



## **THE WTO'S SPECIAL AND DIFFERENTIAL TREATMENT NEGOTIATIONS (PARAGRAPH 44)**

Paragraph 44 of the 2001 Doha Ministerial Declaration mandates the 'strengthening' of Special and Differential Treatment (S&D) provisions in the WTO Agreement, and making them 'more precise, effective and operational'. This Note tracks the evolution of these negotiations from the start of the Doha Round in 2001 until the Nairobi Ministerial in December 2015.

After the 2013 Bali Ministerial Conference, developing countries led in particular by the Africa Group, in coordination with other developing countries, started a process in which they identified the most relevant S&D provisions. Consequently, the G-90 (Africa Group; Least Developed Countries; and the ACP - African, Caribbean and Pacific countries) submitted a package of 25 proposals to the Committee on Trade and Development in Special Session (CTD-SS) with a view to achieving an outcome on the Doha Declaration's paragraph 44 in the 2015 Nairobi Ministerial Conference.

Despite immense efforts by the G90, no outcome was achieved in Nairobi as what was offered by developed countries was not meaningful. The S&D negotiations from the Doha mandate remains pending. This Note highlights certain G90 S&D proposals that can support industrialization and developing countries' on-going regional integration efforts.

Moving forward, it is imperative that developing countries continue, as in the past, to push strongly for meaningful outcomes on paragraph 44 of the Doha Ministerial Declaration. A major difficulty is that there is a huge gap between what developed countries have so far been willing to offer (often a reiteration of rights already provided for in the agreements or in some cases even a retraction of existing rights) and outcomes that would be meaningful.

What would constitute meaningful outcomes in these negotiations? The mandate in paragraph 44 itself - making the existing S&D provisions 'more precise, effective and operational' provides the basis to judge whether the outcomes of the negotiations are satisfactory or not. The outcome of these negotiations should be WTO rules that give space for economic actors to grow local production capacities, thereby energising local, domestic, and regional markets and economies, and improving the quality of employment and living standards.

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## **A. INTRODUCTION - THE CONCEPT OF SPECIAL AND DIFFERENTIAL TREATMENT**

After the end of the Second World War the main trading nations of that time wanted to create an International Trade Organisation (ITO). The effort was stillborn and, as a second best to a new international institution, the General Agreement on Tariffs and Trade (GATT) was concluded in 1947 by 11 industrialised and 12 developing countries (most of them were either not yet independent or had only just gained independence).<sup>1</sup> Already in the negotiations for an ITO there were doubts that all countries could be treated equally in international trade, namely that tariff reductions and other concessions offered by a country should always be reciprocated by the negotiating partner country. Brazil, supported by other developing countries, thought that the central aim of a global trade organization should be to “encourage and promote the industrial and economic development of member countries, particularly of those whose development is less advanced”<sup>2</sup>.

The original GATT does not mention any exception to the basic rule of reciprocity nor other ways to treat developing countries “especially and differentially”.<sup>3</sup> The call for special and differential treatment (S&D) became stronger after the accession of a number of newly independent and often small developing countries in the late 1950s and the early 1960s. It was quite obvious that they could not compete in international trade with industrial powerhouses. Non-reciprocity is described for the first time in Part IV of GATT, introduced in 1965: “The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.” (Article XXXVI.8 of GATT)

Since 1965, other forms of SDT have also become part of global trade policy. For instance, the 1979 Enabling Clause Tariff allows the granting of preferences by developed countries to developing countries (which otherwise would be a violation of the MFN principle). The Uruguay Round agreement contains a wide variety of different types of S&D in order to appease developing countries. In the Uruguay Round, developing countries had to accept all agreements including the plurilateral agreements, the ‘Codes’ that they were formerly not part of. Consequently, some provisions in GATT/WTO agreements allow for postponing a developing country’s trade commitments; in some cases WTO notification obligations have been simplified. (Limited) exceptions are possible to the protection of intellectual property rights and other obligations. Low-income countries can continue export subsidies for non-agricultural goods. Positive efforts by developed members are called for to take into account the interests of developing countries and to provide technical assistance.

The WTO Secretariat distinguishes six (6) types of S&D provisions:<sup>4</sup>

1. Provisions aimed at increasing the trade opportunities of developing country Members;
2. Provisions under which WTO Members should safeguard the interests of developing country Members;
3. Flexibility of commitments, of action, and use of policy instruments;

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<sup>1</sup> The developing countries are Brazil, Burma, Ceylon (Sri Lanka), Chile, China, Cuba, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe), Syria and South Africa. In the literature on SDT, most authors mention eleven developing countries, as South-Africa was counted as developed.

<sup>2</sup> "Developing Countries in the ITO and GATT Negotiations." BWPI Working Paper 95, <http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9509.pdf>

<sup>3</sup> The term itself was derived from the 1973 Tokyo Round Declaration which recognized that differential measures should be applied to developing countries, where feasible, in ways which would provide special and more favourable treatment to them in trade negotiations.

<sup>4</sup> See WT/COMTD/W/196 of 14 June 2013. The WTO secretariat presents provisions related to LDCs as a separate category. However, each LDC-specific S&D provision can also be classified in any of the 5 other categories.



4. Transitional time periods;
5. Technical assistance;
6. Provisions relating to LDC Members.

This categorization is not mutually exclusive. For instance, provisions relating to LDCs (no. 6) can also be categorized under any of the other five categories.

The WTO Secretariat puts the number of S&D provisions in the multilateral WTO Agreements at 129. It also identifies 16 Ministerial, General Council and other relevant decisions as containing (or being) S&D provisions. The actual number of S&D provisions varies according to the method of counting; if one excludes preambular language and takes into account that some provisions are spread out over various paragraphs, the number would be closer to 100.

The WTO secretariat occasionally furnishes a report on S&D provisions that also provides indicative information about the implementation, operation and utilization of S&D provisions – the latest one is contained in WTO document WT/COMTD/W/196 of 14 June 2013 ('Special and Differential Treatment Provisions in WTO Agreements and Decisions'). These reports are not provided on a regular basis. In June 2014, Ecuador proposed that the WTO Secretariat regularly updates this report, at least once a year (WT/COMTD/W/204).<sup>5</sup> The Committee on Trade and Development (CTD) has not yet taken a decision on this proposal.

#### *Special treatment for developed countries*

Developed countries have also benefited from exemptions to general trade rules, sometimes at the expense of developing countries. An early example was aid to reconstruct post-war Europe.<sup>6</sup> An ongoing and much more worrisome case is that of agriculture and textiles – typically highly protected in industrialized countries – were practically excluded from trade liberalisation until the Uruguay Round, which entered into force in 1995. Even then, it is arguable that no real cuts were undertaken in the Uruguay Round in agriculture by developed countries (hence Article 20 of the Agreement on Agriculture on the continuation of the reform process). In fact, a major area of very concrete 'special treatment' provided to developed countries was in the Uruguay Round's Agreement on Agriculture. Many developed countries were given large bound Aggregate Measures of Supports (AMS – also known as the 'trade-distorting domestic supports) whilst most developing countries, as they did not provide those support at the time (in part due to structural adjustment conditions) bound their AMS at zero and today, can only provide AMS supports limited by their 'de minimis' caps. This is just one area. There were other areas in agriculture such that even if the Doha Round would have been concluded as per the final draft negotiation text ('Rev.4'), tariff peaks and tariff escalation in agriculture will only in part have been removed; high rates of effective protection through tariffs and subsidies would have remained in a number of developed countries in sectors that are important for developing countries. Hoekman, Michalopoulos and Winters (2003) argue rightly that more reciprocity in these areas will bring sizable advantages to developing countries.<sup>7</sup>

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<sup>5</sup> See the minutes of CTD meeting of 7 July 2014 for a discussion on Ecuador's proposal, WTO document WT/COMTD/M/91.

<sup>6</sup> For instance, Article XIV GATT ('Exceptions to the Rule of Non-discrimination') allows quantitative restrictions for balance of payments purposes in an undetermined post-war transition period, thereby deviating from Article XII. The major Western European countries agreed in 1950 to gradually eliminate quantitative restrictions between themselves, while discriminating against hard-currency countries such as the US.

<sup>7</sup> Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries. World Bank Policy Research Working Paper 2388,



*Focus of this paper: the paragraph 44 Doha mandate on S&D*

The rest of this paper is about the mandate in the Doha Ministerial Declaration (para 44) of 'strengthening' the S&D provisions in the WTO Agreement, and making them 'more precise, effective and operational', and the evolution of these negotiations at the WTO particularly from 2001.

**B. SHORT HISTORY OF S&D NEGOTIATIONS BEFORE MC9**

Most S&D provisions - many of them inserted in the system through the Uruguay Round - are in 'best endeavour' terms and are not legally binding. As such, they do not confer tangible benefits to developing countries. At the same time, by the year 2000 they had to start fully implementing several WTO Agreements, as the transition periods for developing countries came to an end. The general sense was that developing countries got a raw deal at the Uruguay Round and that the multilateral trading system was tilted against them.

Even by the first WTO Ministerial Conference in Singapore, developing countries were already raising 'implementation issues' or rules in the Uruguay Round agreements where there was a lack of equity. By 2001, when a new multilateral trade round was eventually launched in Doha, developing countries pointed out many implementation-related issues and wanted better S&D provisions so that they would provide some real benefits.

Paragraph 44 of the Doha Ministerial Declaration reads as follows:

*We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). **We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.** In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.<sup>8</sup>*

Thus, a main outcome under paragraph 44 would be, after reviewing all "special differential treatment provisions" (S&D provisions), to strengthen those provisions and make them more precise, effective and operational.

The S&D issues, together with implementation issues, are key to the 'development' component of the Doha Development Round and were provided priority status in the Doha Ministerial Declaration (as seen from the dates provided). Unfortunately, the negotiations have been marginalised and attempts to finalise language have not led to outcomes that complied with the clear mandate provided in paragraph 44 of the Doha Declaration - 'making them more precise, effective and operational'.

In 2002 and early 2003, developing countries submitted 'Agreement-specific proposals' to the Committee on Trade in Development in Special Session (CTD-SS). The African Group was the most prolific proponent. The African Group submitted proposals on 61 S&D provisions, the LDC Group on 23 S&D provisions (most of them the same as the African Group proposal) . Other developing countries also submitted proposals. (See box below).

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[https://openknowledge.worldbank.org/bitstream/handle/10986/19819/multi\\_page.pdf](https://openknowledge.worldbank.org/bitstream/handle/10986/19819/multi_page.pdf)

<sup>8</sup> [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#special](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special)



After the Cancun Ministerial Conference of 2003 until 2015, few other formal S&D proposals were submitted by developing countries to the CTD-SS, as negotiations were still on-going on the original proposals and in some cases, revised proposals were made in other negotiation bodies on the same or similar issue.<sup>9</sup> In 2015, the broad G-90 developing country grouping submitted a package of proposals (see next Section).

### **S&D proposals submitted by developing countries to CTD-SS in 2002/2003**

#### **African Group**

- TN/CTD/W/3/Rev.2 (2002)
- TN/CTD/W/28 (Revision of W/3/Rev.2, February 2003)

#### **LDC Group**

- TN/CTD/W/4 and Add.1 (2002)

#### **Other developing countries/individual submissions**

- «Like Minded Group»/LMG - TN/CTD/W/1 & 2 (2002)
- Paraguay - TN/CTD/5 and Add.1, Add.2, W/15 (2002)
- India - TN/CTD/W/6 (2002)
- Thailand - TN/CTD/W/7 (2002)
- St. Lucia - TN/CTD/W/8 (2002)

#### *February 2003: 12 proposals agreed ad referendum*

In February 2003, the CTD-SS reached an in-principle agreement on a text for 11 S&D provisions (12 S&D proposals as Article XVIII:C attracted two different developing country proposals): “The Special Session recommends that the General Council take note of the recommendations on the Agreement-specific proposals contained in Annex III on which Members have agreed in principle, and decides to revert to the question of their adoption at a later date.”<sup>10</sup> These were not adopted as some Members were doubtful of the value of the compromise language.

#### *April-May 2003 - Listing and categorization of 88 S&D proposals*

In April 2003, the General Council Chairman numbered all S&D proposals submitted by Members to CTD-SS and proposed to categorize them in three categories. For around 35 ‘Category I’ proposals the GC Chairman considered a high likelihood of achieving an outcome. In fact, the first 12 Category I proposals were those already agreed to in February 2003. Around 40 ‘Category II proposals’ were forwarded to other WTO bodies (regular and negotiation) and the Chairman left aside around 15 ‘Category III’ saying that redrafting of these texts was necessary.<sup>11</sup>

#### *May-September 2003 – further negotiations in the run-up to 2003 Cancun Ministerial Conference*

The S&D negotiations continued and text relating to six additional provisions was agreed to between May and August 2003.<sup>12</sup> In the last few weeks before the Cancun Ministerial Conference texts on 10 more provisions were drafted by a very small group of 6 countries and included in Annex C of the draft Cancun Ministerial Text. This text is also known as ‘Annex C’ or ‘the Cancun 28 (S&D

<sup>9</sup> Two submissions were made between 2003 and 2015 by developing countries to the CTD-SS. In June 2007, Egypt commented on Canada’s proposal relating to Article 10.1 SPS, see (JOB(07)/99. In 2010, Cuba submitted a proposal on SPS and TBT, but it was not targeting a specific provision, see TN/CTD/W/32.

<sup>10</sup> See WTO document TN/CTD/7 of 10 February 2003 and its Annex III.

<sup>11</sup> The General Council Chairman’s proposal GC Chairman’s proposal on an approach for S&D is documented in WTO document JOB(03)/68 of 7 April 2003. The collection of 88 S&D proposals is not contained in a WTO-referenced document but in a fax dated 5 May 2003. It can be found at:

<http://www.ictsd.org/downloads/2008/08/latest-sdt-proposals.pdf>

<sup>12</sup> WTO document JOB(03)/161 of 19 August 2003



proposals). Annex C primarily contained language on Category I proposals, with the exception of Article 70.9 TRIPS (which was categorized as Category II). It was not adopted as the Cancun Ministerial did not succeed, i.e. no outcome documents were adopted at all.

#### *2005 Hong Kong Ministerial Declaration: Adoption of 5 LDC-Specific proposals*

After 2003, some of the LDC-specific proposals were discussed. Subsequently, Annex F of the 2005 Hong Kong Ministerial Declaration titled 'Special and Differential Treatment' was adopted. Ministers declared that *"We take note of the work done on the Agreement-specific proposals, especially the five LDC proposals. We agree to adopt the decisions contained in Annex F to this document. However, we also recognize that substantial work still remains to be done. We commit ourselves to address the development interests and concerns of developing countries, especially the LDCs, in the multilateral trading system, and we recommit ourselves to complete the task we set ourselves at Doha"* (paragraph 36 of the 2005 Hong Kong Ministerial Declaration).

Later, in 2006, the African Group issued a paper reviewing Annex C and concluded that most of the items in the Annex C package did not have commercial value (TN/CTD/W/29, 9 June 2006).

#### *The period between MC8 and MC9 (2011-2013)*

Between 2006 and 2010 there was little movement on S&D. At the Eight Ministerial Conference, there was no Ministerial outcome document, but a Chairman statement with two parts – a consensus part, 'Elements for political guidance', and a part recording a summary of key issues raised in the discussions. With respect to S&D negotiations, the first part 'Elements for political guidance' stated that *"Ministers reaffirm the integrity of special and differential treatment provisions to the WTO agreements and their determination to fulfil the Doha mandate to review them with a view to strengthening them and making them more precise, effective and operational. Ministers agree to expedite work towards finalizing the Monitoring Mechanism for special and differential treatment. They also agree to take stock of the 28 Agreement-specific proposals in Annex C of the draft Cancún text with a view to formal adoption of those agreed."*<sup>13</sup>

Developing countries considered that the mandate of paragraph 44 as well as the MC8 political guidance did not restrict them to Annex C. Negotiations nevertheless took place on Annex C but some developed countries wanted to water the Annex C language down even further, and harvest fewer than 27. The Africa Group refused and this was not considered as a deliverable for the Bali Ministerial Conference (MC9).

Between MC8 and MC9 some negotiations also took place on proposals that remained in the CTD-SS and were not forwarded to other WTO bodies in 2003. No agreement was reached on proposals on these S&D provisions:<sup>14</sup>

- SPS Agreement – Article 10.3 (proposals no 24-25)
- Agreement on Import Licensing Procedures – Article 3.5) (28-30)
- SPS Agreement – Article 10.2 of the SPS Agreement (proposal 78).

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<sup>13</sup> WTO document WT/MIN(11)/11 of 17 December 2011, "Eighth Ministerial Conference – Chairman's Concluding Statement – Part I-Elements for Political Guidance

<sup>14</sup> The first two were 'Category I' proposals and the proposal on Article 10.2 SPS was a Category III proposal that was revamped and resubmitted to the CTD-SS by India, the original proponent.



### **C. G-90 TAKES THE S&D NEGOTIATIONS FORWARD AFTER MC9**

After the Bali Ministerial Conference, in 2014 and 2015, developing countries started to consider next steps on the S&D negotiations. Initiated by the Africa Group, the focal points of the G90 (African Group, ACP and LDC Groups) and other interested developing country delegations started a process. They identified the most relevant S&D provisions and considered ways for “making them more precise, effective and operational” (as per paragraph 44 of the Doha Ministerial Declaration).

Consequently, in July 2015, the G-90 submitted a package of 25 proposals to the Committee on Trade and Development in Special Session (CTD-SS). This was a modest package in terms of an outcome on paragraph 44 of the Doha Ministerial Declaration given that there were originally 88 proposals (JOB/DEV/29; JOB/TNC/51).

#### **Summary of the G-90’s 25 S&D proposals**

**Proposals no 1 to 3** deal with Article XVIII (18) GATT (Governmental Assistance to Economic Development). According to the Article’s preamble, developing countries should enjoy ‘additional facilities’ to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for infant industries and (b) apply quantitative restrictions for balance of payments purposes. However, procedural requirements under Article XVIII replicate to a large extent those provided for under Article XII and XXVIII GATT. Therefore, in reality Article XVIII does not provide any ‘additional facilities’ to developing countries, compared to what is available to all the WTO Members under GATT Articles XXVIII (Modification of Schedules) and XII (Restrictions to Safeguard the Balance of Payments)’. Since the 1999 Seattle Ministerial, developing countries had called for a complete review of Article XVIII.

- a. **Proposal no 1** is on Article XVIII (18), Sections A and C. In order to protect infant industries as defined in Article XVIII, countries can under certain conditions modify or withdraw concessions. However, a very onerous and burdensome procedure needs to be followed (e.g. offer of compensation) and other Members can retaliate. According to WTO secretariat, Section A has never been utilised since the inception of the WTO. Three developing countries sought recourse to Article XVIII:C, but in practice they could not operationalize or reap any results from invoking this provision. Hence the proposal provides for a straightforward process, allowing for temporary modification of schedules under Section A or deviation from WTO commitments for an initial period under Section C, while suspending the compensation and retaliation requirements. The proposals also provide for a broader definition of infant industry that also includes industries battered by climate change or hostilities.
- b. **Proposal no 2 and 3** concern Article XVIII Section B and the Uruguay Round Understanding on Balance of Payment provisions. The need for Balance of Payment measures will remain pertinent due to instabilities in the global monetary system. However, after the WTO’s inception, the development dimension under Article XVIII: Section B has been increasingly side-lined. Proposal no.2 provides for better guidelines for determining the adequacy of Member’s reserves within the context of developing countries’ economic development programmes. It also proposes a suspension of the right to retaliate against countries that use this Article. Proposal no. 3 promotes the use of simplified procedures for new Balance of Payment measures as well as those under regular review by the Balance of Payments Committee.





**Proposal no. 4** is on Article XXVIII (Modification of Schedules) and its Understanding. The proposal has three elements. One, clarifying the meaning of substantial interest to include countries whose share of export is significant to the Member wishing to renegotiate its commitments. This will benefit smaller countries which currently do not have a seat at the negotiation table when larger countries opt for modification or withdrawal of commitments under Article XXVIII GATT. Two, if the proposed modification or withdrawal adversely affects the exports of LDCs, LDCs are to be exempted. This is perfectly possible within the current format of the Schedules of Members. Three, in forming or joining a customs union, some developing countries might breach their WTO bound rates for certain tariff lines. The proposal provides a solution allowing these Members to withdraw or modify their tariff commitments in accordance with the common external tariff maintained by the customs union.

**Proposal no. 5** concerns Article 15.1 (Special and Differential Treatment) of the Agreement on Agriculture is about binding special and differential treatment in favour of developing countries into Members' Schedules. It proposes that developed country Members are to bind all their LDC preferences for agricultural products, with a goal of 100% DFQF in agriculture. This can be possible within the structure of the current Schedules.

**Proposals no. 6 and 7** deal with Article 10 (Special and Differential Treatment) of the Sanitary and Phytosanitary (SPS) Agreement. Developing countries and LDCs are regularly confronted with changing and stringent SPS measures, which do not take into account their interests. The Article itself is broad and lacks specification. Therefore, it is proposed that developed countries are to notify all proposed SPS measures, not only a subset of SPS measures. Currently, only SPS measures that are not substantially the same as international standards and have a significant effect on trade of other Members are to be notified. This will help developing countries track and understand the implications of the SPS regulatory interventions by developed countries.

In addition, a comment period of at least 90 days is proposed, and longer for LDCs, if requested. Upon request, developed countries are to consult at an early stage with developing countries, prior to adoption of the measure, not after the fact as often is the case. Where possible, WTO Members are to provide a longer time frame for compliance for developing and least developed countries, at least 12 months.

A stronger legal basis is laid for the provision of technical and financial assistance by developed countries in cases where substantial investments are required to comply with the SPS measures, building on and strengthening Article 9.2 of the SPS Agreement. In the case of SPS measures adopted in urgent circumstances, the market share of developing and LDCs should be maintained.

Finally, importing developed countries are requested not to ban the importation and marketing of products from developing countries based on the rejection of shipments from one or a limited number of suppliers.

**Proposals no. 8, 9 as well as 17** deal with the Agreement on Trade-Related Investment Measures (TRIMs). Developing countries have had longstanding concerns with the implications of disciplines of the TRIMs Agreements on their policy space to use industrial policy tools used before by developed countries in their development, such as performance requirements that were widely deployed by developed economies at some time or another.<sup>15</sup> LDCs had proposed exemption from the entire

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<sup>15</sup> See for example the two-part joint WTO-UNCTAD study submitted to the WTO Committee on Trade-Related Investment Measures, WTO document G/C/W/307 of 1 October 2001, 'Part I: Scope and Definition; Provisions in International Agreements and WTO document' and G/C/W/307/Add.1 of 8



TRIMS Agreement (TN/CTD/W/4). This culminated in the language in Annex F in the Hong Kong Declaration giving LDCs a limited flexibility that will expire in 2020. The proposal provides a solution that will enable developing countries to introduce new TRIMs in order to promote domestic manufacturing capabilities, stimulate the transfer of technology, promote domestic competition and correct restrictive business practices, among other things. This is associated with notification requirements to the Council for Trade in Goods. **Proposal no. 17** proposes to extend the flexibilities of Annex F of the Hong Kong Ministerial Decision to LDCs until they cease to be least-developed country Members.

**Proposals 10 and 11** concern the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and provides for a position that is consistent with the LDCs' demand in the TRIPS Council. It proposes that LDCs be exempted from the TRIPS Agreement until they cease to be LDCs. Furthermore, the definition of an 'LDC-RTA' under the paragraph 6 system is clarified.

Strong protection of intellectual property (IP) rights cannot boost innovation if the required skills, capital and market prospects for innovative production do not exist, as is often the case in Africa. In this context, IP protection may constrain the duplicative imitation of foreign technologies that was crucial for the technological catch-up of today's advanced countries. This is why TRIPS flexibilities are important since they allow LDCs to establish IP policies and laws that are appropriate to their level of development. Using these flexibilities can be helpful in building the competitiveness needed to integrate into GVCs.

As an example, the ASEAN countries rarely sign external agreements that are stricter than their multilateral IP obligations, for example, and eligible members have also exploited flexibilities offered by the international IP system. This has helped to transform ASEAN into an innovative and competitive bloc. For Africa, the Continental FTA agreement provides an opportunity for the continent to set common IP rules and use flexibilities based on a common approach.

**Proposals 12 and 13** concern the GATS. Proposal 12 concerns the General Agreement on Trade in Services (GATS) Article IV (Increasing Participation of Developing Countries) and is about increasing participation of developing countries in services trade. It focuses on operationalizing Article IV.1 GATS through providing for minimum quotas for services and service suppliers from developing countries and LDCs and for the elimination of horizontal limitations maintained by developed country Members on movement of natural persons from developing countries and LDCs.

For LDCs specifically, the proposal provides measures to boost LDC services exports, including removing limitations on movement of natural persons as well as national treatment barriers which are currently not covered well by the LDC Services Waiver. It also includes a proposal to adopt concrete domestic measures for facilitating transfer of technology. Such measures to boost LDC services' exports are to be taken by developed countries and developing countries that are in a position to do so. (It should be noted that despite many developed and developing countries having notified their preferential access to LDCs' services suppliers in 2015-2016, it has been difficult to concretely utilise or operationalise this access).<sup>16</sup>

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February 2002 'Part II: Evidence on the Use, the Policy Objectives, and the Impact of Trade-Related Investment Measures and Other Performance Requirements'

<sup>16</sup>The notifications can be found at

[10](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((%40Symbol%3d+s%2fc%2fn%2f*+)+and+(%40Title%3d+preferential+treatment+to+services))+and+((%40Title%3d+least+developed+countries)+or+(</a></p></div><div data-bbox=)



**Proposal 13** clarifies Article V.3 (Economic Integration) of GATS, which is currently not precise. The proposal provides that services agreements do not necessarily need to have to cover substantially all services sectors when developing countries are a party to such agreements.

**Proposal 14 and 16** concern Article 27 (Special and Differential Treatment of Developing Country Members) of the Agreement on Subsidies and Countervailing Measures. Proposal no. 14 builds on paragraph 10.2 of the 2001 Doha Implementation Decision which stipulates that during the Doha Round, WTO Members shall exercise due restraint with respect to challenging subsidies provided by developing countries, in order to achieve development goals. The proposal provides for continuing such 'due restraint' also after the Doha negotiations, through making these subsidies non-actionable.

Proposal no. 16 creates space for developing countries to use subsidies based on local content which are currently prohibited.

**Proposal 15** concerns Article 12.3 (Special and Differential Treatment of Developing Country Members) of the Agreement on Technical Barriers to Trade (TBT), which is similar to Article 10.2 SPS. The proposal applies the same approaches proposed with respect to SPS measures as mentioned earlier, to technical regulations, standards and conformity assessment procedures.

**Proposal 18** is on the Customs Valuation Agreement. One important issue that plagues developing countries is import under-invoicing, which deprives governments of money for development expenditures. The proposal provides that LDCs shall be allowed to use minimum or reference values in cases of insufficient or inadequate technical and financial assistance, lack of customs cooperation or lack of access to international pricing data. The proposal also provides that LDCs shall not be required to implement provisions from this agreement until implementation capacity has been acquired, a principle from the Trade Facilitation Agreement.

**Proposal 19** deals with the Agreement on Safeguards, Article 9 (Developing Country Members). LDCs are generally not users of safeguard measures but might be hit by safeguard measures applied by others. Therefore, the proposal provides that when a WTO Member applies a safeguard measure, this safeguard measure shall not be applied to an LDC whose import share into that country is 10 per cent or less. The percentage for developing countries is 3 per cent. Developed countries are to provide a list with Members excluded from safeguard measures. The other elements of the proposal broaden, to a very limited extent, the flexibility of developing countries in applying safeguards, with a view to promoting industrialization.<sup>17</sup>

**Proposal 20** is about paragraph 6 of Article XXXVI (Trade and Development - Principles and Objectives) of GATT and the Declaration on the Contribution of the WTO to Achieving Coherence in Global Economic Policy. Article XXXVI.6 addresses international lending agencies and the relationship between trade and financial assistance to development. The proposal provides, among other elements, that WTO Members coordinate their work to ensure that LDCs are not subjected to conditionalities on loans, grants and ODA that are inconsistent with their rights under the WTO

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%40Title%3d+least-developed+countries)))&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true

<sup>17</sup> The many conditions required to be fulfilled before a member can invoke a safeguard (e.g. providing proof of causal linkage between the import surge and injury) was not however adequately addressed in this proposal. These conditions have made it impossible for most developing countries to invoke safeguards under the Safeguard Agreement.



Agreements. LDCs are also not to be required to make concessions that are inconsistent with their needs or capacities.

One element within proposal 20 concerns special and differential treatment for developing countries with regard to the pace and extent of commitments that they may undertake in regional trade agreements involving developed countries.

**Proposal 21** concerns preference erosion. Paragraph 3 of the Decision on Measures in favour of LDCs states that ministers are to keep under review the specific needs of LDCs and continue to seek the adoption of positive measures to facilitate the expansion of trading opportunities of LDCs. MFN tariff liberalisation as foreseen in the Doha Round could lead to diminished trading opportunities of LDCs due to preference erosion. The proposal provides certain general solutions to this problem, mainly by requesting developed countries to provide compensatory and adjustment support.

**Proposal 22** is about the Differential and more Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (The Enabling Clause). At present it is unclear to what extent agreements on non-tariff measures between developing countries are covered by the Enabling Clause. Hence, the proposal provides a clarification. Furthermore, it provides that developed countries are to consult with LDCs to ensure that meaningful market access is obtained under the Generalised System of Preferences (GSP) and other non-reciprocal schemes for LDCs.

**Proposal 23** concerns joint action in the area of trade and development policies under Part IV of GATT (Trade and Development), addressing GATT Articles XXXVI (Principles and Objectives) and XXXVI.2b (Commitments). More specifically, it clarifies the type of collaboration needed in support of the objective of food security, and stresses the right to adequate food as an objective of current and future WTO negotiations. In the case of LDCs, it clarifies that LDCs can adjust their applied tariffs beyond the bound in order to safeguard this human right.

**Proposal 24** concerns state trading enterprises (STEs) which is regulated by GATT Article XVII and its Understanding. STEs fulfil a range of essential and vital functions in developing countries. The proposal clarifies that, in the case of developing countries, the “general principles of non-discriminatory treatment” as referred to in paragraph 1(a) of Article XVII only cover the MFN principle not the national treatment obligations. This would allow STEs to play a role in inter alia preventing consumer prices from exceeding certain limits, enabling the implementation of stabilization arrangements, among other public policy objectives.

**Proposal 25** concerns paragraph 10 of Article 4 of the Dispute Settlement Understanding (Consultations). It was proposed to give attention to the particular problems and interests of developing countries and LDCs before establishment of a panel as well as during panel proceedings.



## **Friends of Industrialization initiative – support from other developing countries**

In January 2015, the idea of a "Friends of Industrialization" initiative was informally suggested. It had two main objectives:

- (i) identify specific aspects of the WTO package in which a relaxation in favor of developing countries would allow them to recover industrial policy tools now banned or limited;
- (ii) suggest concrete proposals that could be tabled to recover these areas of public policy.

Four "priority areas" were identified:<sup>18</sup>

1. **"Effective" Reform of Article XVIII (Government Assistance to Economic Development):** In its current version, this Article allows, through a very intricate process and subject, in general to compensation, the possibility to depart from certain GATT rules for reasons of "imbalances in Balance of Payment" and for the "establishment" of a particular industry. Several proposals had been presented by different countries in the past, including India, to facilitate its procedures and relax its requirements. Overall those proposals revolve around expediting the procedure; excluding the IMF from the decisions; the method for calculating the adequacy of reserves; and the maximum period to maintain the restrictions.
2. **TRIMS Agreement:** This Agreement is one of the main problems for developing countries, e.g. Indonesia. The suggestion was made to take up again the previous initiative of Brazil and India to expand situations in which developing countries may deviate from TRIMs, in order to encourage domestic manufacturing capacity.<sup>19</sup>
3. **Agreement on Subsidies and Countervailing Measures (ASCM):** The ASCM is often used to question the industrial policies of the developing countries, particularly those involving subsidies tied to local content requirements. The possibility of obtaining flexibilities that apply to the use of subsidies contingent upon the use of domestic over imported could be explored.
4. **Special Safeguard for non-agricultural goods:** It was suggested that for developing countries a safeguard mechanism with more flexible requirements than those currently provided in Art. XIX of GATT/Safeguards Agreement could be explored, possibly inspired by the special safeguard for agricultural goods.

Although this process had evolved separately from the G-90 process, it is noteworthy that such an independent study on WTO rules and their impact on developing countries' policy space for industrial policy showed considerable overlap with the areas addressed by the G-90 package of proposals.

## **Results of the negotiations**

Upon submission, various meetings took place in the CTD-SS (often informal).

In November 2015, G-90 submitted a revised proposal (JOB/TNC/51/Rev.1). Prior to the Nairobi Ministerial Conference (MC10), G-90 proposed to harvest a selection of S&D proposals, and noted that this was only a step towards completing the mandate of paragraph 44 (WT/MIN(15)/W/31 of 7 December 2015).

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<sup>18</sup> Friends of Industrialization - Outline of a Potential Reform Agenda to Preserve and Strengthen Policy Space for Industrial Policy, CEI - Center for International Economy (Ministry of Foreign Affairs and Worship, Argentine Republic), January 2015 (not published).

<sup>19</sup> G/C/W/428; G/TRIMS/W/25 of 9 October 2002, Communication from Brazil and India



In the weekend preceding MC10, the CTD-SS Chair presented a text on her own responsibility, which 'should be considered to expire at the end of the Tenth Ministerial Conference'. According to the Chair, her text was an attempt 'to find middle ground on a number of proposals which could be harvested at this juncture.'

At MC10, G-90 expressed deep dissatisfaction with the Chair's text. Despite this, developed countries in particular, US, Japan and EU were attempting to make further annotations to that text. The G-90 proposed to continue S&D negotiations after MC10, based on paragraph 44. It was not adopted:<sup>20</sup>

*"With regard to special and differential treatment provisions of the WTO Agreements, we instruct the Committee on Trade and Development in Special Session to continue to negotiate on the basis of specific proposals found in JOB/TNC/51/Rev.1 and any other proposals from developing countries including LDCs and SVEs, pursuant to the mandate under paragraph 44 of the Doha Declaration, with a view to achieving agreement on all of proposals by 31 July 2016."*

During the negotiations, developed countries made the following key counterarguments:

- 1) The problem presented by developing countries does not exist. For instance, they asked for examples showing that countries could not use the provisions on the balance of payments, or proof that S&D provisions are inadequate, and/or questioned the existence of 'real problems'. Developing countries posited that they are capable of identifying problems - if developed countries are making proposals it is assumed that it would address a problem relevant for the proponent. Furthermore, the problems identified were supported by analysis and experiences of other developing countries. In the course of negotiations, they provided many examples, supported by evidence.
- 2) The Committee on Trade and Development (CTD) is not the right place to discuss certain S&D provisions, for instance in the area of TRIPS or SPS. Developing countries said among others that paragraph 44 provides the mandate to negotiate S&D provisions in the CTD-SS.
- 3) The S&D asked for is 'a step backwards.' They said that some S&D proposals are (tantamount to) derogations from commitments; and this would not help integration into the multilateral trading system, would violate fundamental principles of the WTO, undermine trade, and go against the spirit of the text of the Agreement. In particular, developed countries did not appreciate the contention that the TRIMS agreement was presented as an obstacle to development. Developing countries said among others that they are already integrated in world trade. In fact, that developing countries are even more integrated than developed countries into world trade when measured by common indicators such as trade as share of GDP. They explained that the essence of S&D provisions is to provide special and differential treatment for developing countries, in order to give room for the development of the economy which would in turn allow a better integration into the world economy.
- 4) Unwillingness to take on binding obligations. For instance, developed countries did not accept a binding prescription regarding technical assistance.
- 5) No preferential treatment to all developing countries. Many developed countries said repeatedly that they did not want to provide additional flexibilities for developing countries other than LDCs.

Overall, developed countries were unwilling to engage in various proposals that are considered important for industrialisation; and where they engaged, the language that emerged had very little economic utility. In some cases suggested language detracted from the existing rights of developing countries and LDCs!<sup>21</sup>

<sup>20</sup> WT/MIN(15)/W/44 of 19 December 2015, Draft Ministerial Decision on Special and Differential Treatment Proposals - Preamble and future work, Submission of the G90

<sup>21</sup> See South Centre Informal Note 'WTO MC10: Negotiations on Special and Differential Treatment (S&D)'



#### **D. 'IN PARTICULAR LDCs AND SVES' - IMPLICATIONS FOR DEVELOPING COUNTRIES INCLUDING AFRICA**

The WTO mainly differentiates between developed and developing countries. LDCs are also recognized as a separate group within developing countries requiring additional flexibilities. However, developed countries have been saying that they expect 'emerging developing countries' to make more commitments.

In the S&D negotiations, developed countries have questioned whether all developing countries should be beneficiaries of S&D. One of the consequences of this pressure was the reduction of scope of the group of beneficiaries in the revised G-90 proposal of November 2015 (JOB/TNC/51/Rev.1). Instead of 'developing countries' or the beneficiary group as defined by the original S&D provision, it was in most cases proposed that the S&D provision in question should apply to 'developing countries, in particular, least developed country Members and small and vulnerable economies (SVEs)'.

#### **Key Issues**

This issue of which countries would be the beneficiaries of Special and Differential Treatment flexibilities has many implications, some of which go even beyond the WTO. The following are some key points in this debate:

- 1) Even though LDCs and SVEs are without doubt deserving of flexibilities and special treatment, statistics show that people in other developing countries also do face enormous difficulties. According to the Oxford Poverty and Human Development Initiative (2015), of the top 5 countries with the largest number of poor in the world, only 1 is an LDC (Bangladesh). The others are non-LDCs (India, China, Nigeria, Pakistan). LDCs make up in total 30% of the world's poor. Non-LDCs make up 70% of the world's poor (see Table below). Many developing countries are thus struggling with the same development issues as LDCs.

The Bellagio Initiative on "Poverty in Middle-Income Countries", in November 2011, referring to this 70% of the world's poor that live in middle-income countries, called this the 'new bottom billion'.<sup>22</sup>

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<sup>22</sup> [www.cbm.org/article/downloads/82788/Summary\\_Poverty\\_in\\_MIC.pdf](http://www.cbm.org/article/downloads/82788/Summary_Poverty_in_MIC.pdf)



**Table: Where do the poor live? (2015)**

Rank	Country	Number of MPI poor people (in thousands)	% of World Poor	LDC
1	India	647,992	40.10	N
2	China	169,619	10.50	N
3	Nigeria	85,042	5.26	N
4	Bangladesh	77,494	4.80	Y
5	Pakistan	76,488	4.73	N
6	Ethiopia	76,063	4.71	Y
7	Congo, Democratic Republic of the	46,700	2.89	Y
8	Indonesia	37,223	2.30	N
9	Tanzania, United Republic of	29,484	1.82	Y
10	Uganda	23,764	1.47	Y
11	Kenya	19,559	1.21	N
12	Afghanistan	18,788	1.16	Y
13	Mozambique	16,681	1.03	Y
14	Niger	14,188	0.88	Y
15	Madagascar	14,097	0.87	Y
	World's Poor	1,615,903		
	LDCs	472,678	29.3	
	Non-LDCs	1,143,226	70.7	

Source: Oxford Poverty and Human Development Initiative (2015) Global Multidimensional Poverty Index Databank. OPHI, University of Oxford

- 2) Tools to support non-LDC developing countries to industrialise are also important for LDCs, since when living standards in these non-LDCs rise, they become the markets which can absorb their neighbouring LDCs' exports, or these non-LDCs can invest and support the growth of production capacities in neighbouring LDCs. (This is after all an important part of the original concept of developmental regional integration).
- 3) An emphasis on special treatment for LDCs and Small and Vulnerable Economies (SVEs) raises the question of which developing countries are part of the SVE grouping. There is currently no SVE definition (see below). There will be developing countries that will be caught in the place of not being an SVE or LDC when they too would need the same flexibilities (e.g. non-LDCs/ SVEs in Africa).
- 4) Focusing flexibilities especially for LDCs and SVEs has implications for developing countries' regional integration. What happens to developing countries' customs unions or the African Continental FTA when some LDCs and SVEs have more flexibilities for instance in their tariff levels (e.g. for reasons of infant industry), but this same flexibility cannot be provided to the non-LDC/ non-SVE? In Africa, differential treatment for African LDCs and non-LDCs will pose problems for the African Continental Customs Union (CCU) which is envisaged by the Abuja Treaty to be established by 2019. The CCU will involve all African economies imposing the same Common External Tariffs (CET) on their imports. The domestic and regional markets are already playing a critical role for Africa's producers and for Africa's industrialisation since it is to these markets that processed and manufactured products made in Africa are mainly consumed (as opposed to primary commodities exported to other markets).





**Who is an SVE?**

There is not one uniform criteria or agreed upon group of countries at the WTO that are called Small and Vulnerable Economies (SVEs). The WTO, however, has a Work Programme on Small Economies which applies to 32 countries. Once again, taking the case of Africa, this group excludes most African non-LDCs. Of the non-LDCs, only Seychelles, Mauritius and Cape Verde are small economies.

**African countries that are not an LDC and not a ‘small economy’ under the Work Programme on Small Economies**

Botswana	Gabon	Nigeria
Cameroon	Ghana	South Africa
Congo	Kenya	Swaziland
Côte d’Ivoire	Morocco	Tunisia
Egypt	Namibia	Zimbabwe

In the Doha negotiations, the definition of SVEs was established separately for the Agriculture and the NAMA negotiations. There was no uniform list of SVE countries even between these two sets of negotiations. Even if the definition of SVE in the specific context of agriculture negotiations (as reflected in the draft negotiation text of 2008, TN/AG/W/4/Rev.4, more commonly known as ‘Rev.4’) would be followed, some African countries would be excluded. In the Rev.4, the Republic of Congo; Cote d’Ivoire and Nigeria were excluded from the SVE category but were given SVE ‘treatment’ in the area of market access (see footnote 11 of Rev.4) as they did not comply strictly with the Rev.4 SVE criteria.

Most likely therefore, the definition of an SVE would have to be negotiated, and the outcome is uncertain for many non-LDC developing countries. For Africa, recognition of all or most African countries as ‘SVE’ across all WTO provisions is far from certain.

The approach of reducing the scope of beneficiaries of S&D provisions to LDCs and SVEs could therefore pose problems. Given that there is no clearly defined SVE category and the ‘small economy’ category does not provide good coverage, some countries run the risk of having reduced S&D coverage in the future.

***Issues for Customs Unions***

In the context of regional integration, having differences in S&D treatment could also potentially cause complications for the functioning of a customs union. For example, if one Member can have infant industry protection, but another cannot, this could either undermine the effectiveness of the infant industry protection taken or, if border measures are then used within the customs union, it could undermine the customs union arrangement. These challenges are therefore a concern for the current African regional integration project.

**Past Approaches**

This issue of S&D treatment for different countries is not an easy one. In a few exceptional cases in past GATT/WTO Agreements, more flexibilities have been provided to some developing countries over others (aside from the category of LDCs).



*Article XVIII (Governmental Assistance to Economic Development)*

The beneficiary of the Infant Industry and Balance of Payments provisions under GATT Article XVIII, are Members, 'the economy of which can only support low standards of living and is in the early stages of development.'

*Agreement on Subsidies and Countervailing Measures (on export subsidies – in goods)*

LDCs and developing countries with a GNP per capita of USD 1000 or less, measured in constant 1990 dollars covering the three most recent years for which data are available, can provide export subsidies.

*GATT Art XXXVI.6 (Trade and Development – Principles and Objectives)*

Para 6 recognises developing countries facing 'chronic deficiency in the export proceeds and other foreign exchange earnings'. It says that there is need of close and continuing collaboration between Members and lending agencies 'so that they can contribute most effectively to alleviating the burdens' of these countries.

*Agriculture: NFIDC and NFIDC Treatment*

Since the Uruguay Round, the concept of Net Food Importing Developing Country (NFIDC) has been recognized in the WTO, in the area of agriculture. WTO Members can ask to be recognized as an NFIDC by providing data to the Committee on Agriculture. At MC10, NFIDCs were accorded a longer transition period to phase out agricultural export subsidies (until 2030).

The NFIDC Group covers most African WTO Members with the exception of: Cameroon, Cape Verde, Ghana, Nigeria, Republic of the Congo, Zimbabwe, Seychelles, South Africa.

In the draft agriculture negotiation text (Rev.4), NFIDCs are not obliged to schedule (and to be bound by) an overall cap on trade-distorting subsidies (OTDS). Through footnote 2 to the Rev.4 modalities text other African countries are added: "Cameroon, Congo (Brazzaville), Ghana, Nigeria and Swaziland shall have access also to this provision." (In 2008, Cape Verde was just in the process of graduation from LDC status, Seychelles was not yet a WTO Member).

*TRIPS Paragraph 6 System – Exports to or within a Regional Trade Agreement (RTA) where At least Half of the Members are LDCs*

Under the 'Paragraph 6 system', medicine producers can export medicines produced under compulsory medicine to an RTA area when the majority of RTA parties are LDCs, instead of only to a single WTO Member (the general rule under Article 31(f) of the TRIPS Agreement is that products manufactured under compulsory license are not to be exported).



## **E. S&D PROPOSALS THAT SUPPORT DEVELOPING COUNTRIES' INDUSTRIALIZATION AND REGIONAL INTEGRATION AGENDAS**

The United Nations Economic Commission for Africa (UNECA)'s Economic Report on Africa 2015 highlighted the following key recommendations to support Africa's 'smart industrialisation'. Similar recommendations are also applicable to other developing countries. They include:

- Rethink trade policy as a means to promote industrial development and value-addition in a context where successive bilateral, regional and multilateral trade negotiations have reduced and constrained the use of traditional trade policy instruments that were once used by developed countries to promote industrialization.
- Articulate smart choices within existing trade agreements (audit and take advantage of embedded flexibilities) and stem the trend in policy-space erosion when negotiating any new form of trade and investment agreements, by insisting on the need to use such policy instruments to promote industrialization of their economies.
- Smartly sequence trade policy reforms, to ensure that deeper and bolder regional integration takes place before the gradual opening-up of African economies to the rest of the world, so that African countries are in a better position to compete internationally.
- Design trade policies that promote dynamic efficiency of matured firms which depend on international markets for inputs, at the same time as promoting efficiency of infant industries through providing a temporary shield from fierce international competition. In the case of infant industries, relative tariff protection combined with different activities directed at developing competitiveness of firms in the industry must be carefully designed and implemented to address the source of externalities. Targets must be set and respected. However, in the case of dynamic industries smart trade policies may actually imply reduced protection on imported inputs.
- Strengthen the links among national development strategies, industrial policy and trade policy. For most African countries, in order for trade policy to foster industrialization, industrial development must be the core objective of trade policy.

This Section highlights some of the G-90 proposals that are supportive of developing countries' ambitions for industrialisation and increased regional integration.

### **TRIMs Agreement (no. 8, 9 and 16)**

Flexibilities in the TRIMS Agreement would support the industrialisation efforts of all developing countries. For Africa, the Economic Report on Africa 2013 notes that '*local content policies have probably been the single most important policy driver of linkages from the commodity sector*'.<sup>23</sup> It argues that (East) Asian countries boosted their industrialisation through '*many measures that are prohibited, or at least discouraged, in today's multilateral trade arena. These include tariff protection and performance requirements, such as trade balancing and local content (Chang, 2002)*'.<sup>24</sup> The report concludes that for industrial policy to be effective and for African countries to enter into Global Value Chains, there is a need for policy space.<sup>25</sup>

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<sup>23</sup> United Nations Economic Commission for Africa, Economic Report on Africa (ERA) 2013 - Making the Most of Africa's Commodities: Industrializing for Growth, Jobs and Economic Transformation, <http://www.uneca.org/publications/economic-report-africa-2013>

<sup>24</sup> Ibid, page 94

<sup>25</sup> Ibid, page 7



Economic Report on Africa 2015 also reiterates that policy space for industrialisation has been narrowed: *'African countries are being increasingly constrained in deploying trade policy. Instruments that were once legal and used by virtually all developed countries are being outlawed under WTO.'*<sup>26</sup>

Developing countries struggling to industrialise should therefore attach importance to proposals that expand the policy space to implement local content policies.

### **Subsidies (no.14 and no. 16)**

Production subsidies are a potent trade policy instrument to support industrialisation and structural change. This was highlighted in UNECA's Economic Report on Africa 2015 – the Report considered that production subsidies are *'the most appropriate instrument for supporting domestic production of industrial raw materials and intermediate inputs.'*<sup>27</sup>

Proposals 14 and 16 concern Article 27 of the Agreement on Subsidies and Countervailing Measures. Proposal no. 14 builds on paragraph 10.2 of the 2001 Doha Implementation Decision on due restraint with respect to challenging subsidies provided by developing countries in order to achieve development goals during the Doha Round. The proposal provides for continuing such 'due restraint' after the Doha negotiations, through making these subsidies non-actionable.

Proposal no. 16 creates space for developing countries to use subsidies based on local content. This would complement the flexibilities requested for under the TRIMS.

### **100% Duty-free and Quota-free Market Access (DFQF) for agricultural exports from LDCs (no. 5)**

Various developing countries have advanced their economies on the basis of their agricultural sectors. Rapid industrialization at the expense of agriculture might actually slow down economic growth and increase levels of poverty.<sup>28</sup> Agro-processing is key to adding value to agricultural products and creating linkages between agriculture and industry. Growth of the agricultural sector in ways that contribute significantly to increasing employment and output can have significant poverty reduction impacts.

Market access for agricultural products remains an issue for LDCs for certain markets (e.g. United States). Importantly, without completion of the Doha Round, the only multilaterally binding DFQF commitment is the one from the 2005 Hong Kong Ministerial - developed countries and developing countries in a position to do so are to provide duty-free and quota-free access on 97% of all tariff lines.

An agreement to bring to 100% duty-free access in the area of agriculture would be a step forward in the area of DFQF. This is a modest proposal that had obtained the support of all LDCs prior to MC10.

<sup>26</sup> UNECA ERA 2015, page 88

<sup>27</sup> ERA 2015, 'Box 3.2: Protecting infant industries: import tariffs, import quotas and production subsidies', page 79

<sup>28</sup> See e.g. Agriculture and Economic Growth in Vietnam, Conference on Vietnam in 2001: Prospects for Economic and Social Progress, C. Peter Timmer, University of California, San Diego, <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=1D947D8208954B586F5273968DDF8DB1?doi=10.1.1.519.2626&rep=rep1&type=pdf>



### **SPS Agreement (no.6)**

For developing countries for which fish and agricultural products are a major share of current and future exports, SPS measures can constitute significant barriers for market access. The G-90 proposal in the area of SPS addresses this to some extent. (See earlier section for more details).

### **Article XXVIII - allowing changes in bound applied tariffs to accommodate CET of RECs (no. 4)**

Some African countries in regional economic communities (RECs) have a need for flexibility in modifying their bound tariff commitments, to enable and facilitate adjustment to their Common External Tariff. This seems to be particularly important for the Economic Community of West African States (ECOWAS), where the ECOWAS CET is higher on a number of products for several countries in the region.

The Article XXVIII route, as it is now, can be costly to use. Gabon which is part of the Economic Community of Central African States (CEMAC) region used Article XXVIII to adjust its tariff schedule but it had to reduce many bound tariffs in return. It was in a similar situation as several ECOWAS countries are in now - the CEMAC rate was higher than its WTO bound rate in various instances. However, the need for a special procedure also appears not too urgent as most West African Economic and Monetary Union (UEMOA) countries have applied a similar CET for years without encountering problems (as the ECOWAS CET is largely based on UEMOA CET).<sup>29</sup> Nonetheless, the ECOWAS situation differs a bit from Gabon as this problem extends now to several countries.

The challenges are compounded with the planned African Continental Customs Union referred to earlier by 2019 and all African economies would then impose the same Common External Tariff (CET) structure on their imports.

### **Article V.3 GATS (no. 13)**

Under Article V of GATS, regional services agreement should have 'substantial service coverage', in terms of number of sectors, volume of trade affected and modes of supply. Furthermore, services agreements should not provide for the a priori exclusion of any mode of supply. Hence, current WTO rules on services liberalisation in RTAs favour a very ambitious approach to services liberalisation.

The requirement of 'substantial sector coverage' could be problematic for developing countries entering into FTAs with other developed or developing countries. A more incremental, progressive approach to services liberalisation could be a more appealing approach. More flexibility in GAT V.3 could give room for countries to engage in some services liberalisation, in a way which ensures that their domestic producers are not marginalised by the competition. This greater flexibility is what the G-90 proposal no.13 attempts to achieve.

### **Contingent border measures (no. 1, 2, 3 and 18)**

Several proposals allow for border measures (usually in the form of higher tariffs) in order to protect and foster infant industries (Article XVIII Section A and C), protect Balance of Payments (Article XVIII Section B) and remedy injury or the threat of it to domestic industries due to increased imports

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<sup>29</sup> The extent of the violations for UEMOA countries is not known, more research would be needed.



(Safeguards Agreement). These are grouped together here under the term ‘contingent border measures’.

The importance of tariff policies to support industrialisation cannot be over-emphasised. This is evidenced by the use of tariffs by developed countries in the course of their industrial development, and their strategic use of tariffs up until today in sensitive agriculture and non-agricultural products. Developed countries’ applied agricultural tariffs for instance are today higher than developing countries’ agricultural tariffs. Developed countries also continue to have peak tariffs in the non-agricultural sensitive sectors including in textiles. Hence, the capacity to use tariffs and other contingent border measures to give cushion to developing countries are very important proposals.

Negotiating partners may argue that some developing countries have water in their tariffs (gap between applied and bound rates) and others with a high number of unbound non-agriculture tariff lines. They therefore do not require these measures. These negotiations are therefore not necessary. This is not true for the following reasons:

Firstly, many developing countries do already face certain constraints in their current tariff regimes. Even when countries have ‘water’ in their tariffs, depending on the situation, this water may not be sufficient. The importance of tariffs to allow space to build the capacities of domestic and regional players before exposure to competition must be preserved as a policy tool. Taking Africa – the Southern African Customs Union (SACU) Members as well as several West African Members have already run into problems due to low bound tariff levels. The recently acceded countries are also likely to face similar constraints.

Since the formation of the WTO, some developing countries have attempted to operationalise these measures and have been able to do so only in extremely limited ways or have not been successful.

Secondly, it is very plausible that there would be tariff negotiations in the future (in agriculture and /or non-agriculture) which cut or even eliminate the ‘water’ some Members have, and bind tariffs for those that may have unbound non-agriculture tariff lines. These strengthened S&D provisions will provide flexibilities for countries today as well as into the future.

Thirdly, some contingent border measures allow for quantitative restrictions such as quotas on imports which are otherwise not allowed under WTO rules (in particular Article XI of GATT). This is important. Developed countries use a plethora of tools that have the same effect as quotas, including tariff-rate quotas in agriculture.

Fourthly, improving contingent border measures in response to balance of payments issues (BoP), infant industry and safeguards remains highly relevant for all developing countries also in the context of regional trade agreements (RTA)/ free trade agreements. Various such agreements do not contain Balance of Payment clauses, or other contingent border measures. What has been negotiated at the WTO therefore remains relevant. Improving contingent border measures at the WTO, while ensuring that access to those WTO instruments are allowed in the RTA remains pertinent.

In short, contingent border protection measures available at the WTO (like infant industry, BoP safeguards, general safeguards) remain extremely important for developing countries. At the end of the day, trade is a means to an end – it is not an end in itself. The ends are employment, industrialisation and economic transformation by ensuring that domestic producers can, if they choose to, have at least their domestic and regional markets to sell to (as evidenced by the importance of the African regional market for Africa’s manufactured products).



## F. CONCLUSIONS

These are important negotiations for developing countries given that they can provide some very real benefits. However, negotiating partners – the developed countries – have been intransigent. This is very unfortunate since in the Doha mandates, these S&D negotiations make up a major chunk of the Doha development agenda.

Moving forwards, developing countries can continue as they have in the past, to push strongly for outcomes in the Para 44 Doha negotiations. The mandate of Para 44 provides the guiding principles and the basis to judge whether the outcomes of the negotiations are satisfactory or not:

*'We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational' (emphasis added).*

In the past, offers have been made by developed country partners but these did not contain anything of real commercial value. Developing countries particularly the Africa Group which traditionally had led these negotiations had to be very vigilant:

- post-Cancun (the 2003 Ministerial Conference) when the Group analysed the Cancun 28 package in their submission of 2006 and concluded that they were not meaningful;
- prior to the Bali Ministerial when an even more watered down Cancun 28 package was offered;
- and the package offered to the G90 in Nairobi which was not substantially meaningful.

Perhaps one day, a package that strengthens and makes effective some of the S&D provisions can be attained – when the international community finally realises that the destinies of all countries are intertwined, and that when they improve for some, they also improve for all.

The flexibilities provided to developing countries to support their industrial development such as local content policies, flexibilities by way of intellectual property, breathing space for infant industries, import surges, as well as flexibilities to deal with balance of payments challenges can give space for broad-based, employment-creating development. These are policies which developed countries had used in their development journey, and many still do use trade and tariff policies in some form, in their agriculture and non-agriculture sensitive sectors.

It is not the level of integration into the world economy or the level of openness that should be the yardsticks and guidelines to these negotiations. Many developing countries are already more open and integrated – looking at trade as a proportion of GDP. In fact, the notions around free trade as an end are even being rejected by voters in developed countries.

The outcome of these negotiations should be WTO rules which allow developing country economies to give room for economic actors to grow local production capacities, thereby energising local, domestic, and regional markets and economies, and improving the quality of employment and living standards.



**ANNEX - G90 PROPOSAL ON THE 25 SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS AND KEY ISSUES / CONCERNS TO BE ADDRESSED<sup>30</sup>**

No	Article	Key issue / Concerns
1	Article XVIII - A & C of GATT	Infant industry
2	Article XVIII - B of GATT	Balance of Payments
3	Understanding on BoP provisions	Access to simplified consultation procedures; simplifying the procedures
4	Article XXVIII of GATT and its Understanding	<ul style="list-style-type: none"> <li>- To have a seat at negotiation table when a country renegotiates its commitment impacting exports (offensive)</li> <li>- To have more flexibility in modifying tariff commitments, especially to enable adjustment to a Common External Tariff (defensive)</li> </ul>
5	Art 15.1 AoA	<p>S&amp;D in respect of commitments to be embodied in Schedules of concessions and commitments. This can be clarified to make clear it is a standing provision for current and future negotiations.</p> <p>The provision can also be used to make DFQF binding in WTO Members' Schedules=&gt; Achieving 100% DFQF for LDCs in Agriculture</p>
6	Art. 10.1 SPS	<p>Take into account special needs of developing countries in the preparation and application of SPS measures <i>inter alia</i> through:</p> <ul style="list-style-type: none"> <li>- Consultation mechanism between importing developed countries and exporting developing countries</li> <li>- Provision of additional information in notification and/or through the SPS Information Management System (<a href="http://spsims.wto.org">http://spsims.wto.org</a>)</li> <li>- Obligation for developed countries to withdraw SPS measures that adversely affect developing country exports</li> </ul>
7	Art 10.2 SPS	Allowing time for developing countries to adjust to new SPS measures introduced by WTO Members
8	Art 4 TRIMs	<p>TRIMs inconsistent measures are allowed if consistent with conditions under Article XVIII, Understanding on BoP provisions &amp; Declaration. This is very limiting, i.e. existing flexibility provided is not effective.</p> <p>This proposal concerns policy space to apply TRIMs inconsistent measures <i>inter alia</i>, local content requirements, trade balancing requirements, foreign exchange balancing requirements and domestic sales requirements</p>
9	Art 5.3 TRIMs	<p>This is about the transition period for notified TRIMs inconsistent measures plus possible extension (notification window has now closed)</p> <ul style="list-style-type: none"> <li>- Annex F HK 2005 allows TRIMs-inconsistent measures for LDCs, but only under procedural conditions and for a limited time, and is set to expire by 2020.</li> <li>- African Group proposed that others too can avail of the application of new TRIMs</li> </ul>
10	Article 66.1 TRIPs	<ul style="list-style-type: none"> <li>- LDCs have proposed that LDCs shall not be required to apply the provisions of the TRIPs Agreement until they cease to be an LDC</li> </ul>
11	Articles 70.8 and 70.9	<ul style="list-style-type: none"> <li>- LDCs have proposed that LDCs shall not be required to apply the</li> </ul>

<sup>30</sup> JOB/DEV/29; JOB/TNC/51 of 30 July 2015





No	Article	Key issue / Concerns
	TRIPs	<p>provisions of Article 66.1 TRIPs until they cease to be an LDC</p> <ul style="list-style-type: none"> <li>- This exemption should also apply to pharmaceuticals and agricultural chemical products - Articles 70.8 and 70.9</li> </ul>
12	Art IV.1 GATS	<ul style="list-style-type: none"> <li>- Periodic benchmarks relating to the objectives mentioned under IV.1(a) to (c) would be useful</li> <li>- Quotas for service suppliers from developing countries</li> <li>- Removing horizontal limitations on the movement of persons (mode 4)</li> <li>- Facilitating process of recognition of qualifications</li> <li>- Other regulatory barriers faced by developing country service suppliers</li> </ul>
13	Article V.3 GATS	<ul style="list-style-type: none"> <li>- Developing country party to services trade agreement (RTAs or FTAs) has flexibility with respect to conditions of Article V.3 para 1. The existing Article V.3 conditions include substantial sectoral coverage, and elimination of substantially all discrimination.</li> </ul>
14	Article 27.1 ASCM	<ul style="list-style-type: none"> <li>- Making subsidies implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods non-actionable subsidies.</li> <li>- Follow-up / Making permanent Paragraph 10.2 of the 2001 Doha Implementation Decision</li> </ul>
15	Article 27.3 ASCM	<ul style="list-style-type: none"> <li>- To provide the flexibility for developing countries and in particular LDCs to use subsidies and local content requirements for the purposes of promoting industrialization and fulfilling developmental needs.</li> <li>- To maintain consistency between ASCM 3.1 (b) and TRIMS extension decision (2020) of Hong Kong for LDCs.</li> </ul>
16	Annex F of 2005 Hong Kong Ministerial Decision - Agreement on Trade-Related Investment Measures	<ul style="list-style-type: none"> <li>- The Annex F decision will expire by 2020. LDCs should be exempted from complying with the disciplines of the Agreement on TRIMS unless they graduate from LDC status</li> </ul>
17	Article 20.3 Customs Valuation Agreement. Decision on Minimum Values	<ul style="list-style-type: none"> <li>- Have access to policy tools to combat customs fraud and underinvoicing such as minimum values, reference values, national valuation databases, customs cooperation</li> </ul>
18	Article 9 of Agreement of Safeguards	<ul style="list-style-type: none"> <li>- Article 9.1 to be made more precise and made applicable to all developing countries</li> <li>- Article 9.2 to be reviewed with a view towards eliminating the maximum period of application of a safeguard measure by developing countries.</li> </ul>
19	Article XXXVI.6 ; Declaration on the Contribution of the WTO to Achieving Greater	<ul style="list-style-type: none"> <li>- Prevent depletion of foreign exchange reserves due to structural trade deficits ; coherence between IMF conditionalities/IFI policies and WTO commitments</li> </ul>



No	Article	Key issue / Concerns
	Coherence in Global Economic Policymaking	
20	Decision on Measures in Favour of Least-Developed Countries - Market Opportunities	- Addressing LDC's preference erosion and establishing a right to compensation as a result of MFN tariff liberalisation.
21	Enabling Clause	- Developing countries and LDCs to be consulted and ensuring that their products of export interest are accorded meaningful market access under preferential schemes
22	Food security (Article XXXVI and XXXVIII.2b GATT)	- Food security to be inserted as an objective of Part IV and to be operationalized - food security must be paramount in guiding ongoing and future trade negotiations.
23	Article XVII GATT and Understanding on Article XVII GATT	- Developing countries and LDCs shall not be restricted to establish, or maintain State Trading Enterprises (STEs). Non-discrimination should only include MFN treatment by STEs, and does not require national treatment.
24	Agreement on Technical Barriers to Trade, Article 12.3	- Operationalize the obligation to 'take account' of the special development, financial and trade needs of developing countries in the preparation and application of technical regulations, standards and conformity assessment procedures.
25	Article 4.10 Dispute Settlement Understanding	- During consultations Members should give special attention to the particular problems and interests of developing country Members and LDCs.

