, more specific goals towards achieving this main objective are identified (i.e. the strengthening of domestic services capacity, the improvement of access to distribution channels and information networks, and the liberalisation of market access in sectors and modes of export interest to developing countries). These goals relate to what has been qualified as an obligation of result. The wording of the provision does not indicate precisely the actions that are required of members to achieve these goals, though these can be reasonably inferred (e.g. grant market access in sectors and modes of export interest to developing countries). There is equally no indication how to make the actions legally enforceable. Moreover, no time frame is identified and all that can be assumed is that the relevant actions will take place progressively over time.

Most importantly, what is lacking from this article is the indication of the mechanism by which it will be assessed whether or not developing countries' participation has increased thanks to the actions suggested. It would be useful for a monitoring body to periodically review whether Members have fulfilled their obligations under this provision. Moreover, the wording 'different Members' is ambiguous. One can claim that since the objective of the provision is to increase the participation of developing countries in world trade the actions requested are addressed to developed countries.

Proposal:

*The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by ~~different~~ **developed country** 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.*

Developed country Members will promptly notify the Council for Trade in Services of any measures they have taken with regard to points (a) to (c) in order to allow the Council to proceed to a yearly review of the effectiveness and impact of the steps taken by them to increase the participation of developing countries in world trade of services

Article IV.2

Full text of the provision:

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.*

Analysis:

Paragraph 2 of Article IV suggests that information related to foreign markets will also be a factor in promoting the increasing participation of developing countries in services trade. This paragraph more clearly determines what actors are required to perform the relevant actions - both developed country Members and other Members and clearly states an obligation of result. A specific time frame is also indicated. Again, what is lacking is an indication of how it will be assessed whether Members have fulfilled their obligations and who will be responsible for this. It is important to point out that all developed country Members and many developing country Members have established and notified contact points²⁰ however, it may still be useful for a body to have the responsibility to monitor that the information provided is readily available and in user-friendly manner. Should developing countries have encountered problems in obtaining such information they may want to propose the following addition to the text of the provision.

²⁰ Document S/ENQ/78/Rev.1 dated 5 October 2001, cited in WT/COMTD/W/77/Rev.1/Add.2

Proposal:

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*

The Council for Trade in Services will review on a periodical basis whether developed country Members are taking the recommended actions and whether the information provided by the contact points is provided in a timely and user-friendly manner.

Article XII.1Full text of the provision:

In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

Analysis:

This provision relates to rights of certain Members and not to obligations and the conditions under which the rights can be applied are clear. Therefore, no changes, towards making the provision mandatory, seem required. However, a parallel with Article XVIII:B of GATT is useful here. Panels have tended to examine the 'justification' for restrictions and have sometimes ruled that they were not legitimate.²¹ Only the concerned developing country Member should be allowed to judge the 'adequacy' of their level of financial reserves.

Proposal:

In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services

²¹ See WT/DS90/AB/R

on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves that the developing country Member deems adequate for the implementation of its programme of economic development or economic transition.

Article XIX.3

Full text of the provision:

For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalisation undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

Analysis:

Two distinct provisions are important here. Both constitute an obligation of result. The first relates to the establishing of modalities on the special treatment of least-developed country Members. However, it can also be said that the establishment of modalities for the treatment of autonomous liberalisation should also be considered an S&D provision, since developing countries argue that the idea of granting credit for autonomous liberalisation was conceived with developing countries in mind.²² The article should be altered to specifically indicate this.

What is lacking from this article is a precise time frame for the establishment of the modalities. Both are linked with the establishment of negotiating guidelines and procedures but recent experience has shown that the negotiating guidelines themselves in turn do not give a specific time frame for the completion of the modalities. The Guidelines and Procedures for the Negotiations that were adopted in March of 2001 (S/L/93) simply state that “Members shall endeavour to develop such criteria prior to the start of the negotiation of specific commitments”. The guidelines are moreover silent with regard to the establishment of modalities for the special treatment of LDC Members.

Proposal:

²² Communication from Brazil, Colombia, Cuba, Ecuador, Dominican Republic, Guatemala, Honduras, Indonesia, Malaysia, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Senegal, Uruguay and Venezuela, Autonomous Liberalization and Developing Countries, S/CSS/W/130, 30 November 2001)

*For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by **developing country** Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV. **These modalities shall be developed prior to the start of the negotiation of specific commitments.***

Article XV

Full text of the provision:

1. *Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.²³ The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.*
2. *Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.*

Analysis:

The objective of this provision in relation to developing countries is for the negotiations on subsidies to take due account of the particular development situation of developing countries and their eventual use of subsidies for development purposes. The obligation contained in this article is one for the Members taken collectively. The specifics of how and in what time frame the negotiations on subsidies would proceed were left for a future work program. Paragraph 1 may not require any amendments as any additional elements could be introduced through the work program. Paragraph 2, however, could be altered in order to provide assurances that developing country Members will not have to bear the costs of being adversely affected by the subsidy of a developed country Member and that some monitoring body will provide the guarantee that the concerns of developing country Members are dealt with. The following amendment of paragraph 2 is suggested.

Proposal:

²³A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

2. *Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration. In the case where a developing country Member is adversely affected by the subsidy of a developed country Member, the latter shall take the necessary measures to eliminate the negative effects of the subsidy on the developing country or compensate it for this effect. All such cases will be brought to the attention of the Council for Trade in Services, which will take the necessary actions to ensure compliance with this provision.*

Article XIX.2

Full text of provision:

The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

Analysis:

The S&D provision in this paragraph basically aims to grant developing country Members the right to liberalize at a slower pace and to a lesser extent than their trading partners given their development situation. However, the provision is applicable only with great difficulty as no specific benchmark is given for what represents ‘fewer’ sectors and types of transaction and ‘progressively’ extending market access. Nor is it clear what conditions developing countries can attach when granting access to their markets. Given that the negotiations involve the totality of the membership of the WTO it can be assumed that what liberalization developing countries assume will be compared to that of all of the other Members. The Preamble, but also paragraph 1 of Article XIX and the Negotiating Guidelines, contain a provision that states that the successive rounds aim at “promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations”. It can be said that this comes in support of Article XIX.2. However, this still provides no specific benchmark. The Negotiating Guidelines further state that the Council for Trade in Services will “conduct an evaluation, before the completion of the negotiations, of the results attained in terms of the objectives of Article IV”. The problem remains as no criteria is given on which the CTS can base its evaluation.

Proposal:

The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for

individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV. Developing countries, therefore, will have the right to indicate the sectors and the types of transactions they are in a position to liberalize, at the start of each round of negotiations on specific commitments. Developing countries will also have the right to attach conditions while making specific commitments. The exercise of these rights by developing countries will not be challenged by developed countries during bilateral, plurilateral or multilateral negotiations.

Article XXV.2

Full text of the provision:

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.

Analysis:

This provision clearly states the beneficiaries (developing countries), the actor which has to take action (the Secretariat) and the body which is responsible for deciding what technical assistance shall be provided (the CTS). This article could nonetheless be improved by ensuring that developing countries have their word in the design of the technical assistance which they require. Moreover, the Secretariat should not to be the sole provider of the technical assistance since many other actors (international, regional and local organisations) are well-equipped to fill this role.

Proposal:

*Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat **and other relevant organizations** and shall be decided upon by the Council for Trade in Services. **Technical assistance shall be fully demand driven by recipients and tailored to address specific country situations.***

Paragraph 6 of the Annex of Telecommunications

Full text of the provision:

(a) *Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and*

regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

Analysis:

This article indicates to quite some detail several measures that Members can take both individually and collectively to assist developing countries in acquiring the efficient and advanced telecommunications infrastructure that would provide a more favorable environment for the expansion of their trade in services. However, no specific time frame is given for these measures and no WTO body is entrusted with the monitoring of the implementation of these measures by Members. Therefore, it may be useful for the CTS to be responsible for reviewing periodically the measures taken by Members to implement this agreement and to make recommendations to them where necessary.

Proposal:

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) *Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.*

(e) *Developed country Members will promptly notify the Council for Trade in Services of any measures they have taken with regard to points (a) to (d) in order to allow the Council to proceed to a yearly review of the effectiveness and impact of the steps taken by them to favor the acquisition by developing countries of an efficient telecommunications infrastructure.*

Article IV.3

Full text of the provision:

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.

Analysis:

The objective of the first part of this paragraph is to grant special priority in the application of Article IV.1 and Article IV.2 to least-developed countries. The strengthening of these provisions suggested above are therefore relevant for LDCs also. The second part of the paragraph relates to the particular difficulty of LDCs in accepting negotiated specific commitments. Already, the GATS grants developing countries the flexibility for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to condition to such access. Therefore, if least-developed countries are granted an even more favorable treatment than this one it basically seems to indicate that in situations of serious difficulties the LDCs should be exempted from having to take on any additional commitments. The paragraph could be amended to include a provision for this.

Proposal:

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. If, at the time of a round of multilateral negotiations for the liberalization of trade in services, a least-developed countries Member can present a duly motivated request for not taking commitments if these would

threaten its ability to pursue its development policies, the Council for Trade in Services can decide that the concerned country will have the right to refrain from taking on additional commitment.

ANNEX IX: AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The special and differential treatment (S&DT) provisions in the TRIPS Agreement are fairly limited. The specific approach to S&DT in the TRIPS Agreement is predicated upon: a) the preambular recognition of the special needs of least-developed country Members and the need to provide them with maximum flexibility in domestic implementation of laws and regulations to facilitate the creation of a sound and viable technological base; b) the objective of ensuring that intellectual property rights (IPRs) contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users and in a manner conducive to social and economic welfare (Article 7); c) enabling the adoption of measures to protect public health and nutrition and to promote public interest in sectors of vital importance to Members' socio-economic and technological development and; to prevent abuse of IPRs and resort by right holders to practices that unreasonably restrain trade or adversely affect the international transfer of technology (Article 8). The effectiveness of the S&DT provisions in the TRIPS Agreement to increase developing countries trade opportunities, safeguard their interests and maintain the necessary flexibility to use policy instruments for development have to be seen in this context.

The articles that contain specific S&DT provisions under the TRIPS Agreement include articles 65.2, 65.4, 66.1 and 66.2, and 67. The effect of article 65.2 has been spent since the transition period provided therein lapsed on 1 January 2000. There are other articles in the Agreement that are not specifically S&DT provisions that either carve out exceptions to the S&DT provisions or condition the applicability of the S&DT provisions. An analysis of the S&DT provisions and their effectiveness must therefore necessarily take such provisions into account.

Provision-Specific Analyses and Proposals

S&DT Provisions Applicable to Developing Country Members

A. Transition Periods

1. Article 65.4
2. Article 70.9

B. Technical Co-operation

1. Article 67

S&DT Provisions Applicable Only to Least-Developed Country Members

A. Transition Periods

1. Article 66.1
2. Article 70.9

B. Incentives and transfer of Technology

1. Article 66.2

S&DT Provisions Applicable to Developing Country Members**A. Transition Periods****Article 65.4**Full text of provision:

To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provision on product patents of Section 5 of Part II of such areas of technology for an additional period of five years.

Analysis:

This provision gives a further transitional period for a specific number of developing countries and in respect of a limited number of products. Prior to the TRIPS Agreement a number of developing countries did not provide product patents in certain fields that were considered as relating to critical public goods. The main areas were pharmaceuticals and agro-chemicals. The objective of the transition period was to enable these countries take measures to design alternative policies to ensure availability of these public goods. Part of the policy options of establishing patent protection for products that are considered public goods may in some cases require substantial public expenditure to cushion populations from the negative consequences that might arise. In this context, it is difficult to see why a presumption was made that five years would be the maximum number of years that all the different countries would require to establish mechanisms to ensure the continued supply of these public goods. That presumption is manifested in the failure to include any clause to enable those countries that may have real difficulties to obtain additional extensions to this period. There is clear need to provide a safety valve for those countries that have genuine difficulties to ensure adequate supply of the public goods within this limited time.

Proposal:

Article 65.4 should be amended to read as follows:

*To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provision on product patents of Section 5 of Part II of such areas of technology for an additional period of five years. **The Council for TRIPS shall, upon duly motivated request by a Member entitled to the transition under this article, extend this period beyond the five year period.***

Analysis of Article 70.9 as it Relates to the Transition under Article 65.4

In the context of article 65.4 a related area of concern would be the requirements for the mailbox system and the provision on exclusive marketing rights (EMRs). EMRs have the effect of enforcing a foreign patent and have primarily similar consequences as grant of a patent in the territory. The specific problem relates to the lack of clarity on how and when the exceptions that are meant to deal with the consequences of exclusivity would apply to EMRs in the public interest. In order to make the provisions of article 65.4 fully effective EMRs should be clearly made subject to the policy powers that Members have in the public interest. A new sub-paragraph should be added to article 70.9 to clarify this situation.

Proposal:

Article 70.9 should be amended to read as follows (note: a further suggested amendment to this article is discussed under the analysis on article 66.2 with respect to LDCs):

Where a product is the subject of a patent application in a member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for the period of five years after obtaining marketing approval in that Member or until the product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.²⁴

Provided that:

(a) Where exclusive marketing rights have been granted by a Member under this paragraph, such Members may provide exceptions to such rights in the public interest taking into account the legitimate interests of the right holder and third parties.

B. Technical Co-operation***Article 67***Full text of provision:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of

²⁴ Part VI of the TRIPS Agreement deals with transitional arrangements that allow Members differential times for implementing the Agreement in whole or parts of it.

laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Analysis:

The provision creates a mandatory and continuing obligation on developed country Members to provide technical and financial cooperation. Such cooperation must, at the very least, include the assistance specified in the second part of the provision. The obligation on the developed Members is however conditioned upon: 1) a request by the developing or least-developed country Member and; 2) a mutual agreement on the terms and conditions for such assistance. The provision raises two main problems that will need to be resolved by amendment. First, the provision is typically phrased as meant to 'facilitate the implementation' of the Agreement. It is clear from this wording that the emphasis in the technical assistance envisaged here is on performance of the obligations in the Agreement by the developing country and least-developed country Members. Very little attention is given to ensuring that the technical assistance help developing country and least-developed country Members to fully exercise their rights under the Agreement including full use of the policy flexibility in the Agreement. This is particularly important since in most cases under the TRIPS Agreement, Members rights and policy flexibilities are framed in terms of exceptions making them susceptible to restrictive interpretations and hence more complex and difficult to implement.

This biased emphasis is borne out further when one looks at what technical assistance must include. While there is a mention that the assistance should include help to prevent abuse of IPRs, the main emphasis is on the preparation of laws and enforcement. In order to make this mandatory provision more effective proper emphasis must be put on assistance to enable developing and least-developed Members take full advantage of their rights and effectively use the available policy choice spaces.

The second problem arises in respect to the need for 'mutually agreed terms and conditions'. While mutual agreement is an important factor in technical cooperation schemes, in light of the experience with bilateralism it is critical that such terms and conditions are made subject to a test of reasonableness and transparency and are monitored to ensure that the terms and conditions do not impose unnecessary burden on the developing or least-developed country Members. This is particularly critical as there is obviously an uneven relationship with one party holding the money and expertise. In that regard, there should be some control on the types of conditions under which technical cooperation is undertaken.

Proposal:

To make the provision effective there is need to include in the text specific mandatory requirement that technical assistance shall include assistance to carry out impact studies, the use of flexibilities and the exercise of rights. The provision should be amended to read as follows:

1. *In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance **in carrying out impact studies and cost-benefit analysis and the full use of policy flexibilities**, preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including training of personnel.*

2. *The terms and conditions for technical cooperation shall be notified to the TRIPS Council and such terms and conditions shall not impose burdensome obligations on developing and least-developed country Members and shall in no circumstances require the developing or least-developed country Member to protect or enforce any intellectual property standards not strictly required by this Agreement.*

S&DT Provisions Applicable Only to Least-developed Country Members

A. Transition Periods

Article 66.1

Full text of the provision:

In view of the needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable and technological base, such Members shall not be required to apply the provisions of this Agreement, other than articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of article 65. The Council for TRIPS shall, upon duly motivated request by least-developed country Member, accord extensions of this period.

Analysis:

Article 66.1 gives least-developed country Members an automatic transition period for ten years from the date of entry into force of the Agreement with the possibility of further extensions by the TRIPS Council. It is important to note that further extensions are not time bound although it would appear that each actual extension would be time bound.²⁵ While this approach provides a primarily fair approach, its value and effectiveness is undermined by the pre-condition that requests for further extensions be “duly motivated”. The pre-condition creates an obligation to justify the need for further extension while not providing a clear criteria on what a least-developed Member would be required to prove to pass the test of a duly motivated request. Such lack of criteria may be interpreted to require burdensome economic and technical analysis to provide

²⁵ This is the approach that the Ministerial Conference seems to have taken under Para 7 of the Declaration on TRIPS and Public Health.

evidence of need.

There is no reasonable justification for this obligation. The transition period is meant to allow least-developed Members develop a sound and viable technological base. This is in a form of a promise by other Members particularly developed Members. If at the end of the transition period the least-developed Member has not established a viable technological base, it is difficult to see why such a Member should duly motivate the request for further extension, instead it should be any other Member opposed to the requested extension to show that the objective of the transition period has been met for that least-developed Member.

Proposal:

The language of article 66.1 should be changed to remove the obligation on least-developed Members to justify the request for extension of the transition periods. The only requirement should be a filing of a request by the least-developed Member and if any other Member considers that the request is unjustified that other Member should have the obligation to show cause. An amendment should be introduced to delete the words 'duly motivated' and adding a new sentence to create an obligation to show cause on the objecting Member. The text should read as follows:

*In view of the needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of article 65. The Council for TRIPS shall, upon ~~duly motivated~~ request by a least-developed country Member, accord extensions of this period. **The TRIPS Council shall not refuse to grant such a request if no other Member shows that the least-developed Member requesting the extension has created a viable technological base.***

Analysis of Article 70.9 as it Relates to the Transition under Article 66.1

A problem arises with respect to the effectiveness of the S&DT provision on extension of transition periods under article 66.1 with regard to the applicability of the mailbox provisions and in particular the requirement for the grant of EMRs. Least-developed country Members that elect to request further extensions should not be obliged to enforce foreign IPRs through the provisions of article 70.9 during the extended period. EMRs have the effect of enforcing a foreign patent and for all purposes has the same effect as the grant of a patent. The effectiveness of the transition periods can not therefore be examined without taking into account the effect of article 70.9 of the TRIPS Agreement. There is seemingly a clear intent to exclude the application of Part VI of the TRIPS Agreement to the provisions in regard to the mailbox system and EMRs. In both paragraphs 8 and 9 of article 70, the provisions are couched in the language of, 'notwithstanding the provisions of Part VI'. A literal interpretation of this provisions would suggest that a decision under article 66.1 could not be used to exclude the application of article 70.9 of TRIPS. This situation needs to change.

Proposal

In addition to the amendment suggested to improve the effectiveness of article 65.4, a carve out for least-developed Members wishing to take advantage of article 66.1 should be provided to remove the obligation for the application of the EMRs when they request further extensions in terms of Para (b) below.

Where a product is the subject of a patent application in a member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for the period of five years after obtaining marketing approval in that Member or until the product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Provided that:

(a) Where exclusive marketing rights have been granted by a member under this paragraph, such Member may provide exceptions to such rights in the public interest taking into account the legitimate interests of the right holder and third parties.

(b) Least-developed country Members that elect not to apply any provision of this Agreement in terms of article 66.1 shall not be obliged to enforce the provisions of this paragraph.

B. Incentives and transfer of technology

Article 66.2

Full text of the provision:

Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Analysis:

This provision imposes a mandatory and continuing obligation on developed Members to provide incentives to their enterprises and institutions to promote and encourage transfer of technology to least-developed Members.²⁶ This provision has not been successfully implemented and it is the subject of on-going discussions to establish a

²⁶ The second part of Para 7 of the Declaration on TRIPS and Public Health (WT/MIN(01)/2. 14 November 2001) affirms the continuing commitment of developed country Members to fulfill this obligation. On the other hand Para 11.2 of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17 14 November 2001) confirms the mandatory nature of this obligation.

mechanism for ensuring the monitoring and full implementation of the obligation in terms of Para 11.2 of the Decision of Implementation-Related Issues. Notwithstanding those important discussions, the provisions of article 66.2 need to be strengthened by outlining the particular actions, which need to be measurable, that developed country Members must take. By specifying the main measures, the task for establishing an efficient mechanism for ensuring effective monitoring and full implementation will not only be made easier but also the S&DT provision will be more effective.

Proposal

An amendment is proposed to the wording of article 66.2 as follows:

*Developed country Members shall, **through specific laws and regulations**, provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base. **The measures taken, the laws enacted and the regulations promulgated by developed country Members to comply with the obligation under this article shall be annually reviewed as to their effectiveness and relevance by the TRIPS Council or upon request by a least-developed country Member.***

ANNEX X: DECISION ON MEASURES IN FAVOUR OF LEAST DEVELOPED COUNTRIES

Relevant Provisions

A. Mandatory²⁷

1. Provisions aimed at increasing trade opportunities for Least Developed Countries: Paragraph 2(ii)(second sentence) and Paragraph 3
2. Provisions aimed at safeguarding the interests of Least Developed Countries: Paragraph 2(i) and Paragraph 2(iv)
3. Technical Assistance: Paragraph 2(v)

B. Non-mandatory

1. Provisions aimed at increasing trade opportunities for Least Developed Countries: Paragraph 2(ii)(first sentence)
2. Provisions aimed at safeguarding the interests of Least Developed Countries: Paragraph 2(iii)

C. Additional (not mentioned in the Secretariat's classification)

1. Provisions aimed at safeguarding the interests of Least Developed Countries: Paragraph 1

Provision-Specific Analysis and Proposals

Paragraph 2(ii) second sentence

Full text of the provision:

Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least developed countries.

Analysis:

Although the language of this provision is considered mandatory, the terms 'consideration' and 'to further improve' somewhat weaken its impact given they are not specifically defined.

Therefore, efforts to improve GSP and other preferential schemes have not been altogether meaningful for LDCs. This is particularly worrisome given that as MFN rates continue to be reduced the differential between MFN and GSP rates have been also reduced significantly, which means that any potential benefit from a preferential rate is eroded.

²⁷ Based on Secretariat's classification contained in WT/COMTD/W/77/Rev.1/Add.1

However, an UNCTAD study (UNCTAD/DITC/TNCD/4) also shows that it is not enough to provide duty-free market access. This is demonstrated by the low or scarce utilisation of trade preferences by LDCs. The main reason for this is due to a combination of factors, including lack of stability of preferences, excessive rules of origin requirements, insufficient product coverage, lack of awareness of preferences and conditional requirements. These characteristics feature in preferential schemes such as the EU's EBA initiative and the US's 'AGOA-enhanced' GSP scheme, as well as recently revised GSP schemes of Canada, Japan, EU .

Taking these issues into account, the provision should be revised by providing a basis or direction for improvement in order to make it meaningful.

Proposal:

GSP and other schemes for products of particular export interest to least-developed countries shall be reviewed by Members with a view to on-going meaningful and measurable improvements, including stability of access; full product coverage; simplified rules of origin which match the industrial capacity of LDCs; and technical assistance which addresses supply side constraints.

Paragraph 3

Full text of the provision:

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.

Analysis:

On face value, this mandatory provision appears to be adequate as it is clearly and effectively worded, identifying the beneficiary, an objective and its related outcome, together with a time horizon (i.e. on-going).

However, in practise although there have been initiatives to give effect to this provision, the problem is that they have not resulted in any substantial outcomes for LDCs in terms of expanding their trading opportunities. This is largely because such efforts are not based on the priorities and concerns of LDCs. Consequently, this provision can be viewed as merely paying lip service.

Therefore, the provision should be reworded to give effect to having a relationship between the needs of LDCs and any subsequent action.

Proposal:

Agree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures, as identified by them, which facilitate the expansion of trading opportunities in favour of these countries.

Paragraph 2(i)

Full text of the provision:

Expeditious implementation of all special and differential treatment 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.

Analysis:

Again, despite the clear wording and mandatory nature of this provision, it has not been implemented in practise. Whilst various reviews have been undertaken, obviously it is not enough and implementation issues remain outstanding, yet to be addressed. The fact that any efforts to resolve outstanding implementation issues have undergone such a long and arduous process, and more recently been bundled in the context of negotiations is a blatant disregard of this provision. In addition, this is another case in point, which demonstrates the need for such provisions to be enforced by the dispute settlement mechanism.

The provision could be slightly strengthened by putting the onus on Members to implement such measures and using the term ‘mandatory’.

Proposal:

Expeditious and mandatory implementation by Members of all special and differential treatment 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.

Paragraph 2(v)

Full text of the provision:

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 maximise the benefits from liberalised access to markets.

Analysis:

Although this is considered a mandatory provision, it does not identify the ‘providers’ of technical assistance or an enforcement mechanism for its provision. This has been the main weakness with provisions relating to technical assistance in general. Therefore, as in other cases it needs to be subject to the dispute settlement mechanism.

Although LDCs may have been granted increased technical assistance recently, in the case of technical assistance, it is more about quality rather than quantity. LDCs have been active in voicing their concerns with regard to the development of the WTO technical assistance programme, including the IF, however, their calls for addressing supply side constraints continue to be marginalised and instead the approach has been donor-driven.

Therefore, the provision should be revised so that it is based on LDC driven demands of technical assistance, together with a review mechanism.

Proposal:

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 maximise the benefits from liberalised access to markets~~ based on their needs as they see fit including, among other things, the removal of supply side constraints, which shall be subject to regular review and assessment.

Paragraph 2(ii)(first sentence)

Full text of the provision:

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.

Analysis:

This is a non-mandatory and non-committal provision with weak wording (eg. “To the extent possible” or “may be implemented”) in terms of its effect and hence implementation. This is mainly because it does not provide a firm and enforceable obligation on the part of WTO Members to implement this commitment.

Although the provision refers to timing by way of implementing something sooner rather than later, this could still mean 1 or 10 years later, given it does not clearly stipulate immediate implementation.

Therefore the provision should be strengthened by specifying immediate action and identify Members as responsible for that action.

Proposal:

If amended, the text could be read as follows:

~~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 shall be implemented immediately by Members.~~

Paragraph 2(iii)

Full text of the provision:

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.

Analysis:

Whilst having the intent of safeguarding the interests of LDCs, it proves to be weak in application due to its non-mandatory nature, as reflected by the word ‘should’. As a result, LDCs have experienced various problems on numerous fronts related to implementation of the Uruguay Round commitments, which has been reflected in their position papers. The case of extension of the transition period for LDCs under TRIPs is an example of the non flexible and non supportive way in which this provision has been applied.

Whilst LDCs have been increasingly active in articulating their concerns and priorities in the various committees and councils, their interests continue to be marginalised. This is reflected in their static (in some cases declining) share of world trade and if one compares their list of priorities (as stated in the Zanzibar Declaration) and the outcomes of, for example, the Doha Ministerial Declaration, which clearly do not correspond with one another.

The provision could be improved by replacing ‘should’ with ‘shall’ and stronger language on transition periods, together with a mechanism for regular review.

Proposal:

The text of this provision could be amended in the following way:

The rules set out in the various WTO agreements and instruments ~~and the transitional provisions in the Uruguay Round should~~ shall be applied in a flexible and supportive manner for the least-developed countries. Least-developed countries shall always be entitled to extensions for their transition periods as they may require. To this effect, ~~sympathetic consideration~~ the specific concerns raised by the least-developed countries shall be reviewed and addressed regularly as a standing item in the appropriate Councils and Committees.

Paragraph 1

Full text of the provision:

Decide 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 Organisation.

Analysis:

This provision is somewhat outdated²⁸ and gives the tone of restrictive intent with its convoluted wording. This works to directly undermine the objective of the provision which is to provide a safeguard for LDCs in ensuring they are not required to undertake commitments which are not commensurate with their development needs. Therefore, this can be viewed as a fundamental provision for LDCs which needs to be strengthened and enforced to the fullest extent.

This should not be the case given it is stated in the Marrakesh Agreement in Article XI:2 and is referred to in the Doha Ministerial Declaration (paragraph 50) as a principle for guiding negotiations. However, it is perhaps the nature of the language: ...'will only be required to undertake commitments...' which is problematic in the context of the general trend in interpreting special and differential treatment provisions. For example, it is not clear who the onus lies with in terms of implementation. Is it up to LDCs, the Secretariat or WTO Members? Nor is any mechanism mentioned for enforcing it or reviewing its application.

In reality, LDCs are facing difficulties in fulfilling their commitments from all aspects, including from an institutional, financial and administrative point of view. The problems being experienced with TRIPs and the SPS agreement are testimonial to this fact. Another important consideration is that it is during the accession process that

²⁸ The date for submission of schedules was extended to December 1995.

LDCs essentially give up their right to this provision because they are subject to intense pressure during the bilateral negotiating process to undergo reforms which go far beyond what is applicable to an LDC Member.

Therefore, the provision should be clearly re-worded and revised to suit current/future circumstances. However, it is clear that in order for it to be truly enforceable, as in all other cases, it needs to be subject to the dispute settlement mechanism.

Proposal:

This provision could be rearranged to read as follows:

~~*Decide 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*~~

Least-developed countries are not required to implement or comply with obligations and commitments that they deem to be inconsistent with their development, financial or trade needs, or their administrative and institutional capabilities. During the accession process, WTO Members cannot call on LDCs to assume obligations or commitments that go beyond what is applicable to LDC Members. Both instances shall be subject to regular review. The least-developed countries shall have additional time to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organisation.



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